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[Weekly Reporter, Oct. 31, 1903.]

THE

# WEEKLY REPORTER,

## 1902-1903

(FIFTY-FIRST YEAR),

CONTAINING

## CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

## APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL

FROM THE 24TH OF OCTOBER, 1902, TO THE 12TH OF AUGUST, 1903.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. LI.

EDITED BY

MARTIN JOSEPH BLAKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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1903.

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# PREFACE.

In the fifty-first volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains a summary of the cases published from the 2nd of November, 1902, to the 29th of August, 1903 (both inclusive), in the WEEKLY REPORTER and from the beginning of September, 1902, to the end of August, 1903, in the Law Reports, the Law Journal Reports, and the Law Times Reports.

# JUDGES AND LAW OFFICERS

FROM THE 24TH OF OCTOBER, 1902, TO THE 12TH OF AUGUST, 1903.

---

LORD HALSBURY, LORD CHANCELLOR.

LORD MACNAGHTEN,
LORD DAVEY,
LORD ROBERTSON,
LORD LINDLEY,
} LORDS OF APPEAL IN ORDINARY.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

THE LORD CHANCELLOR.
THE LORDS OF APPEAL IN ORDINARY.
LORD ASHBOURNE,
LORD SHAND,
SIR FORD NORTH,
SIR ANDREW SCOBLE,
SIR ARTHUR WILSON,
SIR JOHN BONSER,
} ADDITIONAL JUDGES ORDINARILY ATTENDING.

## SUPREME COURT OF JUDICATURE—COURT OF APPEAL.

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SIR ROLAND VAUGHAN WILLIAMS,
SIR ROBERT ROMER,
SIR JAMES STIRLING,
SIR JAMES CHARLES MATHEW,
SIR HERBERT HARDY COZENS-HARDY,
} LORDS JUSTICES OF APPEAL.

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SIR EDMUND WIDDRINGTON BYRNE.
SIR GEORGE FARWELL.
SIR HENRY BURTON BUCKLEY.
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SIR JOHN GORELL BARNES.

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SIR ROBERT BANNATYNE FINLAY, ATTORNEY-GENERAL.

SIR EDWARD CARSON, SOLICITOR-GENERAL.

# EDITOR AND REPORTERS.

## 1902—1903.

### EDITOR.

MARTIN JOSEPH BLAKE,

BARRISTER-AT-LAW.

### REPORTERS.

| | |
|---|---|
| HOUSE OF LORDS | CHARLES HARDMAN GRAFTON, Barrister-at-Law. |
| PRIVY COUNCIL | CHARLES HARDMAN GRAFTON, Barrister-at-Law. |
| COURT OF APPEAL (No. I.) | WILLIAM FREDERICK BARRY, FREDERICK GEORGE RÜCKER, WILLIAM ERSKINE REID, and EDWARD G. STILLWELL, Barristers-at-Law. |
| COURT OF APPEAL (No. II.) | JAMES IRVINE STIRLING, R. R. CAMPBELL, H. W. LAW, ALFRED C. THOMAS, and ROBERT HILL, Barristers-at-Law. |
| CHANCERY DIVISION. *Mr. Justice Kekewich and Mr. Justice Joyce* | CHARLES WALTER MEAD, ALAN C. NESBITT, ALFRED C. THOMAS, and CUTHBERT CAMM, Barristers-at-Law |
| CHANCERY DIVISION. *Mr. Justice Byrne and Mr. Justice Buckley* | J. ARTHUR PRICE, NEVILLE TEBBUTT, and H. L. ORMISTON, Barristers-at-Law. |
| CHANCERY DIVISION. *Mr. Justice Farwell and Mr. Justice Swinfen Eady* | JOHN HUMPHREYS DAVIES, PAUL STRICKLAND, ROBERT HILL, and GODFREY R. BENSON, Barristers-at-Law. |
| CHANCERY DIVISION. *Company Cases* | WALTER W. RENSHAW and L. W. BYRNE, Barristers-at-Law. |
| KING'S BENCH DIVISION | WILLIAM ERSKINE REID, ALAN HOGG, and EDWARD G. STILLWELL, Barristers-at-Law. |
| (COMMERCIAL COURT) | W. TREVOR TURTON, Barrister-at-Law. |
| (BANKRUPTCY CASES) | PAUL M. FRANCKE, Barrister-at-Law. |
| PROB., DIV., and ADM. DIVISION | GWYNNE HALL, Barrister-at-Law. |

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OF

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WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

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| Woolfe's Patent, *In re* | CH.D. KEK. J. | 121 | 118 | Aff. [1903] 1 Ch. 18 |
| Woolley, *In re*. Wormald v Woolley | CH.D.JOYCE, J | — | 185 | [1903] 2 Ch. 206 |
| Wormald v Woolley. *In re* Woolley | CH.D.JOYCE, J | — | 185 | [1903] 2 Ch. 206 |
| Wren v Holt | C.A. | 435 | 138 | [1903] 1 K. B. 610; 72 L. J. K. B. 340; 88 L. T. 282 |

| Name of Case. | Court. | Page in W. R. 1902-03. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Wright v Carter | C.A. | 196 | 156 | [1903] 1 Ch. 27; 72 L. J. Ch. 138; 87 L. T. 624 |
| ——— v Lefever | C.A. | 149 | 115 | |
| Wuterick's Patent, *In re* | P.C. | — | 119 | [1903] A. C. 206; 72 L. J. P. C. 60; 88 L. T. 306 |
| Yorkshire Woolcombers Association, *In re* | C.A. | — | 25 | [1903] 2 Ch. 284; 72 L. J. Ch. 635; 88 L. T. 811 |
| Young v Ashley Gardens Properties | C.A. | — | 83 | [1903] 2 Ch. 112; 72 L. J. Ch. 520; 88 L. J. 541 |
| ——— v Beale. *In re* Radcliffe | CH. D. BUCK. J. | 409 | 184 | |
| Zaiser v Lawley. *In re* Lawley | C.A. | 150 | 121 | [1902] 2 Ch. 799; 71 L. J. Ch. 895; 87 L. T. 266 |
| Zimbler v Abrahams | C.A. | 343 | 81 | [1903] 1 K. B. 577; 72 L. J. K. B 103; 88 L. T. 46 |

THE

# WEEKLY REPORTER,

1902-1903.

## Privy Council.

(*From the Royal Court of the Island of Jersey.*)

May 14, 1902.

SPURRIER AND ANOTHER *v.* LA CLOCHE. (*a.*)

*Insurance—Fire insurance—Arbitration—English contract—Conditions—Law of Jersey.*

*A fire policy was issued by an English company in favour of a Jersey gentleman upon property in Jersey. It was in English, and executed in Jersey by the agents of the insurance company. Among the conditions indorsed on the policy it was provided that no action should be brought for any money payable under the policy until the liability and the amount had been fixed by arbitration, and also that the submission to arbitrators should be subject to the provisions of the Arbitration Act,* 1889, *and might be made a rule of the High Court of Justice.*

*Held, that this was an English contract, and ought to be governed by English law; that, consequently, no action could be sustained in Jersey or in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the conditions.*

Appeal against judgments of the Royal Court of Jersey.

The appellants were agents in Jersey of the Sun Fire Office.

The respondent effected in the island of Jersey with the appellants a policy of assurance against fire on certain postage stamps for the sum of £1,000 at the annual premium of £2 5s. and claimed on the policy.

The facts sufficiently appear in their lordships' judgment.

*Cohen, K.C*, and *Wood Hill*, for the appellants.

*R. Storry Deans*, for the respondent.

The judgment of their lordships (Lords MACNAGHTEN, DAVEY, ROBERTSON, LINDLEY, and Sir FORD NORTH) was delivered by

Lord LINDLEY.—The question raised by this appeal in whether the Royal Court of Jersey has given due effect to an arbitration clause contained in a policy of assurance against loss by fire. The policy in question is dated the 4th of January, 1897. It is a fire policy for £1,000 issued by the Sun Fire Office in favour of a Jersey gentleman named La Cloche on a collection of foreign stamps. The policy is in the English language, but it was executed in Jersey by the agents of the company. By the terms of the policy the company agrees with the assured subject to the conditions indorsed to pay what may become due in case of loss out of its capital stock and funds. The witnessing part runs thus: "In witness whereof I for and on behalf of the said company have hereunto set my hand and seal this 4th day of January, 1897. Signed Spurrier and Le Cronier, agent to the Sun Fire Office. Signed and sealed at Jersey, where no stamps are in use, in the presence of Spurrier, Jersey," and then there was a seal.

The conditions indorsed are fourteen in number. They are in the English language. The twelfth condition, which is the only material one, is as follows:

"12. If any difference shall at any time arise between the company or the insured or any claimant under this policy as to the liability or the amount or extent of the liability of the company in respect of any claim for loss or damage by fire or as to any question, matter, or thing, concerning or arising out of any claim for loss or damage under this policy, every such difference as and when the same arises, shall be referred to the arbitration of some person to be appointed in writing by both parties, or two indifferent persons, one to be appointed in writing by the party claiming and the other by the company, within one calendar month after either party has been required so to do by the other party, and in case of disagreement between the arbitrators then to the decision of an umpire, who shall have been appointed in writing by the arbitrators before entering on the reference, and shall sit with the arbitrators, and preside at their meetings during the reference, unless the arbitrators shall otherwise agree in writing, and the death of any of the parties shall not revoke or affect the authority or powers of any arbitrator or umpire, and each party shall bear or pay his own costs of the reference and a moiety of the costs of the award, and in all other respects the submission to arbitrators shall be subject to the provisions of the Arbitration Act, 1889, or any statutory modification thereof, and may be made a rule of her Majesty's High Court of Justice in any division, upon the application of either of the parties. And it is hereby expressly declared to be a condition precedent to the liability of the company in respect of any claim under this policy that the claim shall, if not admitted, be referred to and determined by such arbitrator, arbitrators, or umpire as aforesaid, and the claimant shall have no right of action against the company except for the amount of the claim if admitted, or the amount, if any, awarded by the award of such arbitrator, arbitrators, or umpire."

The first question which arises is whether this is to be regarded as an English contract or as a Jersey

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

contract. Their lordships are of opinion that although this policy was made in Jersey and any money payable under it would have to be paid to the assured in Jersey, the nature of the transaction, the language in which the policy is expressed, and the terms of the agreement and of the conditions all show that the contract between the parties is an English contract, and that wherever sued upon its interpretation and effect ought, as a matter of law, to be governed by English and not by Jersey law. The intention of the parties is too plain to be mistaken; the contract to pay out of the funds of the company is of itself very significant; and the reference to the English Arbitration Acts shows that the arbitration proceedings were to be conducted according to English law and no other. That the intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed is too clear for controversy (see *Hamlyn & Co.* v. *Talisker Distillery Co.*, 71 L. T. Rep. 1, [1894] A. C. 202), and the intention here is unmistakable. It does not follow that the agents who signed the policy in Jersey were not liable to be sued in Jersey upon it; as their principals were in this country. But whatever would be a defence by the law of England for the company on the merits to an action against the company on the policy would be a defence for the agents if sued in Jersey for the nonpayment of money payable under the policy by the company. It follows from these observations that no action could be sustained in Jersey any more than in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the 12th condition: see *Scott* v. *Avery*, 4 W. R. 746, 5 H. L. Cas. 811; and *Caledonian Insurance Co.* v. *Gilmour*, [1893] A. C. 85, 41 W. R. Dig. 6. The contract is one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract. Mr. Deans contended that the arbitration clause was invalid by the law of Jersey because not only the amount payable, but also the liability to pay was to be decided by arbitration; and that this was an illegal attempt to oust the jurisdiction of the court, and went further than *Scott* v. *Avery*. But if a contract is so framed as to give no cause of action unless a certain condition is performed no question arises as to ousting the jurisdiction of any court. It was by not observing the difference between no cause of action and a defence which assumes a cause of action, but is based on the incompetence of a particular court to enforce it that the Court of Exchequer went wrong in *Scott* v. *Avery*. The oversight was pointed out and corrected in the Exchequer Chamber, 1 W. R. 457, 8 Exch. 487, and again in the House of Lords. Maule, J., put the matter in the true light in the Exchequer chamber; he then said: "There is no decision which prevents two persons from agreeing that a sum of money shall be payable on a contingency; but they cannot legally agree that where it is payable no action shall be maintained for it" (8 Exch., at p. 499). Mr. Deans cited no authority to show that by the law of Jersey such a condition as that which has to be considered in this case is invalid, and could be rejected even in a contract governed by the law of Jersey. Judging from the decision in the case of *Southern* v. *Voisin* (the 5th of July, 1892), it would seem that the law that is laid down in *Scott* v. *Avery* prevails in Jersey; and that the distinctions he drew between arbitrations in which liability is left to arbitrators, and those in which the amount payable only is so left, is immaterial where an award settling the amount is a condition precedent to the right to payment of anything. The foregoing observations really dispose of this appeal. What happened was as follows: In December, 1898, a fire occurred in the house of the assured, and his collection of stamps was damaged or destroyed. He gave notice of his loss and claimed £1,000. He appointed a Jersey gentleman (Guiton) his arbitrator. The Sun Fire Office appointed an English gentleman (Thwaites) their arbitrator The arbitrators could not agree upon an umpire. Thwaites wanted an English barrister. Guiton wanted some gentleman resident in Jersey, which would save expense. Neither can be blamed for not giving way to the other. No application was made under the English Acts to the courts of this country to appoint an umpire. The company could not proceed adversely to the assured, who was beyond the jurisdiction of the English courts, and the assured preferred to apply to the court in Jersey. Failure to agree upon an arbitrator brought the arbitration proceedings to a deadlock. On the 30th of September, 1899, the assured brought an action in the Royal Court in Jersey on the policy against the agents who signed it, and he claimed £1,000.

The defendants relied on the 12th condition and the absence of any award as a defence to the action. On the 9th of October, 1899, the Royal Court ordered that the arbitrator should be summoned to appear. Thwaites appeared by counsel and objected to the jurisdiction of the court over him. The court then ordered the defendants to appoint another arbitrator in his place. The defendants declined to do this, and the arbitrators were then dismissed from the action, which was remitted to the Greffier to assess the amount payable to the plaintiff. On the 6th of November, 1900, the plaintiff recovered judgment for £1,000, and on the 4th of December, 1900, the Appeal Court confirmed the preceding orders and judgment. The present appeal is from the judgment of the Appeal Court and from the orders and judgment thereby confirmed. On the merits of the case their lordships do not think it necessary to add anything to what has already been said. No reasons are given for the judgment appealed from, and their lordships cannot make any observations upon them. The judgment appears to them erroneous in principle. The order of the 6th of November, 1899, requiring the defendants to appoint another arbitrator in the place of Mr. Thwaites, appears to their lordships to be erroneous for two reasons—viz., (1) because Mr. Thwaites has done nothing to justify his removal, and (2) because, if he had, the court in Jersey was not the proper tribunal to remove him. The English Arbitration Act conferred no such power on any foreign court.

Their lordships will therefore humbly advise his Majesty that the appeal ought to be allowed and that the judgment of the Royal Court of Jersey of the 14th of December, 1900, and the orders and judgment thereby affirmed, ought to be reversed and that judgment ought to be given for the defendants with costs. The respondent having obtained leave to defend the appeal *in formâ pauperis*, no order can be made as to the costs of the appeal.

Solicitors for appellants, *Dawes & Sons*.

Solicitors for respondent, *Hargreaves & Joblin*.

## Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) July 31, 1902.

RATCLIFF AND ANOTHER v. MENDELSSOHN. (a.)

*Stock Exchange—Default of broker—Liquidation—Completion by jobber with broker's customers—Right of jobber to sue broker for differences.*

*A broker, who was a member of the London Stock Exchange, was declared a defaulter, there being then due from him to a jobber £986 in respect of the purchase and sale of shares. A further sum of £281 became due on the closing of the broker's accounts at the hammer prices. The broker's customer completed the transactions with the jobber on the next settling day and paid him the sums due, but by the rules of the Stock Exchange the jobber had to account for £281 of the amount so received to the official assignee of the Stock Exchange, who was carrying out the liquidation of the broker's estate. The jobber brought an action against the broker to recover the two sums of £986 and £281. At the date of the trial the liquidation was still proceeding, and the jobber had been paid a dividend.*

*Held, that the action was maintainable, and that the jobber could recover the amount claimed less the amount of the dividend received.*

*Judgment of* Mathew, J. (50 *W. R.* 106, [1901] 2 *K. B.* 844), *affirmed.*

Appeal from the judgment of Mathew, J., reported 50 W. R. 106, [1901] 2 K. B. 844.

The plaintiffs were jobbers on the London Stock Exchange. At the date of the mid-May settlement, on the 13th of May, 1901, there became due from the defendant, who was then a broker on the Stock Exchange, the sum of £986 for differences in respect of contracts for the sale and purchase of shares entered into by the defendant on behalf of customers with the plaintiffs. These contracts were carried over to the end of May settlement.

On the 16th of May the defendant was declared a defaulter on the Stock Exchange, and all his contracts then open were closed at the hammer prices in accordance with rule 177 of the Stock Exchange Rules and Regulations, the result being that a further sum of £281 was shown to be due from the defendant to the plaintiffs. At the end of May settlement the defendant's customers either completed with the plaintiffs through other brokers or again carried over, and the plaintiffs received from such other brokers the sums due from the customers in respect of those transactions. By rule 155 of the Stock Exchange Rules and Regulations the plaintiffs would have to account to the official assignee for £281 of the amount received by them from the defendant's customers.

The plaintiffs claimed in the liquidation of the defendant's estate by the official assignee of the Stock Exchange and were paid a dividend of 2s. 6d. in the pound in respect of the two sums of £986 and £281, and there were other assets out of which a further dividend would be paid, but the amount thereof was doubtful.

The plaintiffs claimed in this action to recover £986 and £281.

The defence was, as to the whole claim, that the plaintiff's sole right was to prove in the Stock Exchange liquidation of the defendant's estate by the official assignee; and as to the claim for £281, that the plaintiffs had elected to complete the transactions with the defendant's customers, and had been paid or settled with by them.

(a.) Reported by W. F. BARRY, Esq., Barrister-Law.

Mathew, J., held that the action was maintainable, and gave judgment for the plaintiffs for the amounts claimed less the dividend received.

The defendant appealed.

*Muir Mackenzie* (*J. R. Atkin* with him), for the defendant. — The procedure under the rules and regulations of the Stock Exchange (rules 150-180) operates as a complete *cessio bonorum* of the defaulter's estate: *Richardson* v. *Stormont, Todd, & Co.*, 48 W. R. 451, [1900] 1 Q. B. 701. All the defendant's assets have been taken over by the official assignee, and he has been divested of them, and yet it is said that he can be sued for differences due from him, with the inevitable result that, as he cannot pay the debt, he will be made bankrupt, though it may turn out that he never really was insolvent. It is not necessary to contend that the liquidation proceedings on the Stock Exchange operate as a release of the defendant's indebtedness to the plaintiffs, it is sufficient to say that the right to sue is suspended until the liquidation is completed. The plaintiffs, having come in and claimed in the liquidation, cannot now sue: *Whitmore* v. *Turquand*, 9 W. R. 488, 3 De G. F. & J. 107. Differences due to a defaulter are not legally recoverable: *Ex parte Grant, In re Plumbly*, 28 W. R. 755, 13 Ch. D. 667. In *Ex parte Ward, In re Ward*, 30 W. R. 560, 20 Ch. D. 356, which is relied upon by the other side, the assets had been distributed and the Stock Exchange liquidation had come to an end, and the creditor was suing for the balance due to him. If, however, that case goes further and decides that a creditor who has claimed in the liquidation can sue before the liquidation is closed, it is inconsistent with the previous decision of the Court of Appeal in *Whitmore* v. *Turquand*—which was not cited in *Ex parte Ward*—and is wrong in principle, and ought not to be followed. The doctrine that the Stock Exchange liquidation is a complete *cessio bonorum* was not developed until *Richardson* v. *Stormont, Todd, & Co.*, a decision much later than *Ex parte Ward*. Secondly, with regard to the claim for £281, the plaintiffs have elected to complete with the defendant's principals, and have been paid this sum. They are, therefore, in the same position as if there had been no default. The contract made by the defendant with the plaintiffs has been completed, and there is no longer any liability at law on that contract. There is no legal liability in respect of these differences (*Ex parte Grant, In re Plumbly*), and therefore the payment of the £281 by the plaintiffs to the official assignee cannot create a liability for the differences which does not exist at law.

He also referred to *Ex parte Ward, In re Ward* (*No.* 2), 31 W. R. 112, 22 Ch. D. 132.

*Carrington* (*Rufus Isaacs, K.C.*, with him), for the plaintiffs.—The decision of this court in the first case of *Ex parte Ward, In re Ward* is conclusive in the plaintiffs' favour so far as regards the claim for £986. It was there decided that a creditor who has taken the benefit of the Stock Exchange distribution is not thereby precluded from suing for the debt. At that date it had been decided in *Tomkins* v. *Saffery*, 26 W. R. 62, 3 App. Cas. 213, that the Stock Exchange liquidation is a *cessio bonorum*. The judges in *Ex parte Ward, In re Ward*, with full knowledge of that decision, decided that the defaulting broker can be sued. With regard to the £281, the decision in *Ex parte Ward, In re Ward* (*No.* 2) covers that claim. That case shows that the plaintiffs are suing, not on the original contract, but on a contract arising out of the rules of the Stock Exchange. There has been no election to look to the defendants' customers only: *Stoneham* v. *Wyman*, 6 Com. Cas. 174.

COLLINS, M.R.—This is an appeal from the judgment of Mathew, J., holding that the action is maintainable by the plaintiffs, who are members of the Stock Exchange, against the defendant, who is also a member of the Stock Exchange, to recover £986, the amount of differences on the purchase and sale of stocks and shares ascertained to be due from the defendant to the plaintiffs on the 13th of May, the settling day, and £281, a sum ascertained to be due on the basis of the hammer prices of stocks and shares on the 16th of May, during the currency of the account, when the defendant was declared a defaulter. The learned judge gave judgment for the plaintiffs for these two sums. First, with regard to the sum of £986, that is a sum ascertained to be due from the defendant to the plaintiffs in the ordinary way on the settling day, and on that day it became a debt recoverable at common law. Has anything happened subsequently to cut down the right of the plaintiffs to sue for that debt? The only thing is that the defendant was declared a defaulter a few days afterwards and his assets are now in process of liquidation on the Stock Exchange by the official assignee. Unless that operates as a release of the debt, it seems to me to be no answer to the claim. The case is concluded by the authority of the earlier decision in *Ex parte Ward, In re Ward*, a decision upon almost identically the same facts as those in the present case. The head-note there (20 Ch. D. 356) states that "a creditor of a defaulter on the Stock Exchange who has taken the benefit of the private distribution of Stock Exchange assets, made by the official assignee of the Stock Exchange under its rules, is not precluded from afterwards taking ordinary legal proceedings for the recovery of his debt, though he must give credit for what he has received from the official assignee." That decision seems to me to be directly in point, and as it is a decision of this court it is binding on us. Therefore, with regard to the claim for £986 I agree with my brother Mathew that there is no defence to the action.

There remains the smaller sum of £281. Some complication is introduced by the fact that this sum represents the differences ascertained on the basis of the hammer prices on the 16th of December, during the currency of the account, before the time for the performance of the contract by the defendant's principals had arrived. The decision in *Ex parte Ward, In re Ward* (*No.* 2) shows that the differences so ascertained constitute a debt due from the defendant to the plaintiffs. That being so, the same principle applies as is applicable to the larger sum of £986. The head-note in *Ex parte Ward*, 22 Ch. D. 132, runs thus: "The amount of the differences due by a defaulter on the London Stock Exchange (as fixed by the official assignee of that body under its rules) to a Stock Exchange creditor, is a 'liquidated sum' within the meaning of section 6 of the Bankruptcy Act, 1869, and will support a bankruptcy petition by the creditor against the defaulter." In the course of the argument the reason why it is a debt was explained. Counsel for the debtor contended that the original contract between the debtor and the petitioners still subsisted, whereupon Jessel, M.R., asked: "How can there be two contracts?" and in the course of his judgment he said: "The purchaser in this case became a defaulter, and he must be treated like every other defaulter. It is really as if the rules of the Stock Exchange were imported into the contract. The provisions of the rule must be considered as inserted in the contract, and to that extent they alter the wording of the contract, so that we have the contract altered in this way—that the purchaser is to pay for the shares on the settling day, provided always that if he becomes a defaulter before then the amount due from him is to be ascertained in accordance with the rules of the Stock Exchange. If that is so, there appears to be no foundation for the argument that this rule is to be limited to ascertaining the amount to be claimed from the assignee of the Stock Exchange. The amount is ascertained for all Stock Exchange purposes—that is, for the purposes of the contract." The sum so ascertained is the sum due from the defendant to the plaintiffs, unless in this case again something has happened subsequently which amounts to a defence. The fact that the defendant's assets on the Stock Exchange are being administered is no defence according to the decision in the first case of *Ex parte Ward*. The liquidation on the Stock Exchange is no suspension of the right to sue, and the fact that when the ordinary settling day arrived the defendant's principals completed the transactions and paid the plaintiffs does not affect the plaintiffs' right of action. The plaintiffs, according to the rules of the Stock Exchange, have to account for the £281 to the official assignee for the purpose of securing equality of distribution among the Stock Exchange creditors. Therefore there is nothing to affect the ascertained rights of the plaintiffs. I must notice one other argument. During the course of the argument we were referred to the case of *Whitmore* v. *Turquand*, in the Court of Appeal, as a decision that if there is a *cessio bonorum* by a creditors' deed, and a creditor comes in under the deed and takes a dividend, that operates as a release of the debt though there is no release in terms, and it was said that the same principle applies to a *cessio bonorum* under a Stock Exchange liquidation. We are not, in the circumstances, compelled to say whether the decision in that case is reconcilable with the decisions in the subsequent cases of *Ex parte Ward* I do not say that they are not reconcilable. It is not necessary to go into that question. It is probable that if the case of *Whitmore* v. *Turquand* were looked into it would be found that it did not lay down so definite a principle as it is said to do. We are bound by the two later decisions of this court, and for these reasons I think that this appeal should be dismissed.

STIRLING, L.J.—I am of the same opinion. The case is covered by the two decisions in *Ex parte Ward, In re Ward*.

COZENS-HARDY, L.J.—I am of the same opinion. With regard to the claim for £281, in *Ex parte Ward, In re Ward* (*No.* 2), Cotton, L.J., said: "Rule 170 in the case of a defaulter really alters the original contract, and provides a new contract as between the defaulter and his creditor, and then the amount of the liability is fixed and ascertained in accordance with that altered contract." With regard to the entire claim, in my opinion the right to proceed at law is not affected by the liquidation of the defendant's assets on the Stock Exchange by the official assignee. It is said that at the time when the cases of *Ex parte Ward* were decided it had not been definitely laid down that the operation of the Stock Exchange rules as to liquidation produces a *cessio bonorum*. That, however, is not borne out when we look at the cases, because James, L.J., in delivering the judgment of the court in *Ex parte Saffery*, 25 W. R. 218, 4 Ch. D. 555, expressly so laid it down, and that view was confirmed when the case went to the House of Lords (*Tomkins* v. *Saffery*). It is not, in my opinion, open to us to give effect to the arguments advanced on behalf of the defendant.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Michael Abrahams, Sons, & Co.*

Solicitors for the defendant, *Osborn & Osborn.*

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) } July 3, 7, 8, 11, 1902.

*In re* LEEDS AND HANLEY THEATRES OF VARIETIES (LIMITED). (*a.*)

*Company — Promotion — Secret profit — Fiduciary relationship — Prospectus — Non-disclosure — Misrepresentation — Damages.*

*A company bought two music halls, the conveyance being taken to a nominee of the company who afterwards executed a declaration of trust in favour of the company. He then purported to resell the halls at a greatly enhanced price to another nominee of the company as trustee for another company not yet formed, which was intended to work the halls. The original purchase price was paid and the purchase price on the resale received by the first company, which settled the memorandum and articles of the second company, and registered it, and nominated the signatories to its memorandum and most of its directors, one of whom was a director of the first company. The prospectus of the second company represented the nominee of the first company as vendor of the halls, concealing the interest of the first company in them, and contained material misrepresentations.*

*Held, on the evidence, that the first company bought the halls with the intention of reselling them to the second company at an inflated price, that it promoted the second company, and that the prospectus of the second company was issued with the knowledge and privity of the first company, and that the first company therefore stood in a fiduciary relation to the future allottees of shares in the second company, and was liable for the damage sustained by that company through the breach of duty and fraud of the first company.*

*Decision of* Wright, J., *affirmed.*

This was an appeal from a decision of Wright, J.

The facts were as follows: The Consolidated Exploration and Finance Co. (Limited) (in this report referred to as the Finance Company) was incorporated in 1893 for the purposes, *inter alia*, of the investment of its funds in debentures or shares of any company, the establishment and working of financial, commercial, and industrial undertakings, and the purchase and sale of real and personal property of all kinds.

In December, 1896, the board of the Finance Company resolved to take over two music halls—the Empire Music Hall at Hanley and the Princess Palace Hall at Leeds—on the terms of draft contracts approved on the 21st of December, 1896.

These contracts were entered into by one Rands as the nominal purchaser, he being in reality a clerk employed and paid for the purpose by the Finance Company.

The contracts provided that a part of the purchase-money should be left on mortgage if Rands or his assignees, being a company formed to work the premises, should so require.

The total purchase-money of the two halls was £24,000, and the Finance Company paid the deposit.

On the 1st of February, 1897, Rands purported to sell the halls to one Carter (also a nominee of the Finance Company) as trustee for an intended company to be known as the Leeds and Hanley Theatres of Varieties (Limited) (in this report referred to as the Theatres Company). The purchase price was £75,000, which, under another document dated the 13th of February, was to be paid as to £17,500 in cash, as to £16,000 by mortgages to be given by the Theatres Company, as to £10,000 by debentures of that company, and as to £31,500 by fully-paid shares of it, Rands undertaking to pay all preliminary expenses and to spend up to about £5,000 in structural alterations.

On the 3rd of February Rands executed a declaration of trust, declaring he had entered into the contracts of purchase and sale only as trustee for the Finance Company, to which all moneys paid and all moneys shares, and benefits to be received from them belonged, and that he held the agreements and the properties comprised in them, and all profits and benefits in connection with them, as trustee for the Finance Company, which he appointed his attorney for carrying out the trust.

In the meantime the Finance Company had been promoting the Theatres Company, the prospectus of which was issued in January, 1897. In this document the above-mentioned contracts for the sale of the halls to Rands, and the sale by him to Carter as trustee for the company, were referred to, and it was stated that "the vendor, who has the fullest confidence in the success of the company, will defray all expenses of registration, printing, advertising, &c., up to and including allotment, and stipulates for the right to apply for and have allotted to him, in part payment of the purchase-money, one-third of the share capital issued on the same terms as the allotment is made to the public." There was also contained in it a valuation of the two halls at £75,000 by Messrs. Carter & Le Grand, described as "the well-known and old-established valuers to the licensed trade," but who had in fact been established for less than two years.

The Finance Company settled the memorandum and articles of the Theatres Company, and registered it on the 2nd of February, 1897. They also provided, paid, and indemnified the signatories to its memorandum, and nominated three of the directors, who held their first meeting on the 4th of February, and approved the prospectus and adopted the purchase by Carter. Two of these directors received their qualification from the Finance Company. One director, named Browne, was also a director of the Finance Company, and the minutes of the board meetings of that company showed that in December, 1896, and afterwards he did not vote on questions connected with the promotion of the Theatres Company, though he was present at all but one of the board meetings at which such questions were discussed. The purchase arrangements were carried out by the Finance Company signing a cheque for £6,000 for the original vendors on account of purchase-money, and receiving the same sum from the Theatres Company out of the proceeds of subscription for its shares, and by the Theatres Company paying the Finance Company the balance of the £17,500 which was to be paid in cash, and giving mortgages for the £16,000, debentures for the £10,000, and paying the £31,500 in fully-paid shares of £5 each. The Finance Company, on the other hand, paid the promotion expenses of the Theatres Company and the cost of structural alterations, which together absorbed all but £312 of the cash which it had received from the Theatres Company.

The halls were worked at a loss and sold by mortgagees for about £19,000, which left for the Finance Company, as holders of the £10,000 debentures, a sum of about £2,300. The Theatres Company was ordered to be wound up, and the official receiver and liquidator of the company issued this summons for a declaration that the Finance Company was liable to account to the Theatres Company for a secret profit made in the promotion of it and the sale to it of the two halls, or alternatively that the Finance Company might be ordered to make compensation for misfeasance in inducing the Theatres

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

Company to purchase the halls without proper disclosure and at a fraudulent overvalue. The Finance Company was itself in liquidation, but possessed assets to the amount of about £12,000 to answer the claim. Wright, J., held that the Finance Company was accountable for the profit on the sale and purchase of the halls, and liable for the damage sustained by the Theatres Company through the purchase; and ordered the Finance Company to pay £12,000 with interest at 4 per cent. from the 28th of March, 1897, until payment, and costs.

The Finance Company appealed.

*Hon. E. C. Macnaghten, K.C.*, and *Kenyon Parker*, for the appellants.—In no view of the case have the Theatres Company suffered £12,000 loss. The judgments in *Gluckstein* v. *Barnes*, [1900] A. C. 240, 48 W. R. Dig. 34; and in the Court of Appeal, *sub. nom.*, in *In re Olympia (Limited)*, [1898] 2 Ch. 153, 46 W. R. Dig. 32, do not in any way affect the present case. If misfeasance is charged it must be made out. It cannot be said that when the Finance Company bought the halls it stood in any fiduciary position towards the Theatres Company. That had not been formed and there can be no trustee without a *cestui que trust*. Here there was no one who could claim that at the time of the purchase the Finance Company held the halls on trust for them.

They also referred to *Erlanger* v. *New Sombrero Phosphate Co.*, 27 W. R. 65, 3 App. Cas. 1218, and in the Court of Appeal, 25 W. R. 436, 5 Ch. D. 73; *Cavendish-Bentinck* v. *Fenn*, 36 W. R. 641, 12 App. Cas. 652; *Ladywell Mining Co.* v. *Brookes*, 35 W. R. 785, 35 Ch. D. 400; and *Burland* v. *Earle*, 50 W. R. 241, [1902] A. C. 83.

*Younger, K.C.*, and *W. H. Cozens-Hardy*, for the respondents.—The Finance Company promoted and incorporated the Theatres Company in the strictest and fullest sense. At the date of the purchase the Finance Company was in a fiduciary position towards the intended Theatres Company, and was therefore not at liberty to make a profit. And the prospectus is the work of the Finance Company, and a deliberate fraud, and therefore even if we are wrong as to the fiduciary relationship, we can obtain on the ground of fraud the same relief as we should have been entitled to had we established that relationship. The fact that in *Gluckstein* v. *Barnes* the misrepresentation referred to the actual property was a mere accident. If you can prove fraud you can recover the profit made. [They also cited *In re Brinsmead & Sons*, [1897] 1 Ch. 406, 45 W. R. Dig. 35; *In re Lady Forrest Murchison Gold Mine*, [1901] 1 Ch. 582, 49 W. R. Dig. 28; and *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 48 W. R. 74, [1899] 2 Ch. 392, at p. 428.] There was no independent board to which to disclose the facts, and they were deliberately concealed. We are therefore entitled to profits without proof of damage, but we in fact lost much more than the £12,000 which Wright, J., gave us. The case can be distinguished from *Cavendish-Bentinck* v. *Fenn* on the grounds given by Lindley, L.J., in *In re Olympia (Limited)*.

*Macnaghten, K.C.*, in reply.

VAUGHAN WILLIAMS, L.J.—This case has been argued very well and at great length, though I will not say at too great length. Mr. Macnaghten and Mr. Younger each had numerous different ways of putting his case, and seemed to think each way as good as any other; but we see our way now, thanks to their arguments, to take a very definite line in this case. It will be best to state the facts shortly first. [His lordship stated them, and continued:] The first ground on which it is sought to make the Finance Company responsible to the Theatres Company is, that at the time when the Finance Company bought the property it was acting on behalf of the Theatres Company, though the latter was not yet incorporated. It is said that as the purchase was made for the benefit of the Theatres Company yet to be created it was made by the Finance Company as agents of or trustees for the Theatres Company, and that any excess in the sum paid by the Theatres Company above that paid by the Finance Company would be a sum paid for nothing, because they were entitled to have the property handed over at the price paid by their trustee or agent, and the Finance Company had no right to keep anything beyond the price actually paid by them. I do not see my way to arrive at this conclusion. I do not wish to lay down any proposition of law not necessary for the decision of the case, and I do not say it is impossible for a purchase to be made on behalf of a company as yet unformed; but I do not at present express any opinion on the question, and do not base my judgment on the view that the Finance Company were agents or trustees for the Theatres Company. Mr. Younger, however, put his case in another way, which is much more easy to accept. He says that from first to last it is plain that the Finance Company were acting as promoters of the Theatres Company. It seems clear from minutes of the board meetings of the Finance Company that that company was acting as promoter of the company which should buy the halls from it. This is shown first by the fact that Mr. Browne, who was a director of the Finance Company, and afterwards was nominated a director of the Theatres Company, did not vote on questions connected with the promotion of the Theatres Company when such questions arose at board meetings of the Finance Company; and it is evident that his not voting was deliberate, since he was present at all but one of the board meetings at which the question was discussed. Evidently he did not vote because it was intended that he should be a director of the Theatres Company when formed. And the intention of the Finance Company to promote the Theatres Company becomes avowed in the minutes as time goes on, and the minutes which show this continue even after the registration of the Theatres Company. I come to the conclusion that from first to last the Finance Company was the promoter of the Theatres Company, and intended to buy the halls and to create a board under its own control which should buy the halls at an inflated price. If so, it follows that throughout the period the Finance Company was in a fiduciary relation to the Theatres Company. The Finance Company nominated the directors of the Theatres Company, and gave two of them their qualifications, besides providing the signatories to the memorandum of association, and I do not mean that the Finance Company stood in a fiduciary relation to these directors or signatories, but to the future allottees of shares in the Theatre Company. It is clear from the minutes, as early as December, 1896, that the Finance Company had not only resolved to promote a company, but had decided what sort of company it should be, for a minute states that there is to be an appeal to the public to buy shares. This fiduciary relationship involved, *inter alia*, a duty on the part of the Finance Company to disclose the fact that it was the beneficial vendor of the halls. It is said that there is no proof that this was not disclosed. To my mind it is clear that no disclosure of the fact was made to the future allottees of shares; and any disclosure to the nominee directors was no disclosure at all. It is not clear who wrote the prospectus, but it is clear that it was issued with the knowledge and privity of the Finance Company. The prospectus seeks to represent to the public that the real vendor was Rands, who was represented as

having such a belief in the Theatres Company that, having the option to take a larger sum in cash, he preferred shares. Not only was it not disclosed that the Finance Company was the real vendors, but these statements invite a contrary conclusion. I will call attention to the words of Baggallay, L.J., in *Erlanger's case* and of Jessel, M.R., in *Re British Seamless Paper Box Co.* 29 W. R. 690, 17 Ch. D. 467, quoted by Collins, L.J., in *In re Olympia (Limited)*, as authority for including among the *cestuis que trust* of promoters persons who are invited to take shares. Baggallay, L.J., says: "The syndicate were in substance not only the vendors of the property, but also the promoters of the company, and in such a case the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become, and were expected to become, the shareholders of the company, and to constitute the company, shall have the fullest information as to all the surrounding circumstances." Jessel, M.R., says, in the *Seamless Box case*, "If promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after; in both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons who, at the time the allotment was made, were in fact the promoters or their nominees knew of the fraud. You can defraud future allottees as well as present allottees." And the judgments of Brett and Cotton, L.JJ., in the same case on appeal, are to the same effect. These judgments afford ample authority for the proposition. The prospectus here not only does not disclose the interest of the Finance Company, but contains a positive *suggestio falsi* in its statements as to Rands. In view of this breach of duty the question arises whether the Theatres Company is entitled to any remedy against the Finance Company. In my judgment it is so entitled, but to a remedy in the nature of damages. I am not sure that in respect of this breach of duty the Theatres Company can maintain an action in the nature of one for money had and received, and I think it safer to say that it is entitled to damages. Mr. Macnaghten says no damages are proved. But here the Theatres Company has not tried to rescind the contract; indeed, in view of the amount raised on mortgage, it would be impossible to do so, since matters could not be put in *statu quo*.

The Theatres Company is entitled to damages for the breach of duty, and the damage consists in the fact that it has bought for £75,000 what the Finance Company bought for £24,000. The Finance Company might, of course, have bought cheaply, or the halls have gone up in value; but the mortgagees have realized the property and netted only £19,000, and it is not necessary to prove everything conclusively in proving damages; it is enough to prove a state of things from which an inference may fairly be drawn. A valuer of property usually makes a valuation some days before it is actually used, but this does not prevent his valuation being some evidence of the value of the property. Of course the Finance Company's expenditure in promotion, decoration, &c., must be deducted, but even so there is a cash difference of over £40,000. How, then, can it be said that Wright, J.'s, figure of £12,000 is not supported by evidence? So wide a margin of probable excess in price involves an excess of at least £12,000 in cash. I have hitherto based my judgment on the fiduciary relationship in which the Finance Company was placed as being the most convenient basis for it. But it is equally plain that the prospectus contained untrue statements and suggestions, and the appeal must be dismissed with costs.

ROMER, L.J.—It is enough for me to say that on my view of the facts the law is clear, and there is no need to discuss authorities. I think it is clear that the Finance Company promoted the Theatres Company, and that the prospectus was prepared, printed, and issued under such circumstances as to make the Finance Company responsible for its issue and contents. I am satisfied that this prospectus was fraudulent. Not only does it conceal the fact that the Finance Company were the real vendors, but it contains actual misrepresentations of a material character, and in particular the statement as to Rands. The evidence shows that he had no interest in the property, and was a mere dummy, paid for the use of his name. The prospectus is cunningly framed so as to convey the impression that the promoters had nothing to do with the vendor. Rands in fact had no confidence in the company; it did not matter to him what became of it, and he had made no such stipulation as alleged. The prospectus is evidently fraudulent, and under the circumstances it is a fraud of the Finance Company on the Theatres Company. Further, the duty of the Finance Company was to see that the Theatres Company had an independent board of directors. Two of the directors were provided with their qualification by the Finance Company, of which one of them was a director. There is no direct evidence as to the position of the others, but if they knew of the connection of the Finance Company with the Theatres Company they were parties to a fraud, and, if not, the Finance Company improperly kept them in ignorance of the facts. The Finance Company undoubtedly caused the Theatres Company to incur heavy liabilities, and to part with a large number of its shares; and if, therefore, the halls were worth less than the consideration paid by them, the difference is damage suffered by the Theatres Company in consequence of the fraud of the Finance Company, for which the Finance Company is liable. As to the valuation of the halls no attempt was made to establish the truth of Messrs. Carter & Le Grand's valuation. The damage established is certainly not less than the profit made by the Finance Company, or Wright, J.'s, sum of £12,000, and the appeal fails.

STIRLING, L.J.—I am of the same opinion, and substantially for the same reasons. It is established that the Finance Company as promoter of the Theatres Company has been guilty of misfeasance in the nature of a breach of trust, and that the Theatres Company has, in consequence, suffered damage to the extent of at least £12 000. The Finance Company promoted the Theatres Company, and was therefore bound, in Lord Cairns' words in *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas., at p. 1236, to provide the company with a board of directors who should both be aware that the property which they were asked to buy was the property of the promoter, and who should be competent and impartial judges as to whether the purchase ought or ought not to be made. Here the facts were that one director was a director of the Finance Company. Another received his qualification from it. As to the prospectus, I agree with what Romer, L.J., has said. In *Cavendish-Bentinck* v. *Fenn* Lord Macnaghten, 12 App. Cas., at p. 671, says: "I think that if a person in the position of Mr. Fenn abstained from disclosing his interest, and thus led the board to purchase the property for more than it was really worth it would by very difficult to escape from a charge of fraud. I think that it would have been a fraud to have concealed his interest, and so to have represented

in fact that he was not interested in the property, and that it belonged to other persons who were not connected with the scheme." This case is distinguishable from that in point of fact, in that the contract in that case was a real contract, whereas here there was no real contract between Rands and Carter, both being nominees of the Finance Company.

[It was agreed that judgment should be taken for £12,000 and costs, without interest.]

*Appeal dismissed.*

Solicitors for the appellants, *R. Raphael & Co.*

Solicitors for the respondents, *G. B. W. Digby.*

## High Court of Justice.

Chan. Div. } April 17, 1902.
Farwell, J. }

*In re* DAVIS.
DAVIS *v.* DAVIS. (*a.*)

*Trustee—Breach of trust—Rate of interest on trust moneys.*

*If a trustee employs trust money in trade, he must account for the profits, or, at the option of the* cestui que trust, *he must account for trade interest at 5 per cent.*

This was an action by the beneficiaries under the will of J. Davis, deceased, against the trustees of the will.

The facts are set forth in the judgment of Farwell, J.

*Bramwell Davis, K.C.,* and *Dunham,* for the plaintiff.

*Upjohn, K.C.,* and *Le Riche,* for the defendants.

FARWELL, J., in giving judgment, said: This action asks for relief on various grounds, which I have disposed of as the case went on, but there remains the matter in which the trustees no doubt have done wrong. I credit the defendant Rosenfelt with the desire to do the best he could for the plaintiffs—indeed he seems to have acted with great consideration and kindness. The action charges trustees with not having accounted and other matters. Those charges are without any foundation, and so far as they are concerned I dismiss the action with costs.

Then there is this one point, as to which, although the defendants were challenged about two days before the writ was issued, no opportunity of making amends was given to them. What they did was this: they received £6,400, and if they had placed the sum on deposit at their bankers and the bank rate had been paid on it, the sum would have earned 1½ per cent. The plaintiff Davis, the tenant for life, was in want of money, and the defendants thought it would be advantageous for him to have 3½ per cent. on deposit, and wait to see how trust securities would go in the market. No doubt the trustees were entitled to keep the money on deposit at the bank for a short time; but they in fact kept it for over a year. They paid it to the firm in which one of themselves, Mr. Rosenfelt, was a partner under these circumstances: Mr. Rosenfelt's business was in want of ready money from time to time, and he and his partners had deposited securities to a very large amount—namely, £60,000, with their bankers, in order to be allowed, whenever they pleased, to overdraw up to £20,000. At the time this took place they had an overdraft of about £18,000, on which they were paying 3½ per cent. to their bankers. The defendants could not get 3½ per cent. on the £6,400, and so they placed it with the firm by reducing their overdraft to this extent, and paid the plaintiff, Mr. Davis, the 3½ per cent. instead of paying it to their bankers. Now, I can only say that that is not justifiable, although not dishonest or morally wrong. Mr. Bramwell Davis has very properly elected, considering that the sum is small and that the expense of an account would be great, to ask me to make the alternative order which I am bound by the rule stated in *Vyse* v. *Foster*, 21 W. R. 207, L. R. 8 Ch. App. 309, to give him. James, L.J., there says: "If an executor or trustee makes profit by an improper dealing with the assets or the trust fund, that profit he must give up to the trust. If that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest—that is to say, interest at 5 per cent." Now it is quite true that it has been suggested in subsequent cases, and by the editor of Lewin on Trusts, that perhaps 5 per cent. is hardly the mercantile rate of interest now; but I do not feel at liberty so to decide, or to alter the 5 per cent. mentioned by James, L.J. The result is that, so far as this particular matter is concerned, the defendants must be charged with interest at the rate of 5 per cent.—that is to say, they must pay the difference between 3½ and 5 per cent. for the period during which the £6,400 was invested with the firm. Then this sum will be set off against the costs of the action. As to the costs of this particular matter, inasmuch as the trustees, in my opinion, were quite honest, and really did the best they could for the benefit of the plaintiffs, and were not given any opportunity of setting the matter right before action, I am not going to order them to pay the costs of it.

Solicitors, *Gedge, Kirby, & Millett; Joseph & Hyam.*

Chan. Div. } July 12, 19;
Buckley, J. } Aug. 2, 1902.

*In re* ANGLO-FRENCH EXPLORATION CO. (LIMITED). (*a.*)

*Company—Reduction of capital—Cancellation of shares—No loss of capital—No return of capital—Equilibrium of balance-sheet—Prejudice of creditors—Fresh shares accepted and paid for of larger nominal value than shares proposed to be cancelled—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act,* 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

*A limited company cannot reduce its capital by cancelling any of its fully paid-up shares merely because the holders consent to give them up, because to do so would affect the equilibrium of the balance-sheet to the prejudice of the creditors, by diminishing the amount of the assets which can only be used for capital purposes.*

*But when, as part of the arrangement for the reduction of capital, the holders of the shares given up take from the company further shares of greater nominal value, so that the nominal capital of the company is not diminished, the court may confirm the reduction.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

*Section 3 of the Companies Act, 1877, by specifically giving power to cancel lost capital or to return paid-up capital, impliedly forbids the writing off of capital which is neither lost nor returned.*

Petition.

This was a petition for confirmation of reduction of capital of the above company by the cancellation of founders' shares.

The company was incorporated as a limited company under the Companies Acts in 1889. Its objects were (amongst other things) to seek for and secure openings for capital in South Africa and elsewhere, and with a view thereto to prospect, explore, and employ and equip expeditions and experts, and acquire concessions, and work mines, and deal generally with ores and minerals.

Prior to the agreement referred to later on the capital of the company was £700,300, divided into 350,000 preference shares and 350,000 ordinary shares of £1 each, and 300 founders' shares of £1 each. All this capital had been issued and was fully paid up, and the paid-up capital of the company was thus £700,300.

By clause 5 of the memorandum of association it was provided that the profits of the company should be applied first in payment of a cumulative dividend of 8 per cent. on the paid-up capital of the ordinary shares, and at certain rates upon any increase of capital as mentioned, and of the surplus 75 per cent. was to be distributed as a further dividend on the shares other than founders' shares, and the remaining 25 per cent. amongst the holders of the founders' shares.

In the event of a winding up the founders' shares were to have 25 per cent. of the surplus assets after payment off of the capital paid up on the other shares.

Any rights attached to the shares issued as an increase of capital were in no way to prejudice the rights attached to the founders' shares.

By its articles of association the company might "reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets, or reducing the liability on the shares or otherwise. . . ."

The company had been carrying on its business with great success, and it was desired to increase its capital, but before doing so it was desired to extinguish the founders' shares, as otherwise a large proportion of the profits on the new capital would go to the founders' shares.

Accordingly an agreement dated the 17th of February, 1902, was entered into between two persons on behalf of themselves and all other holders of founders' shares of the first part, the company of the second part, and a person on behalf of the directors of the third part. This agreement recited that it was estimated that the relative values of the ordinary and founders' shares were such that each of the founders' shares was equivalent to 260 ordinary shares, with a liability to pay par—that is, £260, and that it was deemed expedient that the founders' shares should be cancelled, and that the holders thereof should subscribe for and be allotted ordinary shares in the company, and that for that purpose the capital of the company should be increased by the creation of 78,000 new ordinary shares of £1 each; and the agreement provided (1) that when it became absolute each of the holders of the founders' shares who should ratify the agreement, should (if he ratified it in Form A), for every founders' share held by him be deemed to apply for an allotment of 260 new ordinary shares upon the condition that he was to pay up the full nominal amount on allotment, and should (if he ratified in Form B) for every founders' share held by him be deemed to request an allotment to the directors of the company of 260 of the new ordinary shares upon the footing that he should pay up the full amount thereof on allotment; (2) the company were to be at liberty to cancel the founders' shares and to apply for an order confirming the cancellation. The agreement was made conditional, among other things, upon the sanction of the court being obtained to the cancellation, and it was to become void if all the conditions were not fulfilled within six months of its date.

On the 27th of March, 1902, at an extraordinary general meeting the capital of the company was increased to £1,000,300 by the creation of 150,000 new ordinary and 150,000 new preference shares of £1 each, and the conditional agreement was approved of; and subsequently a special resolution was passed (which was afterwards duly confirmed) as follows: "That having regard to the conditional agreement dated the 17th of February, 1902, and made," &c., "the capital of the company be reduced from £1,000,300 to £1,000,000 by the "cancellation of the whole 300 fully paid up founders' shares of £1 each." A petition was now presented praying that the reduction of capital to be effected by the special resolution above mentioned might be confirmed.

*Stewart Smith, K.C., G. Lawrence,* and *W. E. Hollams,* for the petitioners.—We are not proposing to write off any capital which has been lost, or to return any paid-up capital, but simply to cancel 300 shares. [BUCKLEY, J.—How can you do that?] See *Bellerby* v. *Rowland & Marwood's Steamship Co. (Limited),* 50 W. R. 566, [1902] 2 Ch. 14. We come within sections 9 and 11 of the Companies Act, 1867. The operation of these sections is not limited by the Act of 1877. We come within the principle of the *British and American Trustee and Finance Corporation* v. *Couper,* 42 W. R. 652, [1894] A. C. 399. The court may sanction a reduction of capital whenever such a reduction ought to be made: see observations of Lord Herschell in that case, 42 W. R., at p. 653, [1894] A. C., pp. 403, 405. [BUCKLEY, J.—If you were going to return the paid-up capital to the holders of the founders' shares, I could understand your position.] That might have been done, but it is too late now. It would require a special resolution to be passed and confirmed, and then the sanction of the court would not probably be obtained within six months from the date of the agreement. Cancellation of shares without return of capital was sanctioned in the cases of *In re Westminster Electric Supply Corporation* in August, 1897, and *In re St. James's and Pall Mall Electric Light Co.* in 1899, both before Stirling, J., and also in *In re House-to-House Electric Supply Co.,* before Romer, J., in 1898. None of these cases are reported.

They also referred to *In re Development Co. of Central and West Africa,* 50 W. R. 456, [1902] 1 Ch. 647, and *In re Nixon's Navigation Co.,* [1897] 1 Ch. 872, 45 W. R. Dig. 24.

*Cur. adv. vult.*

July 19.—BUCKLEY, J.—The question to be determined on this petition is whether, under the Companies Acts, 1867 and 1877, a company limited by shares can reduce its nominal capital and its paid-up capital by cancelling (with the consent of their holders) paid-up shares to a certain amount where neither has that amount been lost nor is it unrepresented by available assets, nor is it to be paid off as in excess of the wants of the company. The petitioners, who contend for the affirmative of this proposition, say that inasmuch as such a reduction might be made if the amount paid up were returned to the shareholders, the question

cannot be affected by the fact that they are content to surrender the shares without asking payment. The reply would seem to be that if the proposition be true the court has for the last quarter of a century or more been wasting its time in requiring evidence that capital has been lost, unless it can be maintained (which it cannot) that the evidence has been required, not for the protection of creditors, but to enable a majority of the corporators to bind a minority. For, if the proposition be true, it is immaterial whether the capital has been lost or not—it is sufficient to show that the shareholder is content to release all right in respect of the amount paid. In speaking of reduction of capital the word "capital" must be understood as meaning neither nominal capital to the exclusion of the paid-up capital nor the latter to the exclusion of the former. The nominal capital (A) of every company limited by shares (that is to say, the amount stated in the memorandum of association or as modified by subsequent increase) must always be represented by (B) capital called and paid up on shares issued, and (C) capital uncalled up on shares issued, and (D) the amount of unissued shares, or by some one or more of those. Every reduction of capital must reduce (A)—that is, the nominal capital—and must reduce some one or more or all of (B), (C), and (D). The key to the solution of all questions as to reduction of capital lies in remembering that the corporation owes a duty, not to its shareholders only, but to its creditors also. It is unnecessary to attempt to express accurately and exhaustively for the purposes of this judgment what the rights of the creditors are. I shall not be misunderstood if I state quite shortly that their rights are to insist that neither paid-up capital (B) nor uncalled capital (C) shall be diminished without provision being made for the debts due to them or the protection which the Acts provide being extended to them. Their rights are founded upon the fact that capital paid up can, except as permitted by the Acts, be applied only for capital purposes, and that uncalled capital can only be released by proceedings under the Acts. If the reduction be by reducing (A) and (D), or in other words by the cancellation of unissued shares, this may be effected without coming to the court at all: see section 5 of the Companies Act, 1877. To such a case the provisions of the Act of 1867 do not apply. The statute excludes this case, because unissued capital is a thing to which the creditor has no right to look. If the reduction be effected by reducing (A) and (C), the case is governed by the Act of 1867, and the creditors must be provided or their consent obtained. The question is, What are the rights in the remaining case—namely, where the reduction is made by reducing (A) and (B)—by reducing, that is, nominal capital and paid-up capital? The answer, in my judgment, is that the reduction must in this case be so made as not to affect the equilibrium of the balance-sheet to the prejudice of the creditor. On the liability side of the balance-sheet will be found, amongst other things, the amount of capital paid up by shareholders upon their shares. This is an amount in respect of which the creditor has certain rights. It must not be used except for capital purposes. On the other side will be found the assets of the company. Where capital is written off as lost or unrepresented by available assets, the equilibrium of the balance-sheet is maintained by striking out on the one side a certain amount from the paid-up capital, and on the other side a certain amount from the value of the assets. Where capital is returned as in excess of the wants of the company, an amount is in the same manner taken off from both sides of the balance-sheet. The balance item on the debit or credit side of the balance-sheet, as the case may be, is in either case unaffected. But if the proposition for which the petitioners contend were true, the result would be to strike out a sum on the liability side from the amount representing paid-up capital, leaving the asset side unaffected. The balance item in the balance-sheet would thus be altered by a further credit sum. I do not stay to analyze the question whether this additional sum would then become divisible in dividend. In some instances it would; in others it would not. A principal purpose of the Act in allowing reduction by cancelling lost capital is to enable a company to resume payment of dividend, when without reduction it could not legally do so before making up the loss. In my judgment the Act of 1877, by specifically giving power to cancel lost capital or to return paid-up capital, impliedly forbids the writing off of capital which is neither lost nor returned. If this is not its effect, then I fail to see why the court should ever require evidence of loss, for by the hypothesis the consent of the shareholder to release a part of his paid-up capital would be sufficient. *The British and American Finance Corporation* v. *Couper* was cited by the petitioners as an authority in favour of their contention. It does not help them. That case decided, not that every reduction is valid as between the corporation and its creditors, but that, assuming a reduction valid as between the corporation and its creditors, the incidence of the reduction may, as between the corporators, be thrown upon them in any manner, which having regard to their contractual relations *inter se*, the court finds to be just. In the present case the amount proposed to be written off without being returned is, in the circumstances of this company, a quite trivial sum—namely, £300. But the principle is the same as if it were £300,000. If £300,000 were written off on the liability side, the result would be that the obligation of the company to keep capital assets to an amount sufficient to balance the capital paid up would be diminished by £300,000, and the rights of creditors would be affected. The object here in view can in my opinion be attained, but not in the way that has been adopted in this case. Suppose there be a holder of a £5 founders' share with some extraordinary rights of dividend which it is desired to terminate. If that holder is minded to put that £5 paid-up share at the disposal of the company as a share, all rights in respect of which he releases, upon the terms that he shall simultaneously take an ordinary share and pay £5 upon it, the equilibrium of the balance-sheet is not disturbed in such a manner as to reduce the figure which measures the right of the creditor to say that capital assets shall be applied only for capital purposes. In such case the amount owing in respect of capital remains the same as before. It is true that the asset side is increased by the new £5 which the man pays, and that when the founders' share is cancelled the balance item will be increased by £5 to credit, but the creditor is not thereby affected to his prejudice. The amount of the debit in respect of paid-up capital is not less than before, and the obligation of the company not to part with capital assets so as to have less than that amount is not reduced. The point is that the amount of capital assets which as between itself and its creditors the company must not, except by loss—must not by payment to its corporators—reduce below the amount of its paid-up capital is the same as before, and the rights of creditors are unaffected. This is a course which has been adopted and upon which orders of the court have been successfully sought and obtained. I have been referred to two cases (both unreported) in which this was done—viz., *In re Westminster Electric Supply Corporation*, in August, 1897, and *In re St. James's*

*and Pall Mall Electric Light Co.*, in 1899, both before Mr. Justice Stirling. The course then taken was, shortly, that the holders of the founders' shares took up further capital to an amount in excess of the amount of the founders' shares and transferred their fully-paid founders' shares to trustees for the company. The effect of this in substance was that the item in the balance-sheet of paid-up capital was not reduced, but the founders' shares became again shares in the dominion of the company, and in respect of which no corporator had any rights. For the present purpose those shares stood in a like position to shares which had not been taken or agreed to be taken by any person: see section 5 of the Companies Act, 1877. They were not in fact shares within that section, but they were shares upon which no corporator had any rights. Their cancellation was made with the consent of the shareholders who formerly held but had voluntarily released them, and did not diminish the amount of the capital assets to which the creditor had a right to look for payment of his debt, because other shares to a like (or greater) amount had been taken in their stead. The scheme in the present case does not take that form. The agreement to take the new shares is conditional upon and does not take effect until after the reduction has been made. The resolution is to reduce, not after the new shares have been taken, but on the footing of an agreement which is, and in the resolution is described as, conditional. The minute to be approved is one in which the shares issued and paid up are less by £300 than they were before. If I were to make the order asked for, the debit in the balance-sheet in respect of paid-up capital would be reduced by £300, and the amount is only to be brought up to, or rather to an amount in excess of, the previously existing debit by something which is to be done thereafter. In my judgment this is not within the Act, and although the amount is here very small, still, if the parties are not willing to carry through the matter at their own risk, but come for an order of the court, they must, I think, put their proceedings in such form as that the court can make the order. I may add that I think they are amply justified in not carrying through the matter at their own risk, though the amount is small. I say so, not because I intend to express an opinion that, if the founders' shares were so transferred to trustees for the company and replaced by new shares taken, the company could not legally accept a surrender of them, but because, the principal purpose of the whole matter being, no doubt, to get rid finally and for ever of the founders' shares with their inconvenient rights, it is best to do so under an order of the court. As the matter stands, therefore, I think the petitioners have not brought themselves within the Act, and that under existing circumstances I should have to dismiss the petition. But I think the parties can so vary the circumstances as to put the court in a position to make an order. If the 78,000 shares were applied for, allotted, and paid for, and the holders of the founders' shares transferred the latter to trustees for the company, or declared themselves trustees for the company of those shares, the petition could be so amended as to lead to a minute by which the paid-up capital would be shown to be not less but greater than before. I should not, I think, be doing violence to the special resolution for reduction if in that state of facts I were to make an order. As regards the declaration by the founders that they claim no rights in respect of the founders' shares, but hold them at the disposal of the company, I think I could act upon a consent given by counsel appearing for all the founders upon the further hearing of the petition, and the order could be so worded as to give effect to that. Under these circumstances I will, if the petitioners so desire, allow the petition to stand over for a fortnight, with liberty to amend.

The petition was accordingly amended, the holders of founders' shares were made co-petitioners, and they declared that they did not claim any beneficial right in the founders' shares and held the same upon trust for the company, and desired that the same might be cancelled. The 78,000 shares were allotted to the holders of the founders' shares, and all but a small part thereof were paid for in cash, and the capital due on the rest was due and payable from the allottees to the company. On the 2nd of August, upon the petition coming on again for hearing, his lordship made the order asked for, and dispensed with the necessity of the company any longer adding the words "and reduced" to their name.

Solicitors, *Hollams, Sons, Coward, & Hawksley.*

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Chan. Div. } July 3, 4, 8, 1902.
Buckley, J. }

*In re* SMITH.
SMITH *v.* LEWIS. (*a.*)

*Trustee—Trust for sale—Power to retain trust property in present form of investment—Shares in company—Reconstruction of company—Allotment of shares in new company—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

*Where there is a trust for sale with a power to retain trust property (which includes shares in a company) in its present form of investment, on the reconstruction of the company under an arrangement whereby no option is given to shareholders to take cash in lieu of shares in the new company, the trustees may accept an allotment of and retain such shares.*

Adjourned summons.

This was a summons taken out by the surviving trustee of the will of Joseph Smith to determine, among other questions, whether he was justified in retaining unsold certain ordinary and preference shares in the Birmingham Small Arms Co. (Limited), forming part of the trust estate of the testator and allotted to him as such trustee in September, 1896.

By his will the testator devised and bequeathed his real and personal estate to his trustees, upon trust to sell and convert the same into money, and to invest the residue of such money (after making thereout certain payments) in manner therein mentioned, and to stand possessed of the residuary trust moneys, and the investments for the time being representing the same, upon trusts for certain persons for their respective lives, and after their respective deaths for certain other persons in remainder.

The will contained a power to the trustees to postpone the sale and conversion of his real and personal estate, or any part thereof, for so long as they should think fit, and to "retain the same or any part thereof in its present form of investment," even though the property retained might not be an authorized investment. Among the authorized investments were "preference shares of any joint stock company at the time of investment paying a dividend on its ordinary shares."

The testator died in 1895, possessed of 750 ordinary shares in the Birmingham Small Arms and Metal Co. (Limited) of £5 each fully paid. The executors sold some of the shares and kept 520, and in September, 1896, they were the holders of these.

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(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

On the 3rd and 22nd of September the company passed a resolution for its voluntary winding up under section 161 of the Act of 1862 on the basis of a scheme whereby the assets of the old company should be sold to trustees for an intended new company, and whereby the new company, when formed, should allot to each member of the old company for each share in the old company one ordinary and one preference share of £5 each fully paid. There was no alternative given to the shareholders to take money, but they had power to dissent under section 161. The trustees did not dissent, and it was admitted that they did right. The new company was duly incorporated, and there were allotted to the trustees of the will 520 preference and 520 ordinary shares of £5 each fully paid in the new company. Shortly afterwards the company changed its name. The trustees subsequently sold fifty ordinary and twenty preference shares.

*J. E. Harman*, for the trustees.

*Mark Romer*, for the tenants for life.—The trustees were justified in retaining both classes of shares. The preference shares became an authorized investment in 1897. The ordinary shares in the new company were substantially the same as those in the old company. It is true that the reconstruction involved the dissolution of the old corporation, but that was a mere piece of machinery.

He referred to *In re Morris*, 33 W. R. 445, 52 L. T. Rep. 462.

*R. J. Parker*, for the persons entitled in remainder.—As to the preference shares I think there is now no question. But the trustees, although they were justified in taking the ordinary shares, ought to have sold them. The shares in the new company were not the same as those in the old company. The new corporation was totally distinct from the old one.

He referred to *In re New*, 50 W. R. 17, [1901] 2 Ch. 534, and *Tucker* v. *Tucker*, 42 W. R. 266, [1894] 1 Ch. 724.

BUCKLEY, J., stated the facts and continued: The first question is whether the plaintiff, as trustee, is justified in retaining unsold these 500 preference and 470 ordinary shares. As to the preference shares, there is another clause of the will which is important; that is the investment clause which includes "preference shares of any joint stock company at the time of investment paying a dividend on its ordinary shares." No dividend was paid on the ordinary shares in 1896. The company began to pay dividends on its ordinary shares in March, 1897; at that date preference shares became an authorized investment, and have continued to be so ever since. So that, even if the trustees ought to have sold them in 1896, they would have been entitled to buy them in 1897. That point, therefore, comes to nothing.

The further question is whether the ordinary shares are an authorized investment. They are not within any clause which authorizes the trustees to make investments. The whole question turns on whether the retention of these shares is a retainer of some part of the estate "in its present form of investment." In a sense it is not. Shares in the new company are not the same as shares in the old company; they are different shares. But that is not really an answer. I think I ought to look at the substance of the transaction. Is it substantially the same form of investment? Has the money ever been shifted from one investment to another? Now one might put many illustrations of transactions in which investments are not varied. Suppose that at the death of the testator the company had only issued ordinary shares, and that it subsequently created preference shares. Would the ordinary shares be the same shares? I should say that this would be the same investment. The company had power to create preference shares; the ordinary shares were always subject to that power, and are still the same shares. Therefore, in my opinion, nothing in this case turns on the fact that there were preference as well as ordinary shares. Secondly, suppose that after the testator's death the company availed itself of the Companies (Memorandum of Association) Act, 1890, and enlarged its objects, would the investment remain the same? I should say that it would. The investment was one which contained within itself the possibility of alteration—the power of becoming converted. It was the same investment with an alteration of the objects for which it might be employed. What has happened here is that since the testator's death, the company has availed itself of other statutory powers—that is to say, under section 161 it has sold its assets to another company, and has effected that operation in such a form that the trustees were bound to take the shares or to dissent and get their value under section 162 of the Act of 1862. The shares in the new company resulted from the shares in the old company without any act on their part. Have they, then, changed the form of the investment? I think not. The altered thing they have got is the same thing in another shape. They are shares in a new company, no doubt, but the only real difference is that the corporation is a different corporation. Does that fact take them out of the words "retain the same or any part thereof in its present form of investment"? I think that every case of this kind must be looked at on its merits in order to see if the investment is the same. In the present case I think it is. The new company is simply a reproduction, a transformation, of the old company. The shares in question are very valuable, and it is admitted that the trustees did right in taking them. There is no question here of a different form of business or of additional liability. All that has happened is that there is a new corporation which is the old company in a new form. The trustees obtained these shares because, by the use of the statute, the one company replaced the other. I think, therefore, that these shares are within the words of the will, and that the trustees are entitled to retain them.

Solicitors, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *B. Shirley Smith*, Birmingham.

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## House of Lords.

From C. A. (England). May 16, 1902.

COOPER & CRANE *v.* WRIGHT. (*a.*)

*Master and servant—Employers' liability—Accident—Compensation — Sub-contractor — Indemnity—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

*A sub-contractor who engages to do part of a work on a building may be an undertaker within the meaning of the Workmen's Compensation Act*, 1897.

*The appellants contracted to erect a building and the respondent agreed with them to construct the roof. In the course of constructing the roof one of the respondent's workmen was injured, and compensation was awarded*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

*against the appellants under the Workmen's Compensation Act*, 1897.

*Held* (Lords Brampton *and* Robertson *dissenting*), *that they were entitled to be indemnified by the sub-contractor under section* 4 *of that Act.*

Cass *v.* Butler, 48 *W. R.* 309, [1900] 1 *Q. B.* 777, *overruled.*

Appeal against order of the Court of Appeal (A. L. Smith, Collins, and Romer, L.JJ), setting aside an order for indemnity.

In 1899, Barker & Co., being desirous of having a building erected at Nottingham, entered into a contract with the appellants, Cooper & Crane, a firm of builders, by which the latter undertook to construct for Barker & Co. the whole of the building, including the roof and slating. Cooper & Co. made a sub-contract with the respondent Wright, a slater, whereby he agreed to supply the slates and do for them all the slating work of the roof.

Cooper & Crane began to carry out their contract with Barker & Co., and by means of scaffolding had constructed the building to a height exceeding thirty feet, including the framework of the roof, ready to receive the slating.

While a labourer named Brady employed by Wright to convey slates to the roof by means of a hoist or lift was so engaged an accident occurred to the lift causing him injury, from which he died. His widow applied for an arbitration between herself, Cooper & Crane, and Wright under the Workmen's Compensation Act, 1897.

Cooper & Crane by their answer denied their liability to pay any compensation on the ground (amongst others) that the deceased man was not immediately employed by them, but was employed by Wright, their sub-contractor. Alternatively they claimed against Wright an indemnity in respect of any amount which might be awarded to be paid by them.

Wright by his answer denied that he was the undertaker of any work to which the Act of 1897 applies.

The county court judge at Nottingham made his award for payment of the sum of £217, with costs, by Cooper & Crane, as undertakers of the building, for compensation to the widow and dependants.

He made no award against Wright for payment of any compensation.

On further consideration the learned judge made the order now in question, that Wright should indemnify Cooper & Crane to the extent of the £217 and the applicant's costs.

Cooper & Crane did not appeal against the award for compensation. Against the order for indemnity Wright appealed, and the Court of Appeal (A. L. Smith, Collins, and Romer, L.JJ.), following *Cass* v. *Butler*, 48 W. R. 309, [1900] 1 Q. B. 777, set it aside.

*A. Llewelyn Davies* and *Tinsley Lindley*, for the appellants.—The respondent was an "undertaker" within the meaning of section 7 of the Act, and the appellants are entitled to indemnity from the respondent under section 4, which gives an absolute claim to indemnity. The respondent is also within the definition of "undertakers" in section 7, "persons undertaking the construction, repair, or demolition" of a building. Construction of a part is sufficient: Lord Macnaghten in *Hoddinott* v. *Newton, Chambers, & Co.*, 49 W. R. 380, [1901] A. C. 49; *Mason* v. *Dean*, 48 W. R. 353, [1900] 1 Q. B. 770. *Cass* v. *Butler* cannot be right on the grounds stated: *Cooper* v. *Davenport*, 16 Times L. R. 266, is identical with this case.

*Rugg, K.C.*, and *Clavell Salter*, for the respondent.—The respondent was not an "undertaker" within the meaning of the Act. The person referred to in section 4 must be himself an undertaker, and not a sub-contractor. The definition in section 7 speaks of "the undertaker." *Cass* v. *Butler* was rightly decided.

*A. Llewelyn Davies* replied.

THE HOUSE took time for consideration.

Lord ROBERTSON.—Like all your lordships, I have found this a most unsatisfactory question to decide. It can hardly be called a question of legal construction, the problem being how to patch up certain statutory enactments which are incoherent and almost contradictory. The Court of Appeal have adopted a view of which I can only say that it had seemed to me as good and as little exposed to objection as the competing theory; and accordingly I should not have felt justified in disturbing their judgment. But my noble and learned friend Lord Brampton has examined the subject with great care and skill; I have read his opinion with the more attention because it was not in accordance with the opinions of my noble and learned friends opposite; and to the negative, although adequate, reason already given for my not voting for reversal, my noble and learned friend's arguments have enabled me to add an affirmative opinion that his conclusion is right.

Lord BRAMPTON, after stating the facts substantially as above given, continued: In my opinion that decision (of the Court of Appeal) was right, and I will proceed to state my reasons for so thinking. I desire, however, first, to remind your lordships very shortly of the difficulties that, before the Act of 1897, beset a workman who sustained injury in the course of his employment in seeking to obtain redress, for I think that, by bearing them in mind, they will assist in enabling your lordships to form a reasonable conjecture as to the objects which the Legislature had in view in passing that Act, and thus aid in interpreting the enactments contained in it, to which I shall have occasion to refer.

In the first place, there was no available process known to the law by which such redress could be recovered except by action at law or by proceeding under the Employers' Liability Acts; but no such action or proceeding could be successful unless the workman was in a condition to prove by legal evidence that his injury was due to actionable negligence or other misconduct or default of the person from whom he sought to recover, or some other person or persons for whose negligence the former was responsible. Compensation without proof of such negligence was unheard of, and such proof was often hard to discover. Moreover, it was often extremely difficult, even when the facts were ascertained, to determine who was the person liable to be sued in the action; and to avoid such difficulties many persons were often made defendants in actions who were under no legal liability.

Added to these obstacles, the law itself was for the most part too uncertain, too dilatory, and far too expensive for an ordinary workman to embark in. Good illustrations of these difficulties will be found in *Wiggett* v. *Fox*, 11 Exch. 832, and *Johnson* v. *Lindsay*, 40 W. R. 405, [1891] A. C. 371.

Having regard to this unsatisfactory state of things, it was, as I have gathered from a study of the Act, felt by the Legislature that it would be but just and right to confer upon a large class of workmen whose necessities compelled them to seek employment in certain specified dangerous occupations, in the course of which accidents not always possible to be guarded against are of frequent occurrence, some purely casual, others no doubt attributable to negligence or

default of fellow workmen, whom it would be idle to sue, or of others whose identity could not be established, a right to claim compensation to a moderate and limited amount in respect of the loss of such wages as they were incapacitated from earning in consequence of accidental injury, upon mere proof of the accident and its resulting loss, irrespective of its cause.

Another object was to impose the obligation of providing such statutory compensation upon those to whom good sense would naturally point as the fittest persons to bear it, and to define, for the convenience of an injured workman seeking compensation, the persons from whom he was entitled to claim it; and, further, to provide a simple proceeding, entailing comparatively trifling expense, by which such compensation might, if necessary, be enforced.

To carry out these very laudable objects the Act of 1897 was passed. It is, however, so framed as to provoke rather than minimize litigation; and those who are responsible for the language of some of its enactments little know the amount of labour they were entailing upon those whose duty it might be to interpret them.

I turn now turn to the Act itself, section 1 of which enacts as follows:

"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act."

The 7th section, sub-section 1, enacts: "This Act shall apply only to employment by the undertakers as hereinafter defined, on, in, or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined, on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished."

Section 7, sub-section 2, defines the meaning of the term "undertakers" in the cases of a railway, factory, quarry, laundry, or mine to be those who represent the persons or bodies actually carrying on the businesses or works so described. "In the case of a building the word 'undertakers' is declared to mean 'the persons undertaking the construction, repair, or demolition.'"

Section 1, imposing upon "his employer" the liability to pay compensation to a workman, must be read by the light of section 7, sub-section 1, which enacts, "this Act shall apply only to employment by the undertakers" as defined. It follows that the general words "his employer" in section 1, must be read as "his employer, being also the undertaker."

In this case, the deceased man having been employed by Wright, the sub-contractor, and not by Cooper & Crane, the undertakers, his employment, although on the work undertaken by Cooper & Crane, was not, in my opinion, an employment to which alone the Act applies. It is obvious that the Legislature did not intend that such a workman, who had been exposed to equal risks and dangers with his fellow workmen, should be excluded from the benefit of the Act; this is apparent from section 4, which in substance provides that the undertakers of works of construction of or on buildings shall be responsible for compensation to injured workmen employed by their sub-contractors as if they had been employed by the undertakers themselves.

The language of this section is so important that, as I shall have to refer to it hereafter for other purposes, I have felt it will be convenient to set it out in full.

Section 4: "Where in an employment to which this Act applies the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies.

"Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

"This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to and is no part of or process in the trade or business carried on by such undertakers respectively."

That the widow was entitled to compensation from Cooper & Crane as the undertakers seems to me to admit of no possible doubt. The judge was right, therefore, in his award of compensation against them. Even had this been open to question, no appeal against it having been made, that award was not during the argument and cannot now be questioned.

The real question before your lordships arises out of the claim of Cooper & Crane for indemnity from their sub-contractor, Wright.

The case in support of that claim is thus put: that by his sub-contract with Cooper & Crane, Wright became an "undertaker" equally with themselves within the meaning of section 7, and was in every respect under the same primary obligation to pay compensation to the widow; and that such liability was a liability imposed by sections 1 and 7, independently of section 4, so as to bring him within the proviso in that section, and to give them a right to claim indemnity from him.

I do not think these propositions can be maintained.

First, Wright was not an undertaker within the meaning of section 7 of the Act. It may be that in the ordinary common acceptation of the expression a man may be said to undertake anything he has taken upon himself to do, with or without a contract; but this is not the interpretation contemplated by the framers of the definition clause. The Legislature, in using the expression "the undertakers," has given it a limited statutory meaning, beyond which it cannot be extended. The whole Act is new to the law; it gives new rights to workmen and imposes new obligations upon employers, and, so far as it can be, it must be strictly construed. To bring any person within the definition clause he must have undertaken some definite specific work of construction which is to form the subject of his undertaking. In this case it was for the construction of an entire building. Secondly, the contract of the undertaker must be with a person who has authority to employ and to authorize the undertaker to accomplish the work undertaken.

For such a work as the construction of an entire building, as is the case before us, it seems to me that two persons or sets of persons only can fill the position of "the undertakers" defined by the Act; the building owner who takes upon himself the construction of the building he requires; or the persons who, through the medium of a contract with him, engage to take upon themselves the obligation to execute that work for him. I carefully abstain from expressing

any opinion touching the responsibility of a building owner who subdivides the construction of a building among several contractors, because in this case, Cooper & Crane, by their contract with him, undertook the construction from the foundations to the top of the roof. By that contract they constituted themselves "the undertakers" of the whole building within the definition in section 7, sub-section 2.

From that contract they could not recede or be discharged, unless with the assent of the building owner, until the building was completely constructed; and to the execution of their undertaking they were bound to bring their personal skill and experience and to exercise personal control over all the necessary operations. There was beyond this an obligation attached by the statute to their undertaking, towards every workman employed by them on that work undertaken, to pay to him, in the event of injury to him by accident, compensation according to the Act.

Neither the contractual obligation to the building owner nor the statutory obligation to the workman could be terminated or altered at the mere will or by any act of the undertakers. They could not assign their contract or any part of it, nor could they delegate their authority or any part of it to another. It is obvious that such authority of the undertakers must emanate from the building owner himself, for no one else could confer it.

In most cases, I have no doubt, it is immaterial to the building owner whether his undertaker employs his own materials and workmen or engages another to do isolated portions of the work for him; but the building owner has no contractual relations with the sub-contractor, and can only look upon him as a mere employee of those with whom he has himself contracted. The very name sub-contractor imports that he occupies an inferior position to the persons who have undertaken responsibility for the whole building, and that while they are bound to exercise control over his work he cannot control any of theirs. Those who are pleased to do so may call him a sub-contractor or a sub-undertaker, for every day labourer undertakes to do his work; but he is not an undertaker as defined by the statute: see *Percival* v. *Garner*, [1900] 2 Q. B. 406, 48 W. R. Dig. 117. If undertakers could add to their numbers by sub-contracts for different parts of a building, there would be no limits to their number; this would greatly tend to defeat the object of the Legislature in its endeavour to assist the workmen by pointing out specifically the persons to whom he may look for compensation.

Moreover, I can conceive none on whom the obligation to pay compensation could more reasonably rest than those who as a matter of business have undertaken the whole control and every responsibility attaching to the erection of the building they have undertaken to construct.

One must be careful not to be led astray by cases where the building owner, as in the case of *Mason* v. *Dean*, has reserved out of his contract with the undertaker the execution of a portion or portions of the building he requires to be erected, and himself contracts with some other person or persons to do such portion or portions; for there is a wide and marked difference between undertakers as defined by contracts direct with the building owners, and sub-contractors with persons who are themselves already under a building contract to undertake the whole building. I cannot see how the two positions of undertaker and sub-contractor with the undertaker for the same work can exist at the same time in one person, any more than that one person could at the same time be both master and servant. Yet that would be the position of Wright if, being a mere sub-contractor, he were to be treated also as the undertaker of the same work.

The language of section 4 indicates a thorough appreciation by the Legislature of the difference between undertakers to whom the Act applies and a sub-contractor with them for the execution of part of the work. It nowhere speaks of or alludes to sub-contractors as undertakers; and if it had been intended they should be so considered with all their obligations it is impossible to suppose it would not have imposed those obligations and expressed such intention in clear intelligible language.

In *Cass* v. *Butler* the Court of Appeal expressly held that a sub-contractor with and under those who are already undertakers is not an undertaker within the meaning of the Act, and the same was held in *Cooper* v. *Davenport*. These cases are in point, and I think that they were correctly decided.

I must not leave this part of the case without dealing with that which was suggested as some authority for the appellants—*Hoddinott* v. *Newton, Chambers, & Co.* When the facts of that case are carefully considered it will be found that it really does not in the least assist the appellants. No question as to the liability of a sub-contractor arose or was discussed in it. The facts are shortly these: An entire building had been completely erected for the General Omnibus Co. by a firm of builders, who had undertaken its construction according to certain plans and specifications, and it had been handed over to the company and used for some months for the purposes for which it had been built. At the end of that time the company decided to have new work of construction done in it, to give it more strength, by iron supports. The whole of that new work was undertaken by contract direct from the company by Newton, Chambers, & Co., ironworkers, who were altogether unconnected with the original building. In the course of such new work a workman employed on it was killed by an accident, and his widow claimed compensation from Newton & Co. One main objection was that the new work was not work of construction. This House held that it was. Another question was whether the scaffolding used in the new work was a scaffolding under the Act. There was no sub-contract at all, for Newton & Co. contracted directly with the omnibus company. I see no similarity between that case and this.

All these considerations have satisfied me that the Act by no reasonable interpretation can be held to make a mere sub-contractor an undertaker within the meaning of the Act. If I am right in this view it is admitted that the appeal must fail, for Wright does not come within the proviso to section 4.

But even if Wright could, contrary to my opinion, be considered such an undertaker, with an obligation equal to that of Cooper & Crane to pay compensation, I fail to see upon what ground the claim of Cooper & Crane for indemnity as distinguished from contribution can be supported in this case. The common law certainly would not enable one of two persons, each equally liable to pay statutory compensation to an injured workman, who had paid such compensation in full, to obtain indemnity against the other for the whole amount so paid. To justify such a claim some enactment by statute, or some contract between the parties, would be necessary. No such enactment or contract has been shown to exist in this case.

I do not think that a doubt could be entertained that if the accident was caused by the actionable misconduct of a stranger, and the injured workman elected to proceed against the undertakers, being employers, they are, by section 6, entitled to indemnity from that stranger, and so indemnity might be claimed if the accident was caused by any

person, whether the employer or not, under circumstances which would have entitled the injured man to maintain an action or proceedings under the Employers' Liability Act.

It is very reasonable that it should be so, and I think that this is what the Act intended by the language employed. But there is not to be found in the Act anything expressly, nor as, I think, impliedly creating in the possible event of there being two or more undertakers, all being equally liable for compensation, and neither guilty of actionable negligence, an obligation of indemnity in the event of some only of them being called upon to pay.

But I would point out another objection to the claim for indemnity. The proviso in section 4 is that "the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section." Now if it could be truly said that Wright was one of the defined undertakers mentioned in that section, and that there was a common obligation as undertakers upon Cooper & Crane and Wright, how can it be said that Wright was some person other than the undertakers, treating him as a mere sub-contractor, this objection could not arise.

In my opinion Cooper & Crane were the only undertakers within the definition of section 7, sub-section 2, of the Act; they admit that the award was right, and the burden of it must rest where it has fallen. If undertakers desire to cast the responsibility of an indemnity upon their sub-contractors, they must provide for it in their sub-contracts.

It follows that in my opinion this appeal ought to be dismissed with costs.

Lord DAVEY.—It is difficult to come to any conclusion on the subject of this appeal which is not open to criticism, and I can only say that I think that the conclusion to which I have come is less open to criticism than the opposite one. There are three words used in the Act—"employer," "undertaker," and "contractor"—and your lordships are called upon to define the relative meaning in which these words are used. By section 1 it is enacted as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation." Three conditions, therefore, are necessary under this section to give the workman a right to compensation —(1) that the employment shall be one to which this Act applies; (2) that the injury has been caused by an accident arising in the course of the employment; (3) that the workman shall be in the employment of the person from whom he claims compensation. Passing by section 4 for a moment I come to section 7, sub-section 1, which provides that the Act shall apply only to employment by "the undertakers as hereinafter defined," on, in, or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined (the words are repeated), on, in, or about any building of a certain character. We have therefore the employment to which the Act applies defined, and a fourth condition is added to those I have mentioned—namely, that the employer must be "the undertaker" as defined in section 7 (2). In that sub-section I find that in the case of a building "undertakers" means the "persons undertaking the construction, repair, or demolition." In other words, the undertakers are the persons who undertake. I take the liberty of saying that this is not a definition, but a mere verbal or grammatical synonym, and it affords but little assistance in construing the Act. It seems to come to nothing more than this—that the word "undertakers" in the case of a building is used in its ordinary sense, whatever that may be.

It has been decided by the Court of Appeal in *Mason* v. *Dean* that a person who has contracted with a building owner for part only of the work of construction is an "undertaker" within the meaning of the Act. I think this decision right, for otherwise it appears to me that a workman of such an employer would not get any compensation under this Act at all, and it is quite immaterial for that purpose what the extent or nature of his employer's contract may be, provided that the work on which the injured workman is employed is within the Act. Indeed I think that the point is covered by implication, though not expressly, by the decision in *Hoddinott* v. *Newton, Chambers, & Co.* Persons who undertake a part only of the work of construction are therefore within the definition of undertakers.

Nor can I find anything in the definition which requires the undertaking or engagement to be directly with the building owner, or excludes a sub-contractor to whom the contractor for the whole building has let a certain portion of the work. Such a person undertakes the work which he has engaged to do as literally and truly as if his contract was directly with the building owner. Confining myself, therefore, to the definition, and independently of the fourth section, I am of opinion that in the case of a building a sub-contractor may be an undertaker within the meaning of the Act, and consequently a workman employed by him who has been injured by an accident in the course of his employment would be entitled to claim compensation from him. It may be that the so-called definition is so general as to include two persons, each of whom from a different aspect may be the undertaker.

Turning now to section 4, I regard that section as a proviso on section 1; it provides that in a certain case the workman may have a right to compensation from one who is not his employer. It is thereby enacted (in substance) that where "the undertakers as hereinafter defined"—*i.e.* (for the present purpose), persons who have undertaken in whole or in part the construction of any building—contract with another for the execution of any work, the "undertakers"—*i.e.*, the said undertakers—shall be liable to pay compensation to a workman employed by the contractor. The words describing the compensation which the undertakers are to pay to the workmen are these: "Any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies." Two cases are therefore contemplated—(1) where compensation is payable under the Act by the contractor —*i.e.*, the sub-contractor; and (2) where it would be payable if he were an employer to whom the Act applies. I omit for clearness of argument compensation independently of the Act. In other words, the language of the section expressly provides for a case in which both the so-called undertakers and the sub-contractor are severally liable under the Act to pay compensation to the workman for the same injury. The section appears to give an additional remedy to the workman, and not to restrict his right under section 1. It may be difficult in the case of a building to suggest cases in which a sub-contractor may or may not be an employer to whom the Act applies. It would seem that a sub-contractor who has undertaken part of the work must be one or the other in all cases alike. It is, however, possible that the case undertaken by the

sub-contractor might not be an employment within the meaning of the Act. But in the case of a railway, mine, or quarry (where there is a more restricted and special definition of undertakers), it is quite conceivable that a sub-contractor might not be an undertaker or employer to whom the Act applies, and probably in many cases would not be so. The language of the section is, of course, adapted to meet the case of every kind of employment within the Act. I now turn to the proviso on which the question before your lordships turns: "Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section." The meaning of this proviso is plain. Omit section 4, and ask yourself, is any other person liable (either under the Act or independently of the Act, I think it must mean)? I have already expressed my opinion that, excluding section 4 from consideration, a person who has contracted by way of sub-contract to execute work on a building would be liable, and I have pointed out that the language of the section itself contemplates that very case. In the present appeal the liability of the appellants is not questioned. The only question is whether they are entitled to be indemnified by the respondent, and that question has been argued exclusively on the construction of the Act. For the reasons which I have given I think that the appellants are right. It was argued that the construction of the appellants would oblige the sub-contractor to indemnify the principal contractor, although the accident might have been caused by the default of the latter. I do not think that this consequence would follow, for the reason stated by the learned counsel for the appellants in his very able argument. I think that section 6 would place the ultimate liability on the person in default. I think that the appeal should be allowed, with the usual consequences.

Lord SHAND.—I agree with those of your lordships who think that in this case the appeal should be allowed and the judgment of the county court judge restored, and I am content to rest my judgment on the reasons which the county court judge has himself given.

It is almost a hopeless task to attempt to reconcile or to make a consistent whole of the provisions of the Employers' Liability Act, 1897, which have a bearing on the question of relief which this action raises, and I do not therefore propose to go into a detailed examination of the clauses containing these provisions.

The deceased workman, Brady, was not in the employment of the appellants as a servant of theirs, yet they have been held responsible for compensation for the accident under section 4 of the statute, which makes them "undertakers," in the same way as if the work on the building which they had undertaken to put up in its entirety had been "executed by workmen immediately employed by them," a provision which gives a workman or his representatives greater security for the payment of compensation in case of accident than if they had to rely on the employer alone. Section 4 of the statute concludes with the words: "Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section"; and the question is whether, under this proviso, the appellants are entitled to the relief claimed.

On this question I am of opinion, in the first place, that the respondents, the employers of the deceased, were themselves undertakers within the meaning of the Act, which provides by section 7 that, in the case of a building, that term means "the persons undertaking the construction, repair, or demolition." It is true they were sub-contractors. They were, in my opinion, none the less undertaking the construction of part of the building, the slating, and I agree with the county court judge in thinking that this was a substantial part of the construction itself. It is clear the respondent would be an undertaker within the meaning of the Act if his contract had been direct with the proprietor having the building erected under different contracts, and I do not think that the respondent is the less an undertaker in that he was a sub-contractor for the same work, which he actually did, and in the course of which his servant, the workman, was accidentally killed. It follows that, if the action had been originally raised against the respondent alone, he would have been held liable under section 1 of the Act. This appears to me to show that the proviso to section 7, which gives the right of relief in this case, applies, for the respondent's liability arises independently of that section. It has been said that the use of the word "person" in that proviso must refer to others than persons who were themselves also undertakers under the Act, but I do not read the term as qualified in any way, if only the liability arises independently of section 4 itself.

Earl of HALSBURY, L.C.—In this case a building was being constructed for Messrs. Barker & Co. by Cooper & Crane, as builders. Cooper & Crane contracted with the respondent Wright to supply slates for the roof and perform the work of completing the roof. Wright in his turn employed a labourer named Brady to carry the slates, and in the course of that employment a lift broke and caused Brady fatal injuries. It is not denied that under the express language of the statute Brady's representatives were entitled to compensation from Cooper & Crane. They were the persons constructing the entire building, but they had obtained a sub-contrator to construct the roof. No question therefore can be raised but that this is an employment to which the Act relates. To get out for the moment of the technical language of the statute, the substance of the matter would appear to be that Barker was the person for whom the building was being erected. Cooper & Crane were the persons who contracted to build it. Wright was the sub-contractor for the roof, and Brady was employed by Wright, who was Brady's actual employer. Now it appears to me that the general design of the statute was to enable an injured workman, or in the event of his death his representative, to make a claim for damages against the employer in the sense of a person who was constructing the building. Even if he was not the immediate employer of the person injured, the theory of the Act is that, apart from any negligence or misconduct, a man employed in certain dangerous employments shall be in a certain sense insured against any accident that takes place. It was probably obvious to the Legislature that if the workman were driven to sue a sub-contractor and could not rely upon the responsibility of the person engaged to perform the whole work, a series of sub-contracts might render it practically impossible for him to ascertain the person whom he ought to sue, or if he did to obtain satisfaction. But then the Legislature seems to have provided that, though the contractor for the whole work might be sued even by a person not immediately under his control or in his employment, yet the theory of the statute being that the employer was to be made liable, the contractor for the whole work might pursue his indemnity for the liability against the actual employer of the injured workman. Now here, of course, it cannot be denied that Wright is the actual employer, and if the design of the statute is what I have suggested, it is clear that if Messrs. Cooper & Crane, who did not employ

Brady at all, are only made liable by the statute in the first instance, and the statute saves their right of indemnity against the real employer, the case is one actually contemplated by the statute, and so the county court judge decided. The objections appear to be that Wright was not an undertaker at all; that in a popular sense he undertook the construction of the roof is admitted, that he employed Brady is admitted, that the accident happened in the course of Brady's employment under Wright in the construction of the building is also admitted, and the question is whether there is anything in the statute to show that Wright cannot be described within the meaning of the statute itself as undertaker. The whole point seems to turn upon the question whether the persons who are described as undertakers must be undertakers of the whole construction, and I suppose that the argument turns upon the word "the," because the interpretation section enacts that in the case of a building the undertaker means the person undertaking the construction, repair, or demolition. If by that is meant that in order to be an undertaker the person must have undertaken the construction of the entire building, it would be an intelligible construction, though it is not the one that I should place upon the section. But if, as the Court of Appeal seems to have held, an undertaker does include a person who sub-contracts for a substantial part of a building, then I do not understand why in this case Wright was not an undertaker by any of the ordinary particulars by which an undertaker can be described. Wright was certainly an undertaker. He undertook a substantial part of the work—namely, the roof. He had the control and management of that part of the work. He employed Brady as a labourer in that form of employment, and I do not understand why it is suggested that he was not an undertaker, unless it is suggested that in order to be an undertaker he must take upon himself the entire contract that has been made by another person. It seems to me that this would be an unreasonable construction of the statute, which in its language is sufficiently clear. To apply, therefore, the language of the statute itself to the facts of this case the employment here of Cooper & Crane was an undertaking by them, and they are are in their turn undertakers. But they contracted with Wright for the execution of certain work—namely, the roof. But by the language of the statute they are made liable if such work were executed by workmen not immediately employed by them, but on the work for which they contracted. They must pay compensation under the Act to those workmen in respect of any accident arising out of and in the course of such employment. That is the liability imposed upon Cooper & Crane, nor have they denied their liability, nor appealed against the judgment. But while providing that the building contractors shall be liable, the section goes on to provide that they are entitled to be indemnified by any other person who would have been liable independently of that section. Observe that it is not independent of the statute, but of the section. Whether the enactment is felicitously worded or not, when one looks at the section and the proviso together, I think that it can hardly be doubted that the meaning of it was that where part of the work is let out, although the builder of the entire structure shall in the first instance be liable for injury to the workmen employed by the sub-contractor, nevertheless he is not the actual employer, and the builders who are thus made liable for injuries to a workman not employed by them shall have a right of indemnity against the actual employer, between whom and themselves there was no relation except that of contractors. I doubt whether the attempted definition of the word undertaker has added anything to the interpretation of the statute. Cooper & Crane undertook the whole building, Wright undertook the construction of the roof. It is in course of the construction of the roof that Wright's labourer is injured, and if it is contended that the latter words of section 4 do not apply, this consequence would follow, that Wright, apart from that section, would not be liable to Brady, although Brady was employed by him and was engaged in a building operation; and if the argument is right, inasmuch as apart from that section Cooper & Crane would not be liable at all, the workman would have no remedy whatever; so that, though Wright should be employing a man in a trade considered dangerous by the Act, and though in the course of that employment Wright's labourer was injured, the labourer would have no remedy. It seems to me that this would reduce the legislation to an absurdity, and I cannot think that the Legislature could have intended such a result. Put this case. Suppose there was no one who undertook the construction of the whole building. The owner is not in any sense the undertaker. The different contractors undertook to construct, each a different substantial part of one building; there would be no person who undertook the whole building. Then suppose this very accident occurs. Who is liable? No one, if the objection is a good one; and yet one of the contractors would be an employer of a man who by this hypothesis is engaged in a work which the statute has regarded as dangerous: yet he would have no remedy. I think this cannot have been intended. I am not quite certain what is meant by Lord Brampton when he uses the phrase "the building owner." I do not understand whether he means a person who means to have a building built for him, or a person who himself undertakes the actual construction. I agree that the Act does not apply to a man who takes no such part at all, but by four or five different contracts places out the building to four or five different builders. If he did this, there would be no undertaker and no compensation. This seems to me to show that, looking at the whole purview of the section in question, it cannot have been intended.

Therefore I think the judgment of the court below is wrong, and I move your lordships that it be reversed with costs.

*Order of the Court of Appeal reversed, and order of the county court judge restored, with costs both here and below.*

Solicitors, *Mason, Edwards, & Masons*, for *R. H. Beaumont*, Nottingham; *Mackrell, Maton, Godlee, & Quincey*.

## Privy Council.

(*From the Supreme Court of Hong Kong.*)

March 12, 1902.

CHAN KIT SAN AND ANOTHER v. HO FUNG HANG. (*a.*)

*Limitation Statutes—Probate—Forged will—Revocation of probate—Letters of administration—Account—*21 *Jac. I. c.* 16—*Hong Kong Ordinance, No.* 13 *of* 1864, *s.* 8; *No.* 8 *of* 1860, *s.* 29; *and No.* 9 *of* 1870, *s.* 1.

*Upon revocation of the grant of probate of a forged will the grant becomes void* ab initio, *and therefore in an*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

*action for account by the administrator, subsequently appointed, the Statute of Limitations begins to run only from the date of the grant of the letters of administration so necessitated.*

Appeal from a decree of the Supreme Court of Hong Kong.

The facts sufficiently appear in the judgment of their lordships.

*Upjohn, K.C.*, and *Clayton*, for the appellants.

*Morton Smith* for the respondent.

Lord DAVEY delivered the judgment of their lordships (Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY): In this case the respondent, as administrator of the estate and effects of Ho I Shek, deceased, on the 13th of January, 1899, commenced an action in the Supreme Court of Hong Kong, against the appellants, for an account of certain alleged partnership transactions between the deceased and the appellants. The appellants (defendants in the action) pleaded the Statute of Limitations. An order was made on the 1st of December, 1899, that the issue of law with regard to the Statute of Limitations be tried before any other issues in the suit. The terms of the issue were: "Assuming that all the facts stated in the petition are true, is or is not the plaintiff's claim herein barred by the Statute of Limitations?"

The material facts and dates thus admitted for the purpose of argument are the following:

1. Ho I Shek died intestate on the 19th of June, 1880.

2. No administration to his estate was taken out until the month of November, 1886, when probate of an alleged will was granted by the Supreme Court in its probate jurisdiction to Ho Chik Fuk, the person named as executor in such alleged will, but Ho Chik Fuk did not intermeddle with the shares claimed in the alleged partnership transactions.

3. On the 17th of November, 1896, the alleged will was declared to be a forgery, and the probate was revoked.

4. On the 21st of June, 1897, administration was granted to the respondent. The relevant Statute of Limitations is contained in section 8 of Ordinance No. 13, 1864, whereby it was enacted that all actions of account must be commenced within six years after the cause of such actions. These are the same words as those of 21 Jac. 1, c. 16.

It was not seriously and could not be successfully disputed that, according to the well-established rule in English law, the statute runs against an intestate's estate from the date of the grant of letters of administration only. But the appellants contended—first, that, according to the law of the colony, a right of action accrued on the intestate's date to the registrar of the court, and the statute therefore ran from that date; or, alternatively, secondly, that the statute commenced to run from November, 1886, when the grant of probate of the forged will was made to Ho Chik Fuk.

On the trial of the issue the Supreme Court (Original Jurisdiction) decided in favour of the respondent, and its decision was affirmed by the Supreme Court (Appellate Jurisdiction). The present appeal is from the order of the latter court dated the 14th of March, 1900.

The argument of the present appellants in the first court was based chiefly on the grant of the probate of the forged will. Now it is quite true that, so long as that probate was in existence, the title of the grantee could not be impeached in any common law court, and he could have sued for and given a good discharge for any debt due to deceased. It is, indeed, questionable whether in the present case the alleged executor could have maintained an action against the present appellants, because the title of an executor is derived not from the probate, but from the will, and the probate when granted relates back to the death. As more than six years had elapsed between the date of the death and the grant of the probate, any right of action by Ho Chik Fuk under his probate (would, it is said) have been barred. The acting chief justice decided in the respondent's favour on this ground. It is replied by counsel at their lordships' bar that the cause of action vested, though the right to sue was barred. Without giving any opinion on this somewhat subtle point, their lordships think that the general argument may be disposed of on a broader ground. By the revocation the grant of probate was made void *ab initio*, for there was not in fact any will to be proved. It is now known that the apparent title of the so-called executor, although it could not be impeached in any court except the Court of Probate, was founded on a fiction and a fraud, and for the purposes of the present argument the probate must be treated as a nullity, and as never having had any real existence. The court cannot be bound to take notice when the facts are known, of an apparent right of action obtained by fraud. In the Court of Appeal no reliance appears to have been placed on this point, though it has been resuscitated before their lordships. The point there argued was the first contention of the appellants that a right of action vested in the registrar on the death of the intestate. This depends on certain sections of the Ordinances. By section 39 of Ordinance No. 8 of 1860, which was the one then in force, it was enacted that from and after the decease of any person dying intestate, and until letters of administration should be granted in respect of his estate and effects, the personal estate and effects of such person should be vested in the registrar of the Supreme Court. By section 1 of Ordinance No. 9 of 1870 it was declared that the registrar of the Supreme Court was *ex officio* official administrator under Ordinance No. 8 of 1860. And by following sections large powers were given to the official administrator for the purpose of enabling him to get in and protect the estate of the deceased, pending the grant of letters of administration, but no power to sue was conferred on him. It was argued that by these Ordinances all the rights of action included in the estate of the deceased were vested in the registrar or official administrator, and he therefore had, by implication, a statutory right to enforce them by action. But their lordships think that there is nothing in the sections to which they have been referred to overrule the established rule of law that no action can be maintained in respect of the estate of a deceased person except by a duly constituted administrator or executor. The sections referred to seem to place the registrar, pending the grant of letters of administration, in the position of a receiver, and to give him powers incident to such an office, but nothing more. And the result of the inquiry made by the Chief Justice as to the practice under section 39 of the Ordinance of 1860 confirms this view.

Their lordships will therefore humbly advise his Majesty that this appeal be dismissed, and the appellants will pay the costs of it.

Solicitors for the appellants, *Harston & Bennett.*

Solicitors for the respondent, *Trass & Enever.*

## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Mathew, L.JJ.) — Aug. 7, 1902.

*In re* FORD.
FORD *v.* FORD. (*a.*)

*Administration—Inoperative will—Intestacy—Advances to children—Hotchpot—Statute of Distributions* (22 & 23 *Car.* 2, *c.* 10), *s.* 5—1 *Will.* 4, *c.* 40.

*Where a will has become inoperative by reason of the sole executor and universal devisee and legatee dying in the lifetime of the testator, there is an intestacy within section 5 of the Statute of Distributions, and the provisions of that statute as to children sharing in the residue bringing their advances into hotchpot apply.*

*Decision of* Buckley, J. (50 *W. R.* 91), *affirmed.*

This was an appeal from a decision of Buckley J. (reported 50 W. R. 91).

The testator devised and bequeathed all his real and personal estate to his wife absolutely and appointed her sole executrix. This constituted the whole will.

The testator died in September, 1900, a widower, having survived his wife, who died in 1892. Letters of administration with the will annexed had been granted to the two defendants.

The testator left several children, to some of whom he had made advances in his lifetime. Two of the children took out a summons for the determination of the question whether on the distribution of the residuary estate the persons entitled to share therein ought to bring into hotchpot sums of money or benefits given to them by the testator in his lifetime, and for administration of the real and personal estate.

Buckley, J., held that the testator had died intestate, and that the provisions of the Statute of Distributions applied as to children sharing in the residue bringing their advances into hotchpot.

*Terrell, K.C.*, and *J. G. Wood*, for the appellants, used similar arguments to those in the court below.

*Astbury, K.C.*, and *Gatey*; and *Ingpen, K.C.*, and *Brodie Cooper*, for the respondents, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—We think that this appeal must fail. It is true that there is a will by which the testator appointed an executrix and gave all his property to her. The executrix died in the lifetime of the testator, and the result is that there is no person in whose favour the will can operate. There is no one who can take beneficially. In those circumstances the Statute of Distributions seems to apply. It is not in accordance with the truth to say that this man has not died intestate.

ROMER, L.J.—I am of the same opinion.

MATHEW, L.J.—I also am of the same opinion.

Solicitors, *Douglas, Ford, & Co.*; *Rowcliffes, Rawle, & Co.*; *Carr, Scott, Smith, & Gorringe.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

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From Chan. Div. (Vaughan Williams, Romer, and Mathew, L.JJ.) — July 30, 1902.

*In re* CREDIT AND ASSURANCE GUARANTEE CORPORATION (LIMITED). (*a.*)

*Company—Capital—Reduction of capital—Shares paid up in varying amounts—Loss to be borne by all shares equally.*

*Where a scheme for reduction of capital is neither unjust nor inequitable, the court has jurisdiction to sanction it, even though it has the effect of varying the original rights of the shareholders.*

*Decision of* Farwell, J. (50 *W. R.* 629, [1902] 2 *Ch.* 178), *reversed.*

This was an appeal from the decision of Farwell, J. (reported 50 W. R. 629, [1902] 2 Ch. 178), dismissing a petition for confirmation by the court of the reduction of capital.

The Credit Assurance and Guarantee Corporation (Limited) had a capital of £1,000,000, divided into 2,000 deferred shares of £1 each, and 99,800 ordinary shares of £10 each.

The deferred shares were all issued and fully paid, and 37,712 ordinary shares had been issued. Of the latter 2,621 had been forfeited, 1,123 had been issued under a duly registered contract with £5 paid up, and the remainder had been paid up to the extent of £2.

The memorandum of association provided that the profits should be applied after allowing for a reserve fund in paying first a dividend of 10 per cent. on the amount paid up for the time being, one half of the surplus to the holders of deferred shares, and the remaining moiety, subject to the payment thereout of such extra remuneration to the directors as might be determined in general meeting, should belong to the holders of ordinary shares.

By article 152 of the articles of association: "If the corporation shall be wound up and the surplus assets shall be insufficent to repay the whole of the paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

The corporation had power to reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets.

On the 12th of December, 1901, a special resolution was passed reducing the capital to £850,300, divided into 99,800 shares of £10 each, and 2,000 deferred shares of £1 each, and such reduction was to be effected by cancelling capital to the extent of £1 10s. in respect of each of the ordinary shares, which had been issued and were then outstanding, and by reducing the nominal amount of all the ordinary shares in the company's capital from £10 to £8 10s.

Farwell, J., held that the losses must be borne by the shareholders in the same proportion as the capital paid up on the shares.

The company appealed.

*Younger, K.C.*, and *Cozens-Hardy*, for the appellants, cited *Bannatyne* v. *Direct Spanish Telegraph Co.*, 35 W. R. 125, 34 Ch. D. 287; *In re Direct Spanish Telegraph Co.*, 35 W. R. 209, 34 Ch. D. 307; *British*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399.

*Jenkins, K.C.*, and *Martelli*, for the opposing shareholders, said that, if the court was satisfied as to the jurisdiction to sanction the petition, they withdrew their opposition.

VAUGHAN WILLIAMS, L.J.—We are all of opinion that this scheme would not work inequitably or unjustly. That being so, it is admitted, on the authority of the *British and American Trustee and Finance Corporation* v. *Couper*, that we have a discretion to sanction this scheme, and we do sanction it. In a case like this there must be very often something which leaves the rights of the parties not quite the same as before, but I think this scheme alters them as little as possible.

ROMER, L.J.—I agree.

MATHEW, L.J.—I agree.

Solicitors, *Davidson & Morriss; R. Chapman.*

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From Chan. Div. (Vaughan Williams and Romer, L.JJ.) — July 24, 1902.

*In re* BUCKWELL & BERKELEY. (*a.*)

*Solicitor—Costs—Taxation—Disbursement—Money paid to "Security for Costs Account"—Solicitors Act*, 1843 (6 & 7 *Vict c.* 73), *s.* 37.

*Moneys paid by a solicitor on behalf of a client to the "Security for Costs Account" in respect of discovery and interrogatories are not payments which the solicitors are bound to make either by law or custom. Consequently they cannot be treated as "disbursements" within section* 37 *of the Solicitors Act.* 1843, *but must go into the cash account as money lent by the solicitor to his client.*

*Decision of* Kekewich, J. (50 *W. R.* 629), *reversed.*

This was an appeal from a decision of Kekewich, J. (reported 50 W. R. 629).

In a taxation as between solicitor and client the taxing-master disallowed items of £5 and £8 respectively paid by the solicitors to the "Security for Costs Account" under ord. 31, rr. 25, 26, and 27, upon application for discovery and interrogatories. Objection having been taken to the disallowance, the taxing-master gave as his reason in each case: "This deposit cannot be allowed, as the solicitors can obtain the return of it; the costs of doing this are subsequently allowed."

The effect of the disallowance of these items was that more than one-sixth of the bill was taxed off.

The solicitors took out a summons to review the taxation.

Kekewich, J., held that the payments were made by the solicitor in his professional duty and were "disbursements" within section 37 of the Solicitors Act, 1843, under the rule laid down by Lord Langdale in *In re Remnant*, 11 Beav. 603. He accordingly referred the bill back to the taxing-master, but gave leave to appeal.

The client appealed.

*E. W. Hansell*, for the appellant.

*Humphreys*, for the solicitors.

VAUGHAN WILLIAMS, L.J. — We think that this payment, which was really payment into court by way of partial security for part of the costs, ought to be entered in the cash account and not treated as a disbursement. To my mind we are simply applying the rule laid down in *In re Remnant*, which, as everyone admits, must govern this question. If we look at the certificate given by the taxing-master which is set out in the report of that case we see that this payment does not come within the rule there laid down. We are of opinion that this payment is not one which the solicitors were bound either in law or by custom to make. The solicitors in fact provided the money to pay the £5 into court under ord. 31, r. 26, but that was simply money lent by them to their client. We think that the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. In principle this payment cannot be distinguished from any sum which is ordered to be paid into court as security to enable a person to proceed with an action. If a client is out of the jurisdiction and money is ordered to be paid into court as security, the solicitor is not bound to find that money, but if he does, it will be on behalf of the client, while the money in court will be the client's money. Such a payment is merely money lent by the solicitor to the client and ought to go into the cash account. It is not a disbursement within the rule; it is not a sum which either by law or custom the solicitor would be bound to pay as between him and his client. The argument that if a solicitor did not provide this money he would be liable for negligence is unfounded. The solicitor is not bound to find this money: he could rightly apply to the client to find it, and if the client did not supply the money to enable the proper steps to be taken in the action, the solicitor would not be guilty of negligence if the proper steps were not taken.

Solicitors, *Cameron, Kemm, & Co.; Biggs, Roche, Sawyer, & Co.*

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From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — June 23, 1902.

REX *v* HOWARD AND OTHERS, LICENSING JUSTICES OF FARNHAM. (*a.*)

*Licensing law—Renewal of licence—Objection taken by justices—Adjudication by justices raising the objection—Inquiries made by justices before hearing—Bias—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.

*An objection to the renewal of a licence may, under section* 42 *of the Licensing Act*, 1872, *be made by the licensing justices.*

*Licensing justices, having had their attention called by the county licensing committee to the large number of licensed houses in their district, appointed a committee to make inquiries and to report upon the matter. The committee collected statistics and inspected the licensed houses in the district and made a report, which was adopted at a meeting of the justices. At the general annual licensing meeting the chairman of the justices, on behalf of the justices, objected to the renewal of all the licences in the district, stating that the reason why the justices thus raised objection to the renewals was that every one of the licensees might bring evidence before them, and that they would thus be enabled to decide the cases with fairness and justice. The objections were accordingly adjourned, and the clerk to the justices, by their direction, served notice of objection, stating the grounds, upon each licensee*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*requiring him to attend at the adjourned meeting. At the adjourned meeting the justices heard evidence on oath and refused the renewal of nine licences. Upon an application for a* mandamus *to the justices to hear and determine the applications for the renewal of the licences according to law, the chairman of the justices stated upon affidavit that the justices, in raising the objection, had not arrived at any decision whether or not to renew any of the licences, but had merely taken steps to put matters into proper train for fully considering each case on its merits, and that in deciding to refuse the renewals they had acted solely upon the evidence given upon oath in court.*

*Held, that, in the circumstances, the justices were not disqualified from sitting and deciding upon the applications for the renewal of the licences.*

*Judgment of the* Divisional Court (50 *W. R.* 573) *affirmed.*

Appeal from a decision of the Divisional Court (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) discharging a rule *nisi* for a *mandamus* to the licensing justices of Farnham, Surrey, to hold a further adjournment of the general annual licensing meeting, and to hear and determine according to law an application for the renewal of an alehouse licence to Mrs. J. E. Smith.

The case is reported 50 W. R. 573.

There were appeals in eight other cases also which depended upon the result of the first appeal.

The grounds upon which the rule *nisi* was obtained were (1) that the justices were not entitled themselves to object to the renewal of a licence; (2) that, if they were so entitled, they were not entitled to adjudicate upon their own objections; (3) that they were precluded from sitting and adjudicating because they had previously collected evidence and viewed the house, and had prejudiced the case; (4) that one of the justices, Mr. Bentall, was a member of a body actively engaged in opposing the renewal of licences, and had been a party to a resolution passed at a public meeting of the Surrey Congregational Union in opposition to the renewal of these licences.

The affidavits stated that in May, 1901, a special meeting of the justices of the Farnham division was held to consider a letter from the clerk of the peace of the county of Surrey, addressed to the clerk to the justices of the Farnham division, stating that the attention of the county licensing committee had been called to the large number of licences in the parishes of Farnham and Farnham rural; that there appeared to be one licensed house for every 155 of the population, which was largely in excess of any other parish in the county; and that the committee were of opinion that some steps should be taken whereby the licences of a substantial number of such houses should be discontinued; and inviting the justices to consider this question at their next annual licensing meeting. At the meeting a committee was appointed to consider the statistics referred to in the letter and to report upon the subject. The committee collected statistics as to population, number of licences, and other information, comparing the Farnham division with other divisions in the county, and the county with neighbouring counties in the matter of the ratio of population to licences. At a meeting of the justices for the division on the 13th of July, 1901, the committee made a report. The report was unanimously adopted, and the committee were authorized to inquire into the condition, position, and circumstance of each licensed house in the Farnham urban district. The committee then directed the clerk to the justices to send to the owners of licensed houses and the licence-holders in the division the following letter: "The attention of the justices of the Farnham petty sessional division having been called by the county licensing committee to the excessive number of licences in the division, a fact which cannot, in the opinion of the justices, be disputed, and the justices having appointed a committee to make inquiries in connection with the matter with a view to a reduction in the first place of licences in the Farnham urban district, where such excess is most pronounced, I am directed by the justices to so inform you, and to suggest that anything you may desire to say upon the subject addressed to me will receive their best consideration." The committee inspected the fully-licensed houses in the Farnham urban district. Except in one instance, the inquiries were made and information was obtained only from the licensee or the person actually in charge of the licensed premises at the time of the inspection, which person was in every case the wife or daughter of the licensee. On the 6th of February, 1902, the committee made a report to the justices which was headed "Private and Confidential.—Proposed Reduction of Licences in the Division," and it contained tabulated particulars as to all the licensed houses, and recommendations as to the procedure at the forthcoming general annual licensing meeting. The justices held a meeting to consider this report and adopted it, and resolved that their clerk should obtain the presence of witnesses at the general annual licensing meeting in support of the report. On the 1st of March, 1902, the general annual licensing meeting was held, a copy of the report having been placed by the justices in the hands of counsel for the applicants. The justices present included certain members of the committee above-mentioned. When the first application for a renewal was reached a Mr. Hayes rose in court and stated that he objected to the renewal of all the licences in Farnham urban. The chairman of the justices thereupon directed Mr. Hayes to give the requisite seven days' notice of his objection for the adjourned meeting on the 14th of March. The chairman then, on behalf of the majority of the justices, made objection to the renewal of the forty-five alehouse licences in the Farnham urban district, and the applications for renewals of such licences were directed to stand adjourned to the adjourned meeting, the chairman stating publicly that the reason why the justices thus raised objection to the houses was in order that every one of the licensees might have equal opportunities of bringing evidence before them, and that the justices might be thus enabled to decide such cases with perfect justice and fairness. Two of the justices (Mr. George Goodall and Mr. Gould, K.C.) stated that they dissented from the course which was being pursued, and from the whole plan of procedure of the justices in reference to the alehouse licences, and Mr. Goodall retired and took no further part in the proceedings. Mr. Gould, however, continued to sit, and took part in the proceedings. The justices instructed their deputy clerk to serve formal notice in each case requiring the licensee to attend in person at the adjourned licensing meeting and stating the grounds of objection, which were based on the report of the committee; and such notices were served accordingly. In the case of ten of the licensed alehouses notices of objection were also given by Mr. Hayes. At the adjourned licensing meeting on the 14th of March counsel on behalf of the holders of licences who had been served with notice of objection took the objections that the justices themselves sitting at the general annual licensing meeting were not entitled under section 42 of the Licensing Act, 1872, to object to the renewal of licences; and that the justices who had been parties to the service

of the notices of objection were disqualified from sitting and adjudicating, upon the ground that such justices were in fact the prosecutors or complainants, and could not adjudicate in their own cause; and upon the ground of "bias" arising from their resolution as to the renewal of licences, and in consequence of having received and acted upon the report of the committee as to the proposed reduction of licences in the division, and having been thereby influenced by statements not upon oath. The justices overruled the objections and proceeded to hear the evidence on oath in the several cases, and in the result they refused to renew nine licences. It appeared that all the houses in question had been licensed for many years and they had all been properly conducted. In his affidavit in answer to the rule the chairman of the justices stated that the reasons which actuated him, and which he knew also influenced his colleagues, were that the justices had arrived at no decision prior to their decision at the adjourned general annual licensing meeting as to whether to renew or not to renew any of the licences in the district, and that in causing notices requiring the personal attendance of licensees to be served they were not in any way taking sides or committing themselves to any particular view as to the propriety or otherwise of renewing any licence, but had merely taken the steps which the statute imposed upon them of putting matters into proper train for fully considering, after due notice to the applicants, each case upon its merits, and upon sworn evidence which alone they intended to have regard to; and that, in arriving at his decision to refuse the renewal of the licences in question, he did not entertain or take into consideration, nor was his decision based upon or affected by any evidence, matter, or thing, save the evidence given upon oath and the admissions made in open court during the hearing of the applications.

The Divisional Court discharged the rules, holding that licensing justices might themselves give notice of objection, under section 42 of the Licensing Act, 1872, to the renewal of a licence, and that in the circumstances the justices who took the objection to the renewals were not disqualified from adjudicating upon the objection.

The licence-holders appealed.

By section 42 of the Licensing Act, 1872: "Where a licensed person applies for a renewal of his licence the following provisions shall have effect: (1) He need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend; (2) the justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting; provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given; (3) the justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. Subject as aforesaid, licences shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore." By section 26 of the Licensing Act, 1874, it is enacted (*inter alia*) that "a notice of an intention to oppose the renewal of a licence served under section 42 of the principal Act" (the Licensing Act, 1872) "shall not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed."

*Danckwerts, K.C.*, and *Horace Avory, K.C.* (*Stimson* and *W. O. Willis* with them), for the appellant in the first case.

*Disturnal*, for the appellants in the other cases.

*F. Low, K.C.*, and *G. F. Hohler*, for the justices.

*Cyril Dodd, K.C.*, for Gould.

The arguments were similar to those in the court below.

*Cur. adv. vult.*

June 23.—COLLINS, M.R., read the following judgment: This is an appeal from the decision of the Divisional Court discharging a rule for a *mandamus* addressed to the licensing justices of the Farnham Petty Sessional Division of the county of Surrey, calling upon them to show cause why a writ of *mandamus* should not issue commanding them to hold a further adjournment of the annual licensing meeting and to hear and determine according to law certain applications for the renewal of licences. The case is one of importance, as the question raised goes to the root of the law and practice in the matter of the renewal of licences. The circumstances are shortly these. In February, 1891, a letter was addressed by the clerk of the peace of the county to the clerk of the Farnham justices informing him that the attention of the County Licensing Committee had been called to the large number of licences existing in the parishes of Farnham and Farnham rural, pointing out that the proportion was largely in excess of any other parish in the county, and stating that it was the opinion of the committee—that is, the confirming committee—that steps should be taken whereby the licences of a substantial number of such houses should be discontinued, and inviting the justices to consider this question at their next annual licensing meeting. The justices, as appears by the affidavit of their chairman, addressed themselves to the consideration of the question raised by this letter, and appointed a committee to consider the statistics referred to in the letter. Upon the report of this committee, which was unanimously adopted, the committee were authorized to inquire into the condition, position, and circumstances of each licensed house in the Farnham district, which they accordingly proceeded to do—first, by framing questions addressed to the owners of the houses, and afterwards by personal inspection, the results of which were duly reported to the licensing justices, with recommendations which were adopted by them with one dissentient. It is clear from their report that they were of opinion that the only fair and satisfactory way of dealing with the questions was to cause objections to be served on all the owners of licensed houses, so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice. These objections were signed by the clerk, stating that he was acting under the instructions of the justices present at the annual licensing meeting At the general annual licensing meeting held on the 1st of March a certain Mr. Hayes objected to the renewal all the licences in urban Farnham, and the chairman of the justices made objection to the renewal of the forty-five licences in the Farnham urban district, stating that the reason why the justices thus raised objections was "in order that every one of the licensees might have equal opportunities of giving evidence before them, and the justices might thus be enabled to

decide with justice and fairness," and the meeting was accordingly adjourned until the 14th of March following, and instructions were given to Mr. Mason, the deputy clerk, to serve formal notice in each case, requiring the licensees to attend in person and stating the grounds of objection. When the cases came on for hearing, evidence on oath was given in support of the objections, and questions were put by the chairman based on the facts collected by the committee. A copy of the report itself had been placed by the justices in the hands of counsel for the applicants.

The rule *nisi* was obtained on the ground that the justices were incapacitated from dealing with the question of the renewal of the licences, inasmuch as they were at once parties and judges, that they had acted upon evidence not taken upon oath as provided by sub-section 3 of section 42 of the Licensing Act, 1872, and that they must be deemed in law to be biassed on the ground that they had predetermined to refuse the renewal of some of the licences and had already inquired into the cases. There was also a particular objection to one of the magistrates, which I will deal with, if necessary, later on.

In considering how far these points are material it is necessary to understand precisely what is the character in which the justices are required by law to deal with questions of renewal. Whatever views may have been held as to their position before *Boulter* v. *Kent Justices*, 46 W. R. 114, [1897] A. C. 556, was decided in the House of Lords, it is now clear that in the granting or refusing of renewals the justices do not sit as a court, and that the transaction itself is in no sense a *lis* to which there are parties. The objector is not a "party"; his function is merely to inform the mind of the tribunal to enable it rightly to exercise its discretion whether to grant the privilege of a licence or not. This point is so material to the true appreciation of the cardinal consideration in these cases that I propose to read one or two passages from the judgment of Lord Halsbury, L.C., and Lord Herschell in the case I have just referred to. Lord Halsbury, [1897] A. C., at p. 562, said: "The difference between the procedure of a court and of the licensing meeting is not only one of nomenclature. Where justices are acting as a court of any sort they must proceed according to the regular rules which are applicable to all courts of justice; but in respect of an application for a licence or its refusal, they may and constantly do receive representations not on oath." He then quotes Lord Kenyon, who in 1790, in the case of *Rex* v. *Downs*, 3 T. R. 560, when holding a licence bad because it was granted at a private meeting, did not rely upon the general principle that all courts of justice must be open, but upon the ground that the statute directed it, and added that the construction of the then statute law was advantageous to the public because it was "of importance to the public that licences of this sort should be granted openly and not by stealth, in order that they may have an opportunity of objecting to the granting of these licences to particular persons on the ground of unfitness." He adds: "The Acts referred to by the learned judges were repealed by the Act of 1828. But a careful distinction appears to me always to have been reserved between the same bodies acting as a court and deciding questions of licensing at a licensing meeting of the justices." Further on, [1897] A. C. at p. 564, he says: "If I am right in the distinction I have drawn between a magistrates' meeting for licensing purposes and courts, although consisting of the same persons, it would be the height of absurdity to suppose that the Legislature intended to include in the definition and to make applicable to that definition persons who were in fact justices of the peace, but who in the particular matter here referred to—namely, 'licensing'—were not occupying the position of judges at all, but were exercising the discretionary jurisdiction as to how many public-houses they would permit in a district, or what persons should carry them on." Lord Herschell, at p. 569, said as follows: "Persons objecting to the grant of a licence are not, I think, parties to the proceedings on the application in any proper sense of the term. The question is not one *inter partes* at all. The justices have an absolute discretion to determine, in the interest of the public, whether a licence ought to be granted, and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects merely informs the mind of the court to enable it rightly to exercise its discretion whether to grant that privilege or not. A decision that a licence should not be granted is a decision that it would not be for the public benefit to grant it. It is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determination in his favour. It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all, then, become 'the other party'? There is, in truth, no *lis*, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party, for if a licence be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large. The provision contained in section 2 seems, then, to me an additional reason for holding that an appeal from the 'act' of the justices in refusing a licence is not an appeal from a 'conviction or order' of a court of summary jurisdiction."

The standard, therefore, to be applied in determining whether justices have incapacitated themselves from dealing with the renewal of licences is not in any sense that applicable to judges dealing with litigation. Moreover, their position in relation to the right of objecting is not *res integra*. Since *Reg.* v. *Farquhar*, L. R. 9 Q. B. 258, 22 W. R. Dig. 38, at all events, decided in 1874, the practice has been that they might, where circumstances required it, themselves make or cause to be made an objection, at all events provided they adjourned for the purpose of hearing it and caused the necessary notice to be served requiring attendance upon a future day. I think this practice was founded on a true view of the law for reasons which I will state hereafter, but, whether it is or not, I think it has been treated as law for nearly thirty years, and ought not to be now disturbed. In *Reg.* v. *Eales*, 42 L. T. Rep. 735, 28 W. R. Dig. 129, decided in 1880, it is thus referred to by Cockburn, L.C.J., at p. 737. He says: "And although by a practice founded upon a *dictum* in the case of *Reg.* v. *Farquhar* an objection may be made by the justices themselves, it must be upon one of those four grounds" (it was a case under the Act of 1869) "and the particular ground of such objection should be notified to the appellant in order that an opportunity may be given to meet it." He there treats the practice as established and in no way dissents from it. It has been treated as law in more than one case referred to in argument, and was formally decided to be so in 1898 in *Baxter* v. *Leche*, 79 L. T. Rep. 138, 47 W. R. Dig. 99. It is true that a different view was taken by Hawkins, J., in *Reg.* v. *Justices of Anglesea*, 65 L. J. M. C. 12, 44 W. R. Dig. 89. But in the same case that learned judge upheld a decision

based upon a notice given by the chief constable apparently at the instance of the licensing justices themselves. And on the general question whether there is such incompatibility between the position of the justices who adjudicate and that of an objector that the two cannot be combined, it seems to me to be immaterial whether the objection is made personally by the justices or by somebody else at their instance, and from the reported cases it seems to be a very common practice and one that has never been questioned for the objection to be made at the instance of the justices, if not in their name. The observations of Hawkins, J., in the case referred to are very valuable as to the discretion of justices, and their right to discuss among themselves matters affecting the expediency of renewals, and their right to take steps to have a full investigation of them. On the same point Lord Halsbury, in *Sharp* v. *Wakefield*, 39 W.R. 561, [1891] A. C. 173, at p. 178, says: "By the express language of the statute, which is still the governing statute, the grant of a licence is expressly within the discretion of the magistrates. For the reasons to be stated presently, I am of opinion that no legislation has ever altered that provision; but, if one were to argue *a priori*, what possible reason could there be for limiting the discretion of the justices to the first grant of the licence? It is not denied that for the purpose of the original grant it is within the power and even the duty of the magistrates to consider the wants of the neighbourhood with reference both to its population, means of inspection by the proper authorities, and so forth." The key to the position appears to be that the justices in dealing with licences are not a judicial body; that they are deliberately appointed because from their circumstances they are likely to have local knowledge; and it cannot have been the intention of the Legislature that they should divest themselves of all such knowledge in dealing with questions of licences. It would be a great public misfortune if they were bound to determine the question merely on materials provided by the individual who happened to object, and were constrained to sit by in silence although they had reason to suppose that there were very good grounds which ought to be inquired into before the matter was decided; and yet, if they were debarred from making an objection or causing one to be made, these facts never could be inquired into, and the licence would have to be disposed of without the necessary investigation. I think, therefore, that the practice is not only inveterate but is founded on a true view of the function of justices in relation to the matter. If that be so, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges in the sense in which they are judges in such matters, and therefore the standard laid down in such cases as *Leeson* v. *General Medical Council*, 38 W. R. 303, 43 Ch. D. 366, and *Allinson* v. *General Medical Council*, 42 W. R 289, [1894] 1 Q. B. 750, is not applicable to them. They fall outside their principle for two reasons—first, that they are empowered by law to fill the two capacities; and secondly, that, rightly understood, the two capacities are not incompatible in the sense in which in those cases they were assumed to be incompatible, because, as has already been pointed out, in making the objection they do not in any sense become parties to the litigation or anything analogous thereto. They are simply taking the only or the best available course to enable matters vital to the exercise of their discretion to be formally and fairly considered openly before them. Assuming, therefore, what I regard as clearly established by the evidence, that what was done by the justices in this case was honestly done to enable them to secure a full investigation of the facts for the purpose of avoiding the injustice which might arise if they had to deal with the question without such materials, and upon one or more isolated applications only, I think they were within their rights in doing what they did, and were not thereby debarred from sitting and deciding upon the question of renewals. Their original and fundamental discretion in the matter of granting or refusing applications for new licences remains when they are invited to deal with renewals, except so far, and only so far, as it is conditioned by section 42 of the Act of 1872, as amended by section 26 of the Act of 1874, which relates to procedure only: see *Sharp* v. *Wakefield*, [1891] A.C., at p. 182. In my opinion the course the justices took involved no predetermination of any point, but merely secured a full and informed discussion of the whole subject. It is not denied that on the hearing all the formalities of the 42nd section were complied with. The respondents, indeed, contend that the justices could have exercised their discretion without complying with these conditions, but I think the case of *Evans* v. *Conway Justices*, 48 W. R. 577, [1900] 2 Q. B. 224, debars them from advancing that contention in this court. I agree, therefore, with the decision of the Divisional Court, and it is not necessary to discuss in detail the numerous cases which were referred to in argument before us.

With regard to the special objection urged against Mr. Bentall on the ground that he was present at a meeting at which certain resolutions were passed upon which he did not vote, I think it cannot be sustained. It is not necessary to express an opinion upon the technical objections urged against the granting of a *mandamus* in the form prayed for. The appeal must be dismissed.

MATHEW, L.J., read the following judgment: The grounds relied upon in support of the appeal were—(1) That the justices were prohibited from being themselves the objectors to the renewal of the licence; (2) that they were disabled from adjudicating upon the grounds of objection; and (3) that their decision was invalidated on the ground of personal interest in the result, or manifest bias against the applicant. As to the first point, if the jurisdiction of the justices depended upon the Act of 1828, there would seem to be no question that objections to a renewal might be made by the bench sitting in open court, and that upon giving the applicant the opportunity of being heard, the justices had an absolute discretion to grant or refuse the renewal But it was argued that the discretion of the justices could no longer be exercised freely, and that their jurisdiction was fettered by the provisions of the Act of 1872. Attention was called to the language of section 42, and it was contended that the jurisdiction of the magistrates depended upon the objection being made by someone who was not a member of the bench. No reason was given for this supposed change of the law. It would matter nothing to the applicant from what quarter the objection came. A third person would be entitled to object without giving a reason and might then withdraw and be no party to the subsequent proceedings. The grant of a renewal was for the magistrates only, and would seem to depend in every case upon the result of the subsequent inquiry upon sworn testimony. But it was said that the inference from the language of the section was clear, and that the object of the Act was to provide for a new method of procedure in all cases. Section 42, as modified by the later Act of 1874, is in the following terms: [His lordship read the section.] Sub-section 1 would seem to assume that

an objection might be made from the bench, and that the applicant might be required to attend in person upon having proper notice given him in accordance with sub-section 2. He would thus learn the grounds upon which his attendance was considered by the justices to be necessary. The proviso in sub-section 2 leads to the same conclusion. It would appear, therefore, that the justices may entertain any objections to the renewal, whether made previously or not, and take evidence upon them. Further, even if, contrary to what would seem to be the true meaning of the statute, sub-sections 1 and 2 must be taken to apply only when the bench are not the objectors, the last clause in the section preserves their former powers and discretion. They continue to possess the authority conferred upon them by the Act of 1828. This is in accordance with the valuable judgment of Hawkins, J., in the case of *Reg.* v. *Anglesea Justices.* I see no reason to doubt the authority of the cases referred to by the Master of the Rolls, which sanction the conclusion that objections may be made from the bench in open court, and may afterwards be investigated upon proper notice to the applicant to attend and answer the objections. The argument for the appellant would involve this consequence, that the magistrates, if there were no objector, would be bound to renew the licence, though they knew or had been furnished with reliable information that the application ought to be refused.

But then it was said that, even though objections might be made from the bench, the justices, who were parties to the notice to the applicant to attend, could not afterwards sit and adjudicate upon the application. The proceedings would have been regular under the Act of 1828, and it seems to me that there is no ground for saying it was impliedly forbidden by the Act of 1872. But it was urged that the inquiry was in the nature of the trial of an action between the justices and the applicant, and that those who had instituted the proceedings could not adjudicate upon what was described as their own cause. But, as has been laid down in the cases referred to by the Master of the Rolls, in licensing cases there is no *lis*, and nothing in the nature of a suit or a prosecution. The duty of the justices is to arbitrate impartially, not between themselves and the holder of the licence, but between that person and the public. The fact that the magistrates had obtained the report which was so much complained of by the counsel for the appellant was the ground upon which we are asked to say that the justices had made themselves parties to the opposition in each case, and were attempting to adjudicate on their own behalf. The form of the report, it was said, showed that the justices must have arrived at the conclusion that the appellant's premises were not required, and that the subsequent inquiry was only designed to support a foregone decision. But I am wholly unable to adopt this reasoning. The report seems to me to contain no more than the information necessary to enable the magistrates to enter upon the consideration of the question whether there were too many licensed houses in the district. The document was neutral in its character, and contained no indication of an opinion as to the claim for renewal by the appellant or any other occupier of licensed premises. The justices seem to have acted with perfect fairness, and to have been guided to the conclusions at which they arrived, not by anything contained in the report, but by the sworn evidence laid before them. The objection that the justices had what was described as an interest in the result of each inquiry took another shape in the suggestion that they were shown to have been influenced by bias. There is no ground for any such conclusion. The magistrates proceeded from first to last with commendable care, and seem to me to have no other motive than the desire of honourable men to discharge their duties faithfully. With reference to Mr. Bentall, I agree that his temporary presence on the bench did not invalidate the proceedings. He was not shown to have committed himself to any opinion on the subject of inquiry, or to have taken sides, as was suggested, against the appellants. It is not necessary to deal with the technical objections to the application for a *mandamus* which were raised by the learned counsel for the respondents.

COZENS-HARDY, L.J., read the following judgment: In this case I should be content to say that, for the reasons assigned by the Master of the Rolls, I agree that the appeal must be dismissed. But having regard to the great importance of the questions which have been raised as to the precise powers and duties of justices with respect to renewals of licences, it is right that I should state shortly, in my own words, the conclusions at which I have arrived. I do not propose to restate the facts. It cannot be disputed that, under the Act of 1828, the justices had an absolute discretion to grant or refuse applications for new licences and applications for the renewal of old licences. Their functions in this matter were administrative rather than judicial, and they were entitled to rely upon their general knowledge of the needs of the locality as well as upon any evidence which might be adduced. The Act of 1828 is still the governing statute, except so far as it has been modified by the Acts of 1872 and 1874. With respect to new licences, there are very material modifications to which it is not necessary to refer in detail. With respect to renewals, the material section — viz., section 42 of the Act of 1872, as amended by section 26 of the Act of 1874—need alone be considered. Now, in two cases the effect of this section has been discussed in the House of Lords. In *Sharp* v. *Wakefield* it was held that the old discretion of the justices under the Act of 1828 was not affected, and that section 42 only dealt with procedure. The attempt to establish a vested right to the renewal of a licence, except on some ground personal to the applicant, failed. In *Boulter* v. *Kent Justices* it was held that justices in granting or refusing to grant an application for renewal are not a court, and that the objector contemplated by section 42 is not a litigant, and that in short there is no *lis*. Now in the face of those decisions it has been strenuously argued before us that the effect of this section is to prevent the justices from exercising their discretion and discharging the duties imposed upon them in the public interest unless some outsider appears and objects to a renewal, or, in other words, that they are powerless themselves to require the attendance of the licence-holder with a view of considering whether his licence should be renewed. I cannot adopt this view. It seems to me that there is no reason why the justices should not on their own initiative direct the licence-holder to attend on a subsequent day, inform him of the grounds of objection, and then deal with the matter in due course at the adjourned meeting. The view has been repeatedly expressed and acted upon since 1874 that the justices may themselves start an objection. This conclusion seems to me necessary to enable the magistrates to perform their duty. The House of Lords held in *Boulter's case* that there is no *lis* between an objector and a licence-holder, and no right to recover the costs occasioned by an unsuccessful objection. In short, I regard the objection as merely a mode of informing the licence-holder that his case will be considered and that he

must be prepared to deal with certain specified points. It is not necessary to consider whether the justices can act solely upon their own local knowledge—for example, as to the number of public-houses compared with the population, or whether they must in all cases act upon sworn evidence. In the present case the evidence was all taken upon oath. If I am right in the view that magistrates may themselves take, or direct their officer or agent to take, objection, all difficulty seems to be removed. It cannot be wrong to obtain careful and accurate information before taking, and with a view to taking, such objection. No question of bias as against a particular licence-holder arises. In making the preliminary investigation and considering whether the number of licensed houses was in excess of the needs of the district the justices were simply preparing to discharge the important duties, mainly administrative, imposed upon them by the Act of 1828. In directing all the licence-holders to be served, and in taking sworn evidence upon each separate application, they seem to me to have acted with praiseworthy care. They were not adjudicating upon any rights. They were not prosecutors. In truth, there was no prosecution. They were only determining whether in the public interest a lucrative privilege should or should not be conferred. There is no ground for suggesting that they exercised their discretion capriciously or without regard to the circumstances of each individual case or without considering the requirements of the locality. The separate objection taken to Mr. Bentall may be disposed of very shortly. He was present at a meeting of the Surrey Congregational Union at which a mild and harmless resolution was passed expressing satisfaction at the efforts of the Farnham magistrates to reduce the number of licensed houses. He took no part in the proceedings, and I think it idle to suggest that this in any way precluded him from acting as a licensing justice. I may add that in fact he retired directly it was brought to his mind that any objection could be taken to his presence. For these reasons I agree with the Divisional Court that the rule for a *mandamus* must be discharged.

*Appeal dismissed.*

Solicitor for the appellants, *W. Montgomery White*, for *Edgar Kempson*, Farnham.

Solicitors for the justices, *Prior, Church, & Adams*, for *Hollest, Mason, & Nash*, Farnham.

Solicitors for Gould, *Miller, Smith, & Bell.*

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## High Court of Justice.

Chan. Div. }
Farwell, J. } July 3, 12, 1902.

*In re* DELANY.

CONOLEY *v.* QUICK AND OTHERS. (*a.*)

*Will — Charity — Gift to voluntary association for charitable object—Failure of gift.*

*A testator directed his trustees to sell leasehold and freehold property and to divide the proceeds in legacies to certain individuals named "or their successors" or "his successor."*

*Held, that the gifts were not given to the individuals for their own benefit, but for charitable objects, and therefore failed.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

This was an originating summons to determine certain questions arising under the will of a testator who died on the 6th of July, 1888.

The facts are set forth in the judgment of Farwell, J.

*P. B. Abraham*, for the plaintiff.

*F. A. Milne, A. L. Ingpen, C. E. Shebbeare, A. H. Withers*, and *Bischoff*, for the defendants.

FARWELL, J., in giving judgment, said: The testator made his will dated the 1st of January, 1884, and thereby, after certain legacies to his wife, gave the rents of his freehold and leasehold estates to her during her life, and after her death he directed his trustees to sell the property, "and the proceeds to be divided in legacies as follows: To Mary Owen, Honora McAuliffe, Annie Clarke, Nazareth-house, Hammersmith, or their successors, the sum of £400. To Eliza McHenry, Margaret Libaud, of the Convent of the Assumpton, Wellington-road, Bromley-by-Bow, or their successors, the sum of £300. To the Rev. Frederick Bampfield, superior of the Institute for Boys and Girls, Barnet, Herts, or his successor, the sum of £100. To the Rev. Lord Archibald Douglas, superior of the St. Vincent's Home for Boys, Harrow-road, London, W., or his successor, the sum of £100. To the Rev. Francis Verhagen, of the Franciscan Friary, Stratford, Essex, or his successor, the sum of £300. To Lizzie Mulhearn, Burleigh-road, Upton, in her own right, the sum of £100. To Kate Dore, of 2, Bexley-villas, Carnarvon-road, Stratford, Essex, in her own right, £100. To Robert Dore, 2, Bexley-villas, Carnarvon-road, Stratford, Essex, the sum of £100. To the Rev. Cornelius Keens, Corpus Christi Church, Midon-lane, or his successor, the sum of £19 19s." The testator made a codicil, dated the 7th of September, 1885, to his will, and thereby gave the plaintiff a legacy.

He died on the 6th of July, 1888, without issue, leaving his wife surviving him. She died in January, 1901, and the defendant Ada Boffee is her legal personal representative. The next of-kin and heir-at-law of the testator are not known, but the defendant Ada Boffee, whose interest is the same as theirs, sufficiently represents their interests for the purposes of this argument. The testator's property consisted of six leasehold and one freehold house. If, therefore, the objects of any of the gifts in his will are charitable, such gifts will fail.

The questions to be decided are (1) Are the gifts to the several individuals named, "or their successors," or "his successor," legacies given to the individuals for their own benefit, or are they given to the holders of offices for the benefit of the associations in which they hold office? and, if the latter, (2) Are the objects of such associations charitable? It is necessary to consider each gift separately. The first is "to Mary Owen, Honora McAuliffe, Annie Clarke, Nazareth-house, Hammersmith, or their successors." Mary Owen, Honora McAuliffe, and Annie Clarke were at the date of the will and of the death of the testator members and holders of official positions in a religious community known as "the Poor Sisters of Nazareth," but since 1891 Miss McAuliffe has held no office. This community is a society of Roman Catholic ladies voluntarily living together in a state of celibacy for the purpose of sanctifying their own souls by prayer and pious contemplation, and also with the object of affording permanent homes for aged and infirm poor persons of both sexes without distinction of creed or nationality and homes for incurable and orphan children. The community own several houses which are vested in trustees, but the three ladies named do not by themselves hold any of such

houses as such trustees, but only in conjunction with others. Members of the community are bound in common to hand over any money coming to them for the use and benefit of the community. Money given to the community generally is applied partly in keeping up the houses of the community and partly for their charitable purposes The testator was acquainted with Mary Owen and Honora McAuliffe, but not with Annie Clarke. Her name was supplied to him by some member of the community when he expressed a desire to benefit the community and asked in what names the legacy should be given. In my opinion, the legacy is given to the three ladies as holders of offices and for the benefit of the association in which they held office. The primary meaning of "successors" is persons in succession. The persons named were known to the testator to be holders of offices in the association, and the only succession to which he can refer is the succession to those offices. The persons named are not intended to take any personal benefit, but are designated only as the then holders of office, and the gift to them depended on their continuance in such office. The decision of Kindersley, V.C., in *Thornber* v. *Wilson*, 3 W. R. 388, 3 Drew. 245, is an authority in favour of this view, and his subsequent decision on another gift in the same will in 7 W. R. 24, 4 Drew. 350, is even stronger. In the latter case there was a devise (subject to a term of seven years) of real estate on trust to sell and pay the net residue of the proceeds of sale "to the minister of the Roman Catholic chapel at Kendal." [His lordship read p. 351 from the judgment of the Vice-Chancellor, and continued:] In the case before me the widow has a preceding life interest, and the Vice-Chancellor's concluding observations therefore apply to this case also. So, too, in *Smart* v. *Prujean*, 6 Ves. 560, at p. 567, Lord Eldon expressed his opinion that a legacy of £100 for such purposes as the superior of the convent or her successor should judge most expedient, being given in that character was sufficient to show it was for a superstitious use. The mere description of the legatee as the holder of an office is not, of course, sufficient to raise any real inference. Thus in *Doe* v. *Aldridge*, 4 T. R. 264, a devise to the Rev. A. A., "late of Amesbury, but now preacher at the meeting-house in Lyndhurst," for life was held a gift to him for his own benefit, and in *Donnellan* v. *O'Neill*, 18 W. R. 1188, Ir. Rep. 5 Eq. 523, where the devise was to Cardinal Cullen, and in case of his death to the Roman Catholic Archbishop for the time being of Dublin, and to his heirs, &c., "absolutely for his and their own use and benefit," the Vice-Chancellor treated the devise as a clear gift for the personal benefit of the devisees. I am further of opinion that the objects of the association are charitable, and that the gifts, therefore, fail. The case is indistinguishable from that of the Sisters of Charity of St. Paul at Selley Oak in *Cocks* v. *Manners*, 19 W. R. 1055, L. R. 12 Eq. 574. The case of the aged and infirm poor and of incurable and orphan children is the outward and visible object of the association of the Poor Sisters of Nazareth, and this admirable object is not rendered less charitable within the meaning of the Act of Elizabeth because the sisters also desire to sanctify their own souls by prayer and contemplation, whether such sanctification is regarded as concurrent with or assisted by their charitable work. The court can only look to the actual purpose aimed at by the association, and cannot inquire into the motives of the members of the association. The care of the aged poor and the like is a charity within the Act, whether the persons who devote their lives to it are actuated by the love of God, a desire for their own salvation, or by mere pique or disgust with the world. The legacy and share of residue, therefore, given for the Poor Sisters of Nazareth fail.

The next gift is to Eliza McHenry and Margaret Libaud, of the Convent of the Assumption, or their successors. These two ladies both held office in the community of the Little Sisters of the Assumption at the date of the will and of the death, but have held no office therein since 1891. This community is a society of Roman Catholic ladies voluntarily living together in a state of celibacy for the purpose of sanctifying their own souls by prayer and contemplation, and for the purpose of gratuitously nursing the sick of the poorest classes in their own homes. It is supported by voluntary contributions, which are expended in lodging, boarding, and maintaining the members thereof, I am unable to distinguish this gift also from that to the Sisters of St. Paul at Selley Oak in *Cocks* v. *Manners*. Indeed, I may read Vice-Chancellor Wickens's judgment with some immaterial omissions as applicable to the present case: "The community is in point of law a voluntary association for the purpose of nursing the sick, and I cannot distinguish it in this respect from any of the numerous voluntary associations established in London, such as the Scripture Readers, Home Missionaries, or Anglican Sisters of Mercy, in which zealous persons unite for the purpose of performing charitable functions, taking out of the funds of the association so much as is necessary for their own wants, and extending their operations as their means permit." And he distinguishes the gift in that case to the Selley Oak community from another gift in the same will to a Dominican convent, on the ground that the sole purpose of the latter was to sanctify their own souls by prayer and contemplation without engaging in any corporeal works of mercy. The Vice-Chancellor pointed out that religious services can only be charitable so far as they tend towards the edification or instruction of the public, and he held that the gift referred to above was not charitable. There is, in truth, no "charity" in attempting to improve one's own mind or save one's own soul. Charity is necessarily altruistic and involves the idea of aid or benefit to others; but, given the latter, the motion impelling it is immaterial.

The next gift is to the Rev. Mr. Frederick Bampfield, superior of the Institute for Boys and Girls, Barnet, and his successor He was such superior at the date of the will and of the death of the testator, but died in January, 1900. The defendant Francis Spink is the present superior. This gift also is, in my opinion, to the holder of the office, not to the individual. The institute is a congregation of Roman Catholic secular priests, students, and lay brothers living together under rule for their own spiritual benefit, and for carrying on various works for the benefit of their neighbours, one of which, and that obviously referred to by the testator, is an educational charity for poor boys and girls. This legacy and gift of residue, therefore, fail.

The next legatee, the Rev. Lord Archibald Douglas, is not a party, and the next is the Rev. Francis Verhagen, who was at the date of the will superior of the Franciscan Friary at Stratford, but ceased to be so in the testator's lifetime. He can, in my opinion, take nothing beneficially, and I have not the present superior before the court.

There must be the usual inquiry for the heir-at-law and next-of-kin of the testator, and the costs of all parties down to to-day will come out of the estate.

Solicitors, *Hussey & Ingpen*.

Chan. Div.
Buckley, J. } July 11, 1902.

DOUGHTY v. LOMAGUNDA REEFS (LIMITED). (a.)

*Company—Sale of assets to another company—Shares in purchasing company—Voluntary winding up—Dissentient member—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

*An agreement by a limited company which is subsequently voluntarily wound up, for the sale of its assets to another company in part consideration of shares in the purchasing company, is not necessarily a sale in the winding up so as to come within section* 161 *of the Companies Act,* 1862, *because its provisions contemplate a winding up and because a small part of its consideration can only be exactly ascertained on a winding up.*

*A limited company, one of whose objects as stated in its memorandum of association, was to sell its undertaking, agreed to sell the same and all its property, except* £200, *to another company in consideration of shares in the purchasing company and of an indemnity to itself and its liquidators against certain obligations. The* £200 *was to be kept to defray the costs of the agreement and of the winding up of the company, and the balance was to be handed over to the purchasing company. This agreement was approved at an extraordinary general meeting of the company, and at the same meeting was passed a resolution (subsequently confirmed) to wind up the company voluntarily. The plaintiff, who was a shareholder in the company, objected to the sale, and claimed that it was* ultrà vires *unless his interest was purchased under section* 161 *of the Companies Act* 1862.

*Held, that the sale was a sale by the company under its memorandum of association and not a sale in disguise by the liquidator, and that although the agreement for sale contemplated a winding up, and the balance of the* £200 *could only be exactly ascertained in a winding up, yet as the objects of the agreement could have been substantially accomplished by a change in its form irrespective of a winding up, it was valid, and the provisions of section* 161 *of the Companies Act,* 1862, *did not apply, the case falling within the principle of* Cotton v. Imperial and Foreign Agency and Investment Corporation, [1892] 3 *Ch.* 454, 41 W. R. Dig. 36.

Action.

The defendant company were incorporated in July, 1895, under the Companies Acts, 1882 to 1890, with a capital of £150,000 in £1 shares, for the purpose (amongst other things) of purchasing or otherwise acquiring mines and mining rights in Africa, and particularly to enter into certain agreements mentioned in the memorandum of association.

Among other objects for which the company was established, as stated in the memorandum of association, was the following: "To sell or dispose of the undertaking of the company or any part thereof, for such consideration as the company may think fit, and in particular for shares, debentures, debenture stock, or securities of any other company having objects altogether or in part similar to those of this company."

Among the articles of association were the following:

"164. If the company shall be wound up, the liquidators (whether voluntary or official) may, with the sanction of an extraordinary resolution, distribute in specie among the contributories any parts of the assets of the company, and in particular any shares, stock, or debentures of any other company which this company may be entitled to, and may with the like sanction vest any part of the assets of the company in trustees upon such trusts for the benefit of contributories as the liquidators shall think fit.

"165. If at any time the liquidators of the company should make sale or enter into any arrangement pursuant to section 161 of the Companies Act, 1862, a dissentient member within the meaning of that section shall not have the rights thereby given to him, but instead thereof he may by notice in writing addressed to the liquidators, and left at the office not later than fourteen days after the date of the meeting at which the special resolution authorizing such sale or arrangement was confirmed, require them to sell the shares, stock, or other property, option, or privilege, to which under the arrangement he would otherwise have become entitled, and to pay the net proceeds over to him.

"166. Any such sale or arrangement, or the special resolution confirming the same, may provide for the distribution or appropriation of the shares, cash, or other benefits to be received in compensation otherwise than in accordance with the legal rights of the contributories of the company, and in particular any class may be given preferential or special rights, or may be excluded altogether or in part, but in case any such provision shall be made the last preceding article shall not apply, and any dissentient member shall have the rights conferred upon him by section 161 of the Companies Act, 1862."

By an agreement dated the 12th of November, 1901, and made between the defendant company and the Lomagunda Development Co. (Limited) (therein called "the purchaser company"), it was agreed (1) that the defendant company should sell to the purchaser company the whole of the mining claims, lands, mines, goods, and chattels (excepting the £200 thereinafter mentioned), securities, credits, debts, bills, and things in action of the defendant company, and the whole of its undertaking and business, and all its real and personal property whatsoever; and (2) as part of the consideration that the purchaser company should pay, satisfy, and discharge the debts liabilities, and obligations mentioned in the schedule thereto, and should keep the company and its liquidators and contributories indemnified in respect thereof; (3) that the defendant company should retain out of the property and assets thereby agreed to be sold, the sum of £200 to defray the costs and expenses of and incident to the said agreement and the winding up of the company, and should hand over to the purchaser company, on the dissolution of the defendant company, any balance remaining of the said sum after payment of such costs and expenses; (4) that as the residue of the consideration, the purchaser company should allot to the defendant company or its nominees 17,092 fully-paid shares of £1 each of the purchaser company (which was stated by the plaintiff to be at the rate of one of such shares for every six of the issued shares of the company). By clause 7 the purchase was to be completed on or before the 31st of March, 1902; and by clause 9 the agreement was conditional upon the same being sanctioned on or before the 31st of January, 1902, by an extraordinary resolution of the company.

On the 30th of December, 1901, at an extraordinary general meeting duly convened for the purpose the agreement of the 12th of November, 1901, was approved and adopted, and the directors were authorized to carry it into effect, with such (if any) modifications as they should think fit to assent to. And on the same day a resolution was passed that the company should be wound up voluntarily, that a named person should be appointed liquidator, and that the liquidator should be authorized to distribute any of the assets of the company amongst its members in specie.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

On the 15th of January, 1902, this latter resolution was confirmed at an extraordinary general meeting. The plaintiff was the registered holder of 400 shares in the defendant company, and he objected to the sale agreed upon, contending that he was not getting sufficient value for his shares, and he brought this action against the company claiming a declaration that the agreement of the 12th of November, 1901, was *ultra vires* and void, an injunction to restrain the defendant company and its liquidator from carrying it into effect, or alternatively, a declaration that the defendant company and its liquidator were not entitled to carry the agreement into effect without purchasing the interests of the plaintiff and of other dissentient shareholders, and a corresponding injunction.

The action came on for hearing as a non-witness action.

*G. F. Hart*, for the plaintiff.—The sale of the undertaking of the company agreed upon in November, 1901, was a sale in the winding up. The agreement itself contemplates a winding up, providing for its liquidator being indemnified, and the balance of the £200 was to be handed over upon the dissolution of the company, and could be only ascertained in the winding up. The resolution to wind up the company was passed at the same meeting as the resolution approving of the agreement for the sale. The case is thus different from *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, 41 W. R. Dig. 36, where the agreement for sale was approved before any resolution to wind up was passed. Here the agreement for sale is part of the scheme for winding up. Consequently the case falls within section 161 of the Companies Act, 1862, and the liquidator can only carry out the sale after purchasing the interest of the plaintiff. The articles of association purporting to exclude the operation of that section are *ultra vires* and invalid: *Payne* v. *The Cork Co.* (*Limited*), 48 W. R. 325, [1900] 1 Ch. 308.

*Astbury, K.C.*, and *J. W. M. Holmes*, for the defendant company.

BUCKLEY, J.—Those sections of the Companies Acts, 1862, which dictate the provisions of the memorandum of association provide, amongst other things that the memorandum shall state "the objects for which the proposed company is to be established." If the matter were untouched by authority, I think that there would be room for a great deal of argument to show that the objects referred to are those which the company is to carry out for the purpose of earning a profit—what I may call the "living" objects of the company, acts which it has to do as a living corporation, with a view to a profit—and do not include clauses addressed to the disposal of the assets of the company at a time when it was no longer going to carry on its undertaking. But if I rightly read the judgment of Chitty, J., in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*, that is not an accurate statement of what the objects are to be. I think that he meant to decide, and did decide, that under a clause which provides for the sale of the undertaking of the company you may, in pursuance of that object contained in the memorandum of association—with a view to having no subsequent undertaking at all—agree that a sale shall be made at a date when the corporation as a living thing is to come to an end. The learned judge was dealing with a case in which there was an agreement for the sale of the undertaking, and it was contemporaneously proposed that the company should go into liquidation, and he treats it as a case in which the liquidation was contemplated as part of the scheme for the sale. It is quite true that the special resolutions for winding up were negatived at the particular meeting when the agreement was approved, and were passed afterwards, but I do not think he drew any distinction from that fact. He dealt with the case on the footing that the power of sale contained in the memorandum of association was a good power, exercisable under circumstances in which it was intended that the sale should be the end of the corporate life so far as earning profit was concerned. *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*, decided in 1892, has often since been commented on, and I consider it wholly binding upon me. On the other hand, in *Payne* v. *The Cork Co.* (*Limited*) it was decided by Stirling, J., that when you are proceeding, not under the memorandum of association, but upon the articles of association, any articles which go to provide that liquidators—as distinguished from the corporation acting under one of its objects as stated in the memorandum of association—shall sell on terms other than those provided by section 161 are not valid—that is to say, that you cannot take power by the articles to exclude section 161. What I have to decide here really amounts, it appears to me, to this—whether this is a sale properly made by the corporation under a clause contained in the memorandum of association, or whether it is in disguise a sale by a liquidator upon terms not justified having regard to section 161 of the Companies Act, 1862. [His lordship then referred to the provisions of the memorandum and articles of association, and of the agreement for sale, and to the resolutions of the 30th of December, 1901, and their confirmation on the 15th of January, 1902, and continued:] In that state of things the question is, Was this a sale under the memorandum of association or was it in disguise a sale by the liquidator? It seems to me that it must be the former. When the liquidator came into existence in January, 1902, it did not remain within his determination to say how the assets should be sold, or for what, or when. The company had become bound by that agreement to sell; he did not sell at all. It was therefore a sale by the company. Then was it a sale which the company could properly make? It is on the face of it, as appears by what I have been reading, a sale which demanded of the company to go into liquidation. In *Cotton's case* Chitty, J., decided that that was not enough; but that you must see whether there was a sale under a power in the memorandum of association, and he said that such a power was a good power. Now it is true that there are stipulations contained in that agreement which, as far as I can see, could not be thoroughly worked out except in a winding up. The balance of the £200 could not be ascertained until it had been ascertained what the costs of the winding up were. The deficiency to be supplied in case £200 was insufficient could not have been predetermined, and clause 2 contemplates that the liquidator and contributories should be relieved from all liability against contracts and debts, and so on. But does that make it any the less a sale by the company? I do not think that it does. I cannot disguise from myself that in point of fact the same transaction without any of the objections which are capable of being urged to this could have been carried out by putting it in a different form. If instead of saying that the purchaser should indemnify the contributories against them they had ascertained what the debts were, and had said that the purchaser should pay that sum, and if instead of the stipulation as to the £200 they had stipulated that the purchaser should pay in cash a sum sufficient to cover the costs of the liquidation, then the thing would not

have been dependent on the liquidation in any way, and could have been carried out utterly irrespective of it. I do not think that there is any substantial difference between these two transactions. If on the decision in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* it would have been competent to make the latter bargain, it seems to me that it must be equally competent to make the former. After this company had executed this agreement, if it had not gone into liquidation, the agreement would still, I apprehend, have been capable of being enforced against them, because the vendors would not have been able to set up that the purchaser had not provided for anything which they were under an obligation to do. I have hesitated about this case principally because I have always felt a difficulty in grasping the exact principle of *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*, but I cannot help feeling that that case governs the one before me, and I must dismiss the action with costs.

Solicitors for the plaintiff, *Michael Abrahams, Sons, & Co.*

Solicitors for the defendants, *Ingle, Holmes, & Sons.*

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Chan. Div. Joyce, J. } May 29; July 23, 24, 1902.

*In re* MAUNDER.
MAUNDER *v.* MAUNDER. (*a*)

*Will—Construction—Gift over—Death "before becoming entitled"—Entitled "in right" or "in possession"—Vesting.*

*A testatrix gave real estate to her son R. for his life, and after his death specifically among her grandchildren, R.'s sons and daughters, but in the event of any of her grandchildren dying "before becoming entitled" then over.*

*Held, that the words "before becoming entitled" meant "entitled in possession" and not entitled "in right," and that the gift over might therefore take effect at any time prior to the death of the tenant for life.*

Commissioners of Charitable Donations *v.* Cotter, 1 *Dr. & War.* 498, *disapproved.*

Adjourned summons.

Mary Maunder, by her will dated in 1889, gave her residuary real and personal estate to trustees upon trust for her son R. for his life subject to the repayment out of income of certain mortgages on parts of her real estate, and after the death of R. the testatrix made specific devises of parts of her real estate among her eight grandchildren, the sons and daughters of R., naming them, and after a direction as to the rents and profits of the specifically devised properties during minorities, and a bequest of the ultimate residue if any of her trust estate to the wife of R. for her life, and afterwards among the said grandchildren, the will proceeded as follows: "And in the event of either of my grandchildren dying before becoming entitled to any share of my estate hereinbefore in any way disposed of, I direct that the child or children of such deceased grandchild shall take the parents' share, or if there shall be no such child or children then that such share or devise or bequest hereinbefore contained shall vest equally in all my surviving grandchildren."

The testatrix died in 1891, leaving her son R and seven of her said eight grandchildren her surviving; another grandchild who survived the testatrix and was also a son of R. had by a codicil made in 1890 been (in effect) substituted as a beneficiary in the place of the grandchild who had died, and there were thus eight surviving grandchildren claiming under the dispositions of the testatrix.

This was a summons taken out by R., the plaintiff and sole acting executor to determine the question (amongst others) whether the gift over in the event of a grandchild "dying before becoming entitled" referred to a death before becoming entitled in possession or before becoming entitled in interest.

*Gatey*, for the plaintiff.

*P. Wheeler, W. H. Cozens-Hardy, G. Cave,* and *H. C. Manby*, for the various defendants.

The following cases were relied upon—viz., for the contention that "entitled" meant "entitled in right": *The Commissioners of Charitable Donations and Bequests* v. *Cotter*. 1 Dr. & War. 498, and *In re Crosland, Craig* v. *Midgley*, 54 L. T. Rep. 238; and in support of the adverse view *Turner* v. *Gosset*, 34 Beav. 593; *Henderson* v. *Kennicott*, 2 De G. & Sm. 492; and *In re Noyce, Brown* v. *Rigg*, 34 W. R. 147, 31 Ch. D. 75.

JOYCE, J. (after stating the facts): In my opinion upon the construction of this will "entitled" means "entitled in possession." There is no gift to the grandchildren by the will until after the death of R, and if the testatrix had intended the substitutional gifts to take effect only upon the death of a grandchild in her own life she would in all likelihood have said so, and the words would have been, instead of "die before becoming entitled," "die in my lifetime." The words of the gift over again are more appropriate to a substitution during the life of the tenant for life, and I am of opinion that the gift over may become operative at any time during R.'s life. In coming to that conclusion I am only following the decision of Romilly, M.R., in *Turner* v. *Gosset*, in which case *The Commissioners, &c.*, v. *Cotter* was cited. The latter case was an Irish case, and though entitled to very great respect, is not a decision binding on this court; moreover, it was based upon the decision in *Doe* v. *Prigg*, 8 B. & C. 231, which could not now be considered good law; in fact it has been overruled in *In re Gregson's Trusts*, 13 W. R. 193, 2 De G. J. & S. 428, as was pointed out by Malins, V.C., in *Marriott* v. *Abell*, 17 W. R. 569, L. R. 7 Eq. 478.

Again, the case of *In re Crosland* turned on different circumstances; in that case there was an immediate gift, not a gift in remainder, although the time for payment was deferred. The view I adopt is further supported by the decision in *In re Noyce* and is in accordance with what would have been held in *Henderson* v. *Kennicott*, had not the judge in that case felt himself embarrassed by the case of *The Commissioners, &c.*, v. *Cotter*, the reason for which decision does not, in my opinion, any longer exist.

Solicitors, *Young & Sons; Marshal & Co.; Leslie, Antill, & Arnold; Oldfields, Bartram, & Co.*

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Chan. Div. Swinfen Eady, J. } June 20, 21, 23, 1902.

PERCIVAL *v.* WRIGHT. (*a*.)

*Company—Directors—Purchase of shares—Fiduciary position—Negotiation for sale of undertaking—Duty to disclose.*

*The fiduciary relations which exist between partners do not apply as between directors of an incorporated com-*

(*a*.) Reported by A. C. NESBITT, Esq., Barrister-at-Law.

(*a*.) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

*pany and other individual shareholders, even after negotiations for the sale of the company's undertaking have arisen. A person buying or selling shares in a company, of which he is a director, is under no obligation to disclose matters which have come within his knowledge as a director, whether such matters have arisen in the ordinary course of the company's business or relate to a contemplated sale of the company's undertaking.*

This was an action to set aside a sale of shares in a limited company to certain directors of that company, on the ground that the purchasing directors ought to have disclosed to the vendor shareholders certain facts affecting the price.

Prior to October, 1901, the plaintiffs held 253 £10 shares in a colliery company called Nixon's Navigation Co. (Limited).

The objects of the company included the disposal by sale of all or any part of the property of the company.

The shares of the company were transferable only with the approval of the board of directors. They were in a few hands, and were not quoted upon the Stock Exchange.

In the course of October, 1900, the plaintiffs, through their solicitor, inquired of the secretary of the company whether he knew of a purchaser for the shares, and in a further communication with him the plaintiffs' solicitor said that the plaintiffs would consider an offer of £12 5s. a share. This price was based upon a valuation obtained by the plaintiffs some months before from an independent firm of valuers.

The chairman of the company then wrote to the plaintiffs' solicitor offering to take the shares at the price named. But, a fresh valuation having been taken, the plaintiffs' solicitor replied that they would accept £12 10s. a share.

On the 22nd of October, 1901, the chairman wrote accepting this offer on behalf of himself and two other directors. The transfers were approved by the board, and the transaction was completed.

Some time afterwards the plaintiffs learnt that before and during these negotiations the board had been in communication with one Holden, who had in view the purchase of the entire undertaking of the company. Various prices were suggested by Holden, but the lowest of these represented a price per share considerably higher than £12 10s. No sale, however, resulted; no firm offer was ever made by Holden for the purchase of the undertaking; and the court was not satisfied that the board ever in fact intended to sell.

The plaintiffs brought this action against the chairman and the other purchasing directors, claiming to have the sale set aside, on the ground that the purchasers, being directors, ought to have disclosed the negotiations or communications with Holden which had taken place or were in progress. Beyond the communications made by Holden to the board or to the chairman, no evidence of undervalue was given, nor was there any suggestion of unfair dealing, other than such as might be involved in the non-disclosure of those communications.

*Eve, K.C.*, and *Vaughan Hawkins*, for the plaintiffs.—The fiduciary relation in which directors undoubtedly stand (*Great Eastern Railway* v. *Turner*, 21 W. R. 163, L. R. 8 Ch. App. 149; *In re Forest of Dean Coal Mining Co.*, 27 W. R. 594, 10 Ch. D. 450; *In re Lands Allotment Co.*. 42 W. R. 404, [1894] 1 Ch. 616; *Ferguson* v. *Wilson*, 15 W. R 80, L. R. 2 Ch. App. 77; *Wilson* v. *Lord Bury*, 29 W. R. 269, 5 Q. B. D. 518; *Ex parte Chippendale*, 4 De G, M. & G. 19, is a fiduciary relation towards all the shareholders and towards each individually. Directors selling the undertaking of a company, or taking steps in contemplation of such a sale, are trustees for sale. If, being in this position, they buy shares in the company, they are buying up the interest of their *cestui qui trust* in the trust property: *Watson* v. *Sprattley* 2 W. R. 627, 10 Ex. Ch. 221. This they cannot do, otherwise than through a broker on the Stock Exchange, without the fullest disclosure of facts with regard to the contemplated sale which affect the value of the property. They may not be under any similar obligation of disclosure in regard to facts arising in the ordinary course of their management, for the shareholders know what their powers of management are and know that things may happen any day in the ordinary course of the company's business which will not be disclosed, but which affect the value of their shares. But the situation is changed immediately when the directors go beyond ordinary management and take steps in contemplation of a sale of the entire undertaking. In a partnership a managing partner could not, after entering into negotiation for a sale of the business, go to his sleeping partner and, without a word as to their negotiations, say, "What will you take for your share?" If he did so it would be no defence to say that the sleeping partner was bound to know that the managing partner might be negotiating such a sale. The relation of partnership is one in which *uberrima fides* is required, *Maddeford* v. *Austwick*, 1 Sim. 89; Lindley on Partnerships, book 3, c. 2, and the fact of incorporation makes no difference to this.

*Macnaghten, K.C.*, and *Mark Romer*, for the defendants.—There is no case in which a director has been held to be a trustee for an individual shareholder. It would be most inconvenient if a director buying or selling shares were bound to disclose everything within his knowledge which he knew might, when he was buying, appreciate, or, when he was selling, depreciate the shares; and no different principle applies when the question of a sale of the undertaking arises.

*Vaughan Hawkins* replied.

SWINFEN EADY, J., after dealing with the evidence, said: On the facts the position is this: The board had been approached by a person who contemplated that if favourable terms could be arranged with the Nixon Co. he might be able to form a company to purchase their undertaking. Preliminary negotiations took place, but in my opinion no firm offer was ever made to the board, and the board eventually declined to proceed with the matter for reasons apart from any question of the price.

The ground of action for setting aside the sale of the shares is not undervalue. It is not suggested that the plaintiffs' valuers were not fully competent to value the shares, or that any higher price could in fact have been obtained for them from other purchasers. The real ground of action is that the purchasers, being directors of a company, were in a fiduciary position, and that, from the first moment when negotiations were on foot with a view to a sale of the property of the company, they were precluded from purchasing the shareholders' shares without explaining the situation. It is said that, however wide may be the powers of management which directors possess, their position is changed when they pass beyond ordinary management and enter into negotiations for the sale of the entire concern, and that they cannot deal with individual shareholders without disclosing to them matters within their knowledge outside the scope of ordinary management—that is, proposals for sale. The position of directors has often been considered and has been explained, though in different language, by many eminent equity judges. Lord Selborne in *Great Eastern*

*Railway Co* v. *Turner* says the directors are trustees or agents of the company, trustees of the company's money and property, agents in the transactions which they enter into on behalf of the company. Sir George Jessel in *In re Forest of Dean Coal Mining Co.* says they are no doubt trustees for the company of assets which have come into their hands. Lord Lindley in *In re Lands Allotment Co.* says, "although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control." From this point of view cases like *Parker* v. *McKenna*, 23 W. R. 271, L. R. 10 Ch. App. 96, have been decided, and it has been decided that trustees are bound to dispose of and to allot shares on the best obtainable terms and not to favour themselves or their friends in the allotment.

But the contention for the plaintiffs in the present case carries the fiduciary obligations of directors a great deal further. It is said that directors stand in a fiduciary position towards each individual shareholder, and that, in dealing with the question of purchase of shares by a director from a shareholder, the analogy of a trustee for sale must be applied after but not before negotiations for a sale of the undertaking have arisen. I asked whether there was any case establishing the fiduciary position of the directors towards individual shareholders, and in reply to me counsel did not dispute that directors could deal with shares as private persons till after a question of sale had arisen, but said that their position was then altered and the relation between them and other individual shareholders became that of partners *inter se*. There is no authority for that proposition, and I feel unable to adopt the view that it would be safe or proper to draw a line at the date when negotiations for a sale began, or that there is any foundation for the notion that a line should be drawn there. It is said that so long as business is going on in the ordinary way directors are under no obligation to disclose information acquired; that however rich a vein of ore may have been struck they need not disclose it to a vendor of shares to them, and whatever losses may have occurred in the ordinary course of management they need not disclose them to a purchaser of shares from them, because shareholders are to be held to have impliedly released them from the obligation to disclose incidents in the ordinary course of management; but that negotiations for a sale of the undertaking are on a different footing. Why? The true rule is, in my opinion, that the shareholders are fixed with knowledge of all the directors' powers alike, including their power of negotiating a sale of the undertaking, and that they have no reason to assume that this, any more than any other power, is not being exercised.

In my opinion the defendants were under no obligation to disclose to the plaintiffs the negotiations which ultimately proved abortive. The contrary view would place directors in the position of being unable to purchase shares unless they make a premature disclosure of negotiations, which their duty to the company may well require them to keep undisclosed.

The plaintiffs' case wholly fails, and must be dismissed with costs.

Solicitors for the plaintiffs, *Eyre, Dowling, & Co.*

Solicitors for the defendants, *Ince, Colt, & Ince.*

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## Privy Council.

(*From the Supreme Court of New South Wales.*)

May 14, 1902.

COMMISSIONERS OF TAXATION *v.* TRUSTEES OF ST. MARK'S GLEBE. (*a.*)

*New South Wales—Land and Income Tax Assessment Act*, 1895, *s.* 11, *sub-section* (v.)—*Charitable purpose—Exclusive use—Exemption.*

*Certain glebe lands were vested in trustees by Crown grant for the purposes of promoting religion and education in New South Wales. Under these powers the trustees granted building leases of part; the remainder were waste lands and not physically occupied or used for any purpose. The rents were applied, as authorized, for purposes of the trust connected with a church.*

*Held, that the lands were not "occupied or used exclusively for or in connection with public charitable purposes, churches, &c., within the meaning of section* 11, *sub-section* (v.). *of the Land and Income Tax Assessment Act*, 1895, *and were not therefore exempt from assessment.*

Appeal from the decision of the Supreme Court of New South Wales, upon a special case stated.

The facts are given in their lordships' judgment.

Section 11, sub-section (v.), of the Land and Income Tax Assessment Act of 1895: The lands and classes of lands hereinafter specified are exempted from assessment for taxation under this Act—viz., sub-section (v.) "Lands occupied or used exclusively for or in connection with public pounds, public hospitals, whether supported wholly or partly by grants from the Consolidated Revenue Fund or not, which are not a source of profit or gain to the users or owners thereof, benevolent institutions, public charitable purposes, churches, chapels for public worship, universities, affiliated colleges, the Sydney Grammar School, mechanics' institutes and schools of art, and lands on which are erected public markets, town halls or municipal council chambers, or any lands the property of or vested in any council or municipality, public hospital, university, or affiliated college."

The questions stated in the special case were: (1) Was the court right in holding that only such lands as were directly or physically occupied or used for or in connection with a public charitable purpose, were exempt from assessment under said sub-section? Or (2) Were the demise of such lands and the receipt and application of the rents thereof by the present respondents, an occupation or exclusive user of said lands for a charitable purpose within the meaning of said sub-section? (3) Was the possession of the said waste lands an occupation or exclusive user of said waste lands for or in connection with public charitable purposes within the meaning of said sub-section?

*Asquith, K.C.*, and *Vaughan Hawkins*, for the appellants.

*Cohen, K.C.*, and *T. T. Paine*, for the respondents.

Their lordships' (Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY, and Sir FORD NORTH) judgment was delivered by

Lord DAVEY.—This is an appeal from the decision of the Supreme Court of New South Wales, upon a special case stated by the Court of Review, under section 45 of the Land and Income Tax Assessment Act of 1895. The question in substance raised by the special case was whether certain glebe lands by Crown

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

grant vested in the respondents for parochial church purposes in connection with the Church of England were in the circumstances stated in the special case exempted from assessment for land tax. The Supreme Court decided that the glebe lands were exempted, and the commissioners have appealed. The decision of the question depends on the construction of section 11, sub-section (v.), of the Land and Income Tax Assessment Act, 1895, which is as follows: [His lordship read the section set out above.] Are the lands in question "occupied or used exclusively for or in connection" with public charitable purposes or a church? The lands (in area about forty acres) were vested in trustees appointed under an Act of 8 Will. 4, No. 5, by Crown grant of the 3rd of June, 1857. The object of the grant was therein stated to be to promote religion and education in New South Wales, and the trusts were declared to be "for the appropriation thereof as the glebe annexed to the Church of England" at Greenoaks, Darling Point, and known as St. Mark's, in conformity with the provisions of the said Act and of another Act of 7 Will. 4, No. 3, so far as applicable. By section 21 of the Act 8 Will. 4, No. 5, trustees were empowered with certain consents to demise glebe lands for terms of years and apply the rents and profits (1) in paying an annual sum of £150 a year to the officiating minister of the church as an allowance for the glebe; (2) in building or enlarging the church to which the glebe is annexed, or a residence for the clergyman; (3) in or towards building or enlarging a church in another place in the same township or district, and paying a stipend to the officiating minister; (4) with the consent of the bishop in or towards the building of other churches and residences for clergymen and endowing the officiating minister thereof. Pursuant to this power the glebe lands of St. Mark's have been sub-divided into blocks for sale or to let on building leases. Some of the blocks have been demised by the respondents on building leases and the lessees have erected private dwellings thereon. Others of the blocks have been demised on building leases but have not yet been built on, and the balance of the lands are waste lands, and are not (to use the language of the special case) "physically occupied or used for any purpose." On these facts the Supreme Court has held that the lands are "used in connection with" the charitable purposes of the Crown grant. It cannot be denied that the words in themselves and without a context are capable of that construction. But on reading the whole of the section 11, sub-section (v.), of the taxing Act their lordships think that the words point rather to the use and occupation of the land itself, and do not *primâ facie* apply to the use or purpose to which the rents and profits derived from the land may be applied. A private dwelling-house is used and occupied by the owner or lessee of it as a residence for himself and his family, and it would in the opinion of their lordships be a forced construction to say that it was used by the lessors for their own purposes, because they apply the rent which they receive in a particular way. If it be said that the land is used by the trustees though not by the lessees for the charitable purpose the answer would seem to be that the land is, strictly speaking, not used by the trustees at all. They have parted with the use and occupation of it during the term of the lease. It is the money derived from the rents and profits which they use, and not the land. Looking at the context, it is to be observed that lands used "for or in connection with" public hospitals, universities, and affiliated colleges are in the first instance exempted, and later in the section as a separate exemption "lands the property of or vested in" any public hospital, university, or affiliated college are also exempted. According to any admissible use of language the latter exemption must be intended to cover something not included in and different from that comprised in the first exemption. But there is no similar exemption of land the property of or vested in churches or charitable trustees generally. The words "for or in connection with" (say) a hospital or a church are probably intended to include not only the actual site of the hospital or church, but also other buildings or land occupied in connection with the principal building, as, for example, land used for a residence for the head or minister, or a room for church meetings or other similar purposes. In short, their lordships, while admitting that the words are not free from ambiguity, think that they should be construed strictly. If it had been intended to include all lands which are vested in or held as an endowment only of churches, grammar schools, and the like, they cannot think that the Legislature would not have found apt words to express its meaning. As to the lands which are not let the special case finds that they are not occupied or used for any purpose. They are not therefore, on the construction which their lordships have given to the words of the section, within the exemption. Their lordships will therefore humbly advise his Majesty that the order of the Supreme Court should be reversed, and question 1 in the special case should be answered in the affirmative and questions 2 and 3 in the negative, and that the present respondents should pay the costs of this appeal, regard being had to the terms on which special leave to appeal was given.

Solicitors for appellants, *Light & Galbraith.*

Solicitors for respondents, *Paines, Blyth, & Huxtable.*

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## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Mathew, L.JJ.) — Aug. 4, 5, 1902.

DYER AND OTHERS *v.* SCHOOL BOARD FOR LONDON. (*a.*)

*School board—Establishment of pupil teachers' centres—Buildings separate from elementary schools—Higher education—Power to expend rates on such centres—Elementary Education Act,* 1870 (33 & 34 *Vict. c.* 75).

*A school board, though it may give instruction to pupil teachers in non-elementary subjects so long as such instruction is given in public elementary schools, has no power to establish at the expense of the rates pupil teachers' centres in separate buildings. The establishment of such centres amounts to the establishment of non-elementary schools, and falls within the decision in* Rex *v.* Cockerton, 49 *W. R.* 433, [1901] 1 *K. B.* 726.

This was an appeal from a decision of Farwell, J.

The facts were as follows: In 1900 the School Board obtained a provisional order, confirmed by the Act 63 & 64 Vict. c. cxcvii., empowering them to acquire certain premises in Islington, with a provision that the site, if purchased by the board, should not for a period of fifty years be used otherwise than for the purpose of a pupil teachers' centre.

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

The board having accordingly purchased the site and commenced the erection of a building for use as a pupil teachers' centre, the auditor, Mr. T. B. Cockerton, at his audit of the accounts for the half-year to Michaelmas, 1901, disallowed a sum expended for this purpose. The grounds of the disallowance, as stated in his certificate, were briefly that expenditure on a pupil teachers' centre was *ultra vires* of the board, inasmuch as such a centre was not a public elementary school, and the education proposed to be given in it would be given to persons not forming part of the educational staff of such a school, and included subjects not allowed, provided for, or recognized by the Education Code.

Certain ratepayers thereupon commenced this action, and moved for an injunction to restrain the school board, their officers, contractors, and servants, till judgment in the action or further order, from spending any moneys which were the produce of the rates in or towards the erection or building of the pupil teachers' centre in question.

The school board having meanwhile determined to appeal to the King's Bench Division against the auditor's decision, Farwell, J., granted the injunction on the ground that the board ought not to expend money on the erection of the building until the auditor's certificate had been set aside.

The school board appealed, and it was agreed that on this appeal the question as to the legality of the erection of pupil teachers' centres, which had not been determined by Farwell, J., should be decided by the court, counsel for the board waiving all questions as to whether the action was maintainable without the Attorney-General being a party.

It appeared that the ages of the pupil teachers taught ranged from seventeen to twenty-four, and that they were not confined to those connected with London board schools; while the education given in them included subjects not comprised within the limits of elementary education.

The Board of Education Day School Code includes (article 31) pupil teachers among the teachers recognized by the board, and other articles provide that they must be not less than fifteen years of age when engaged, and that central classes shall be established for their instruction, and also provide for their examination.

The form of memorandum of agreement for their engagement, contained in Schedule 6 to this code, includes the following clause: "The school board shall cause the pupil teacher to receive, without charge, from a certificated teacher or other qualified teacher approved by the Board of Education, special instruction, including practical instruction in teaching during at least five hours per week, of which hours not more than three shall be part of the same day. Such special instruction and any instruction in secular subjects given to the pupil teacher during school hours shall be in the subjects in which the pupil teacher is to be examined during this engagement, pursuant to the code."

*Jenkins, K.C.*, and *Llewellyn Davies*, for the appellants.—A pupil teacher's centre may not be a public elementary school within the Education Act, 1870, and the education given in it may go beyond elementary education; but pupil teachers' centres are not within the decision in *Rex* v. *Cockerton*, 49 W. R. 433, [1901] 1 K. B. 726, which did not in any way relate to them. They were not before the court in that case. The school board have express powers under the Act to employ pupil teachers, and are bound by the form of agreement to give them special instruction which is not elementary in character; and must therefore have a right to establish these centres for the purpose of doing so efficiently. Moreover the board's special Act of 1900 expressly provides that this site shall not for fifty years be used for any purpose except for such a centre, and therefore legalizes its use for that purpose.

*Upjohn, K.C.*, *Danckwerts, K.C.*, and *Courthope Munroe*, for the respondent.—*Rex* v. *Cockerton* decides that a school board may not expend money raised by rates on any education which is not elementary. It has to be admitted that the education given in these pupil teachers' centres is not confined to elementary education; and that the centres are not public elementary schools; and they therefore come precisely within the decision in *Rex* v. *Cockerton*. [They were stopped by the court.]

*Jenkins, K.C.*, in reply.

VAUGHAN WILLIAMS, L.J.—Put shortly, Mr. Jenkins' argument is as follows: He accepts the decision in *Rex* v. *Cockerton*, and does not deny that the rates may only be applied to establish and carry on public elementary schools, and that the education given in those schools must be the education of children in elementary subjects. But he says that the employment of pupil teachers is recognized by the code, and pupil teachers are an adjunct of the staff of teachers in elementary schools; and that if you look at the code and ascertain the instruction which is intended by it to be given to pupil teachers you will find it is of a character hardly to be described as elementary. He says that it is clear that the pupil teacher has to receive instruction in subjects which are not elementary, and that this instruction is not dealt with by the *Cockerton case* and was not in the contemplation of the court when it decided it. If all this is true, he says it follows that the school board is entitled to establish a school of the character of a pupil teachers' centre to give this education, and to erect the necessary buildings, though such a school is not a public elementary school, and the education given there is not elementary. Speaking for myself, I am not disposed to quarrel with the proposition that in elementary schools education may be given to pupil teachers, under the agreement with them, which could not properly be described as merely elementary, and so far I do not join issue with the argument on that agreement. But there is nothing in it to lead me to suppose that the education to be given to pupil teachers ought not to be given in the public elementary school itself. Mr. Jenkins admits this has been done and extra payment made to the certified teachers who gave it; yet he asks us to say that, as a necessary consequence of the agreement, the board may establish a separate school in which to give this instruction, and charge the cost of building and carrying on this school on the rates. I cannot agree to this at all. So to hold would, I think, be entirely inconsistent with *Rex* v. *Cockerton*, which in substance decides that the only schools to be paid for out of the rates, whether in respect of buildings, education, or anything else, are elementary schools devoted to the elementary education of children. It appears to me that whatever instruction may be given in such schools in addition to elementary education is a mere accessory of the schools, and that it is not right to draw the inference that the board may establish special schools, not properly to be described as elementary schools, in which to give education that is not elementary. And the force of this view is increased by the consideration that at these pupil teachers' schools the average age of the scholars ranges between seventeen and twenty-four, and that scholars may come from any part to them to get an

education which is obviously higher, not elementary, education. It is impossible, consistently with *Rex* v. *Cockerton*, to hold that the Act of 1870 authorizes the charging on the rates of the expense of establishing and conducting such a non-elementary school. The appeal must be dismissed with costs.

ROMER, L.J.—I also am of opinion that the auditor's disallowances were right. It is established with regard to pupil teachers' centres that they are perfectly distinct from ordinary board schools, not only in regard to locality but in regard to their nature. They are not elementary schools at all, but in them higher education is given, though, of course, it covers elementary subjects; and it is given to persons who are not children. It is clear that it is not limited even to such education as will make the pupil teachers fit for their duties as such in board schools. It is clear on the admitted facts that the education given is of a higher kind, and that the centres are not limited even to pupils connected with London board schools.

The expenditure on these pupil teachers' centres of money raised by rates is therefore wholly unauthorized by the Elementary Education Acts. It is said that such expenditure is sanctioned by something in the code. If so, the code would have gone beyond its due authority, and it could not have extended the provisions of the Act.

But if the code is looked at it is clear that the code does no such thing as is alleged. It does not insist on the establishment of pupil teachers' centres or make any provision with regard to them. We must declare, therefore, that the board have no power to expend the rates on these centres. As to the special Act of 1900, this Act was not concerning itself with the expenditure of rates, the provision as to the use of the land for the purposes of a pupil teachers' centre was inserted for the benefit of the owner of the site. It cannot be supposed that such a provision was intended to extend the provisions of the Education Acts; for the Legislature was not dealing with any such question as we have before us. This contention also fails, and the appeal must be dismissed with costs.

MATHEW, L.J.—I am of the same opinion. The school board cannot establish these pupil teachers' centres without further statutory powers, and these are not given by the code or by the Act of 1900. The object of the Act of 1870 was clearly to provide elementary education in board schools. There is provision in the Act for teaching pupil teachers in non-elementary subjects; but the school board have no power to create independent colleges for the instruction of their pupil teachers. As to the agreement between the board and pupil teachers, it is possible to construe every word of it in a sense *intra vires* of the board, and the language used does not go beyond the instructing of pupils in elementary schools.

The court made an order declaring that the disallowance by the auditor was rightly made, and restraining the school board from making any payment out of the school fund for the building of any school other than a public elementary school.

*Appeal dismissed.*

Solicitors, *C. E. Mortimer; F. A. Baker.*

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From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — July 21, 1902.

MOLINEAUX v. LONDON, BIRMINGHAM, AND MANCHESTER INSURANCE CO. (LIMITED). (a.)

*Company—Director—Qualification shares—Acting as director—Implied agreement to take shares—Reasonable time to obtain qualification—"Ceases to hold his qualification"—Qualification of director raised by resolution of company—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *ss.* 23, 37—*Companies Act,* 1900 (63 & 64 *Vict. c.* 48), *s.* 3.

*By the articles of association of a company the qualification of a director was the holding in his own right of* £50 *in shares of the company. The plaintiff, who was a director, held this number of shares. Subsequently the directors resolved that a resolution should be put to the shareholders at the next general meeting that the qualification of a director should be the holding of* 250 £1 *shares in the company. At the general meeting resolutions were passed for increasing the capital of the company and altering the articles of association by raising the qualification of a director as above. This resolution was duly confirmed, and a prospectus was issued which the plaintiff signed and in which his name appeared as a director. The plaintiff was present at all the meetings. After the resolutions had been confirmed, and before the issue of the prospectus, the secretary and manager of the company, without the plaintiff's knowledge, entered the plaintiff's name on the register for* 200 *shares, making in all the requisite* 250 *shares. The plaintiff subsequently sent in his resignation as a director. Upon a counter-claim for calls in respect of the* 200 *shares,*

*Held,* (1) *that the plaintiff had not "ceased to hold his qualification" within the meaning of section* 3, *sub-section* 2, *of the Companies Act,* 1900, *when the qualification of a director was raised, and that therefore his office was not thus vacated; and* (2) *that, as the plaintiff had accepted the office of and had acted as a director after he knew of the increase in the qualification, he must be taken to have contracted with the company that he would obtain the requisite shares within a reasonable time, and that he ought to have obtained the shares before signing the prospectus; and that, therefore, his name had been properly placed on the register, and he was liable for the calls.*

Appeal by the plaintiff from the judgment of Phillimore, J., at the trial of the action without a jury.

No question arose on the claim. The counter-claim was to recover £50, the amount of a call on 200 £1 shares in the defendant company standing in the plaintiff's name.

Phillimore, J., gave judgment for the defendants on the counter-claim.

The facts and arguments appear from the judgment.

*Disturnal,* for the plaintiff.

*J. A. Hamilton K.C.,* and *F. W. Sherwood,* for the defendants.

*Cur. adv. vult.*

July 21.—COZENS-HARDY, L.J., read the judgment of the court as follows: The plaintiff was appointed a director of the defendant company in May, 1899. By article 70* of the articles of associa-

* There was no other article dealing with the qualification of a director.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tion of the company the qualification of a director was the holding in his own right of £50 in shares in the capital of the company. The plaintiff throughout held this number of shares. He had at one time 200 shares, but he sold 50 to a man named Brown, and he transferred 100 to his brother, apparently as trustee for himself. In February, 1901, at board meetings at which the plaintiff was present, it was resolved that a resolution be put to the shareholders at the next general meeting to alter the qualification of a director from 50 shares to 250 shares, and that the plaintiff should be elected a life member of the board, subject to confirmation at the annual meeting. In March the share prospectus was provisionally approved; this had reference to a contemplated increase of the capital of the company from £10,000 to £100,000. The increase of the capital and the enlargement of the directors' qualification were parts of one scheme. On the 4th of April, 1901, a general meeting was held at which resolutions were unanimously passed for increasing the capital by the creation of 90,000 new shares of £1 each, and for altering the articles so as to make the plaintiff a life director. Article 70 was cancelled, and a new article substituted making the qualification of a director 250 shares. On the 19th of April a board meeting was held, at which the date of issue of the share prospectus was fixed for the 23rd inst. On the same day a general meeting was held at which the resolutions passed on the 4th of April were duly confirmed, and they thereby became special resolutions. The plaintiff was present at all these meetings. On the 22nd of April the plaintiff signed the share prospectus, in which his name appeared as one of the directors. It was issued on the 23rd of April. On the 20th of April the secretary and manager of the company entered the plaintiff's name on the register in respect of 200 shares, making with his original 50 his qualification. This was entered as of the 4th of April, on which day the other directors had qualified, and on which day there was some conversation with the plaintiff on the subject of qualification. The plaintiff says he was not aware of this entry on the register until after his resignation.

On the 26th of April the plaintiff wrote to the secretary as follows: "If you can obtain a purchaser of my 200 shares at ten shillings, I shall be pleased to hand you £5 and resign my seat." The plaintiff's view is that this relates, not to the 200 new shares required to make up his qualification, but to the 200 old shares of which he still considered himself the real owner. He wrote a similar letter on the 3rd of of May. A board meeting was held on the 8th of May, at which the plaintiff was present, but not, as he says, as a director. A discussion took place. The plaintiff was under the impression that he had originally applied for 250 shares, and that he could get them back and thus acquire his qualification. The board did not accept this view. No conclusion was arrived at. On the 16th of May the plaintiff sent in his resignation of the office of director, which by article 82 would become operative on the 16th of June. The call in question was made on the 22nd of May. The plaintiff was not present at any board meeting after the 8th of May. No application has been made by the plaintiff for rectification of the register. Under these circumstances Phillimore, J., has held the plaintiff liable in respect of the call on the 200 shares.

It has been contended with great ability on behalf of the plaintiff that he is not liable (1) by reason of the provisions of section 3 of the Companies Act, 1900, and (2) because he never agreed to take those two hundred shares from the company or to become a member in respect of them. It will be convenient to deal with these points separately. First, section 3 of the Act of 1900 is as follows: "(1) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the regulations of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment or such shorter time as may be fixed by the regulations of the company. (2) The office of director of a company shall be vacated, if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the regulations of the company, obtain his qualification, or if, after the expiration of such period or shorter time, he ceases at any time to hold his qualification; and a person vacating office under this section shall be incapable of being reappointed director of the company until he has obtained his qualification. (3) If after the expiration of the said period or shorter time any unqualified person acts as director of a company, he shall be liable to pay to the company the sum of £5 for every day during which he so acts."

It is argued that the plaintiff ceased to hold his qualification on the 19th of April, when the qualification was raised from £50 to £250, and that thereupon he necessarily vacated office, and that no subsequent acts on his part purporting to be done as director can afford ground for raising the implication of a contract to take qualifying shares. But on careful consideration of the language of the section it seems to us that this argument cannot prevail. Sub-section 1 deals with the original appointment of a director, and states that it is his duty to obtain the "specified share qualification" within two months after his appointment at the latest. This could not apply to the plaintiff, who was appointed in May, 1899, for the Act did not come into operation until the 1st of January, 1901. Sub-section 2 states the consequences of a breach of the duty referred to in sub-section 1. It provides that the office of a director shall be vacated if he does not within the prescribed period obtain his qualification—*i.e.*, the specified share qualification—"or if after the expiration of such period or shorter time he ceases at any time to hold his qualification." Those last words plainly contemplate that the director once had, but no longer has, the specified share qualification. It is an abuse of language to say that the plaintiff "ceased" to hold 250 shares on the 19th of April. The section does not touch a case like the present, where after election the share qualification has been raised. The opposite view would lead to the strange result that a prosperous company increasing its capital and also the qualification of directors might find that the passing of the special resolution instantaneously vacated the office of every director and left the company without any executive. Neither the language nor the policy of the Act compels us to arrive at this conclusion. The case must therefore be decided apart from section 3 of the Act of 1900.

On principle and apart from authority it seems to us that a person who accepts an appointment as director, knowing that the holding of a certain number of shares is a necessary qualification, and acts as director, must be held to have contracted with the company that he will within a reasonable time obtain the requisite shares either by transfer from existing shareholders or directly from the company. If he has not obtained the shares within a reasonable time from the public the company are authorized to put him on the register in respect of the shares. What is a reasonable time must depend upon all the circumstances. As a general rule, and apart from any special provisions in the articles, the qualification ought in the case of an established company to be

obtained before acting. Where a director takes an active part in the scheme for increasing the qualification, the "reasonable time" may well begin to run before the date of the second confirmatory resolution, and may be held to have ended at the latest on the first occasion when he does an important act as director after that date. The articles, though not themselves a contract between the company and the director, must be regarded as showing the terms upon which, on the one hand, he agrees to act as director, and on the other hand, the company agree to pay him remuneration for his services. By section 37 of the Companies Act, 1862, the register is *primâ facie* evidence that a person on the register is a member in respect of shares registered in his name. His position is not the same as it would be if his name were not on the register and the liquidator were seeking to make him a contributory. Moreover, he is absolutely bound as a member under section 23, if it can be shown that he has "agreed," expressly or by implication, "to become a member in respect of the shares which are registered in his names." The conditions of section 23 are satisfied if the reasonable time has elapsed without his having obtained the shares *aliunde*. The authorities in the Court of Appeal are consistent with the above propositions; we refer especially to *Brown's case*, 22 W. R. 171, L. R. 9 Ch. App. 102; *Lord Inchiquin's case*, 39 W. R. 610, [1891] 3 Ch. 28; *Isaac's case*, 40 W. R. 518, [1892] 2 Ch. 158; *Cammell's case*, [1894] 1 Ch. 528, [1894] 2 Ch. 392.

Applying these principles, we think the plaintiff was bound to have acquired his qualification before signing the prospectus of the 22nd of April. This was a statutory duty imposed upon him as director by section 9, sub-section 2, of the Act of 1900. It was a solemn assertion that he was a duly qualified director. He was so if, but only if, the insertion of his name on the register on the 20th can be deemed authorized. True it was the Act of the manager and secretary. But it was ratified and adopted by the board on the 22nd of May by making a call on the plaintiff in respect of these particular shares: *In re Portuguese Consolidated Copper Mine (Limited)*, 45 Ch. D. 16, 39 W. R. Dig. 47. It is of no moment that the plaintiff was not aware at the time that his name had been placed on the register.

We ought perhaps to allude to an argument which was strongly pressed upon us as to the effect of the resignation on the 16th of May. If, as we hold, there was a binding contract prior to that date, the plaintiff could not, by his own sole act, release himself from its obligation. Nor is there any ground for holding that there was an implied condition in the contract that he might thus release himself.

It follows that we consider Phillimore, J.'s, judgment on the counterclaim was correct, and that this appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitor for the plaintiff, *James Mitchell*, for *R. A. Willcock & Taylor*, Wolverhampton.

Solicitor for the defendants, *Harvey Clifton*.

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From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — July 8, 1902.

IGOE (*Appellant*) *v.* SHANN AND OTHERS (*Respondents*). (*a.*)

*Licensing law—Renewal of licence—Value of licensed premises—Break in continuity of licence—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 45.

*Section* 45 *of the Licensing Act*, 1872, *which requires premises to be of a certain annual value as a qualification for being licensed for the sale of intoxicating liquor for consumption thereupon, does not apply to premises which were licensed at the time of the passing of the Act, and in respect of which the licence has been continuously renewed from that time But where there has been a break in the continuity of the licence by the renewal having been refused since the passing of the Licensing Act*, 1872, *the annual value required by section* 45 *applies.*

*Judgment of* Divisional Court (49 *W. R* 559, [1901] 2 *K. B.* 740), *reversed*, Cozens-Hardy, L.J., *dissenting*.

Appeal from a decision of the Divisional Court (Lord Alverstone, C.J., and Lawrance, J.) upon a case stated by the quarter sessions for the county of Lancaster: reported in 49 W. R. 559, [1901] 2 K. B. 740.

On the 21st of September, 1900, the respondents, who were the licensing justices for the city and county of Manchester, refused to renew to the appellant a licence to sell beer by retail to be consumed on or off the premises in a house known as the Council Inn, Manchester. On the 23rd of October, 1900, the appellant appealed to the court of quarter sessions, who dismissed the appeal subject to this case for the opinion of the High Court.

The appellant was the tenant and occupier of the Council Inn, and was licensed in respect thereof for the sale of beer by retail to be consumed on or off the premises. On the 9th of August, 1900, notice of objection to the renewal of the appellant's licence was served upon him, the grounds of the objection being (*inter alia*) that the premises were not of the necessary annual value. The justices refused the renewal upon the ground raised by the objection.

The Council Inn was originally licensed for the sale of beer by retail to be consumed on or off the premises in the year 1868, and the licence was continuously renewed down to the year 1886.

At the general annual licensing meeting for the city held in August, 1886, the renewal of the licence to Edwin Wade, the then licensee, was objected to, and the consideration of the objection was adjourned until the following September, when the renewal of the licence was refused. He continued to carry on business and sell beer by retail in the house until the 8th of October, 1886, when he yielded up possession thereof to Jane Jackson, who became the new tenant and occupier thereof, but did not then obtain any licence or transfer of a licence to continue the business. The licence for that current year expired in course of law on the 10th of October, 1886. Jane Jackson commenced to carry on business and to sell beer by retail thereon on the 8th of October, 1886, but not under a justices' licence, and she continued to do so. On the 12th of October, 1886, Jane Jackson applied to the justices in special session for the grant of a licence to her, which was granted, and the licence was thenceforward continuously renewed until the 21st of September, 1900.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The annual value of the premises on the 21st of September, 1900, exceeded £15, but was less than £30. The premises were situate within the city of Manchester, the population of which, according to the last census, exceeded 100,000.

It was contended on behalf of the appellant that, inasmuch as the house was, on the 10th of August, 1872, licensed for the sale of intoxicating liquors for consumption thereupon, the qualification in respect of annual value prescribed by section 45 of the Licensing Act, 1872—namely, £30—did not apply thereto, but that the qualification in respect of the annual value which did apply thereto was that prescribed by 3 & 4 Vict. c. 61, s. 1—namely, £15.

It was contended on behalf of the respondent justices that the licence held in respect of the house at the time of the passing of the Licensing Act, 1872, having lapsed in 1886, the house thereupon ceased to be qualified to receive any other or new licence except upon the conditions as to annual value required by the Licensing Act, 1872, s. 45, and that upon the true construction of that section the conditions therein prescribed as to the annual value applied to all licensed premises of which the licence had not been in existence continuously from the 10th of August, 1872, down to the application for the renewal thereof, or to which a licence other than that existing on the 10th of August, 1872, had been granted since that date.

The quarter sessions decided that the value qualification prescribed by section 45 of the Licensing Act, 1872 applied to the house, and dismissed the appeal upon the ground that the house was not of the necessary value as required by that Act. The Divisional Court held that, though there had been a break in the continuity of the licence, the justices could not refuse to renew on the ground only that the house was not of the annual value required by section 45.

The respondents appealed to the Court of Appeal.

Section 45 of the Licensing Act, 1872: "Premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent or value or rating as a qualification for receiving any such licence. Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied: (a) The premises . . . shall be of not less than the following value: If situate . . . within the limits of a town containing a population of not less than 100,000 inhabitants, £50 per annum; or if the licence do not authorize the sale of spirits, £30 per annum. . . ."

*C. A. Russell, K.C.*, and *Hildesheimer*, for the justices.

*Horace Avory, K.C.*, and *J. R. Randolph*, for the applicant.

*Cur. adv. vult.*

July 8.—COLLINS, M.R., read the following judgment: This is an appeal from a decision of the Divisional Court, consisting of the Lord Chief Justice and Lawrance, J., reversing the decision of the licensing justices and of the quarter sessions in refusing a licence to the applicant. The facts are very shortly stated in the report of the case in the Law Reports, [1901] 2 K. B. 740, and are as follows: [His lordship read the facts, which are substantially the same as those set out above, and continued:] The quarter sessions, affirming the licensing justices, had held that the continuity of the applicant's licence had been broken, and that therefore he was not entitled to claim a renewal of his licence unless the house in respect of which he claimed had complied with the conditions as to value laid down in section 45 of the Licensing Act, 1872—in this case £30. The case for the applicant was that under the second clause of that section he was exempted from the conditions of value therein imposed, and was bound only by those of 3 & 4 Vict. c. 61—viz., in this case, £15—and that the premises exceeded that value. The case depends on the meaning of the second clause of section 45 of the Licensing Act, 1872. It is not, I think, necessary to refer to the first clause, which has perplexed the courts and the text writers: see Mr. Paterson's note to the section in his book on the Licensing Acts, and *Reg. v. Mann*, 21 W. R. 329, L. R. 8 Q. B. 235. It is admitted that this case depends on the second clause only. That clause is as follows: "Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied." The section therefore is framed to exclude from qualification for a licence after the passing of the Act any house not of the prescribed value unless at the time of the passing of the Act it is licensed for the sale of any intoxicating liquor for consumption on the premises. Its object, therefore, obviously was, while raising the standard of the value qualification for the future, to safeguard, to some extent at all events, the rights, such as they were, in respect to houses already licensed at the time of the passing of the Act; and the question is how far the Legislature must be taken to have enacted that such houses and their owners should be relieved from the burden of the new qualification. It is contended by the applicant, the respondent here, and he was bound to contend no less, that this immunity is conferred once for all upon the house, provided it was in fact licensed at the time of the passing of the Act, quite irrespective of whether or not that licence has been continued by renewals, and no matter to what purpose it may have been applied in the interval between the passing of the Act and the subsequent application. It is contended, on the other hand, that the Legislature must have intended to continue the immunity only so long as the licence in existence at the time of the passing of the Act had been kept alive by renewals, and that the principle laid down by the Court of Queen's Bench and confirmed by the House of Lords in the parallel case arising under or created by section 19 of the Wine and Beerhouse Act, 1869, must be applied to this legislation also. This makes it necessary to consider that section and the cases decided under it; for it seems to me that, when closely scrutinized, the two sections, though contained in different Acts of Parliament, are equally enacted with reference to the well-known practice of magistrates in dealing with the renewal of licences, and equally had for their object the safeguarding of existing licence-holders in respect of their licensed houses. Section 19 of the Act of 1869 (32 & 33 Vict. c. 27), when first passed, was, so far as is material, in these words: "Where on the first of May, 1869, a licence under any of the said recited Acts is in force in respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in

respect of a licence for the sale of beer, cider, or wine not to be consumed on the premises may be refused, in accordance with this Act." It was amended by an Act of the following year, but before that Act came into operation it was interpreted by the Court of Queen's Bench in *Hargreaves* v. *Dawson*, 24 L. T. Rep. 428, 19 W. R. C. L. Dig. 11. It was there held that, though on the bare language of the Act the condition of immunity from objection on grounds other than the four named was simply that on the 1st of May, 1869, a licence under any of the recited Acts was in force with respect to the house, to construe the conditions so narrowly would be to ignore the practice prevailing under the licensing laws and to defeat the obvious intention of the Legislature, and the court therefore construed those words as not extending to the case where a licence existing at the date of the Act had not been continued by annual renewals. The key to the decision is contained in the observation of Cockburn, L.C.J., in the course of the argument: "Does not the 19th section imply that there is an existing licence?" That is, at the time of the application. The Legislature by the amending Act of 1871 (34 & 35 Vict. c. 88) expressly enacted (in section 3) what the court had so decided. The matter came up for discussion again in *Reg.* v. *Curzon*, 21 W. R. 887, L. R. 8 Q. B. 400, after the amending Act of 1871 had been repealed, and the court held that "on the true construction of section 19 of the Act of 1869, confirmed by section 7 of the Act of 1870 (33 & 34 Vict. c. 29), the justices were not prohibited from exercising their discretion in the case of a house licensed on the 1st of May, 1869, the licence or certificate of which had lapsed before the application for renewal"; and they expressly approved the decision in *Hargreaves* v. *Dawson*, decided without reference to either of the amending Acts. The matter ultimately came before the House of Lords in the case of *Freer* v. *Murray*, [1894] A. C. 576, where the decisions I have referred to were approved, and the House held, under circumstances practically indistinguishable from those in this case as to the history of the licence, that the fact of the chain of continuity having been broken put the applicant outside the protection of section 19, and left the justices an absolute discretion, as in the case of a new licence. On the argument in the Court of Appeal, Lord Esher, M.R., expressly agreed with the view taken by the Court of Queen's Bench in *Hargreaves* v. *Dawson*, and approved in *Reg.* v. *Curzon*, on the construction of section 19 standing alone and unamended: see 41 W. R. 450, [1893] 1 Q. B. 635. If, therefore, it is necessary for the applicant in this case to show that his licence has been renewed up to the date of his last application, *Freer* v. *Murray* is a clear authority in the House of Lords that he has failed to do so. Is there then any substantial distinction between the legislation of section 45 of the Act of 1872 and that of section 19 of the Act of 1869 which would justify us in refusing to apply to the present case the principle of the decisions upon the Act of 1869 to which I have referred? I cannot think that there is. In the one case, that under the Act of 1869, the Legislature were continuing to persons licensed at the time of the passing of the Act a certain immunity which they then enjoyed, while as to persons not licensed they left unfettered discretion to the magistrates. So here they preserve for persons having licences at the time of the passing of the Act, immunity from disqualification on the ground that their houses fall below a certain value, while to others who did not hold licences at the time of the passing of the Act they negative qualification unless their houses are of a much larger value. It seems to me that all the reasons which induced the court to interpret the first-named Act as they did, apply equally to the second. It is difficult to assign any reason in the one case more than in the other why the Legislature should have intended to enact arbitrarily that the condition of the house at the time of the passing of the Act should determine for ever the rights of the occupiers thereafter, quite irrespective of whether it continued to be used as a public-house or for any other purpose. The same reasons that led the courts to insist in the one case that the section must be taken to refer to a licence kept continually in existence up to the date of the application apply equally to the other, and no reason was given in argument why any other intention should be supposed. Nor does it seem to me that there is any such difference in the language as to justify any valid distinction. That the language of the section in the one case is affirmative and in the other negative can surely make no solid difference. If the provision of section 45 of the Act of 1872 be thrown into the affirmative it seems to me that it cannot be distinguished from section 19 of the Act of 1869. At my invitation Mr. Avory transposed the sentence thus: "Premises licensed at the time of the passing of this Act . . . shall be qualified"—that is, on application—"to receive the licence, although the following provisions are not satisfied." If the premises are licensed a licence is "in force" with respect to them in the same sense as in the Act of 1869, and I think no effectual distinction can be made because the words in the later Act in terms refer to the premises and not to the occupier. What the Legislature is considering in both cases is a right of the owner or occupier in respect of the premises. The interests they are safeguarding cannot be considered as dissevered from the owner or occupier. It is equally the right or expectation of the owner or occupier, in respect of the premises, which is to be safeguarded in both cases. Reliance was also placed by Mr. Avory on the words "an application" in section 19 of the Act of 1869; but, as no question as to qualification can arise either for a new licence or a renewal except upon "an application," I can see no force in this argument. In fact the provision of the Act of 1872 might be thrown into the exact words of section 19 of the earlier Act, substituting "except on the ground of value," &c., for "except upon one or more of the (four) grounds," &c., without in any way altering the sense. For these reasons I think that the decisions in the Court of Queen's Bench, the Court of Appeal, and the House of Lords upon the Act of 1869 have laid down a principle applicable to the interpretation of the section now in question, and that we are bound to adopt it. This view seems to me also to be in accordance with that taken by Cockburn, L.C.J., in *Reg.* v. *Mann*, L. R. 8 Q. B., at p. 239, where he says, referring to section 45 of the Licensing Act, 1872: "The first part of section 45 must be taken to refer to houses already licensed, but to which, at the time of the passing of the Act, no licence under the Acts referred to in the Wine and Beerhouse Act, 1869, is attached, and it proceeds to enact that they 'shall not be subject to any of the provisions prescribing a certain rent, or value, or rating as a qualification for receiving any licence.' Such houses are excluded from the operation of the subsequent part of the section, which applies to premises not, at the time of the passing of this Act, licensed for the sale of intoxicating liquors. Then with regard to future applications for new licences, the section provides that the premises shall be of a certain value, depending upon specified circumstances. I think, therefore, that this section is intended to extend only to licences first applied for after the passing of the Act, as

distinguished from the renewal of licences previously granted. The Legislature probably did not wish to interfere with vested interests, because it would be in some cases a hardship upon a man who has had a licence for many years, without any complaint of his conduct, to be compelled to find other premises, or to increase the value of those he occupies, either of which courses may be beyond his means or beyond physical possibility." For these reasons, with great respect to the Lord Chief Justice and my brother Lawrance, I am unable to agree with their decision, which, in my opinion, must be reversed and that of the quarter sessions restored.

MATHEW, L.J.—I am of the same opinion. I must say that I should have been better satisfied if it were possible to adopt the construction arrived at by the Divisional Court, and to say that a substantial compliance with the provisions of the statute is all that is necessary, because the objection which has been taken to the renewal of the licence seems to me to be technical in the highest degree. This, however, is a test case, stated for the purpose of having the question determined whether the continuity of the licence must be maintained. It seems to me that the matter is reasonably clear. It is said that, as the premises were licensed at the time of the passing of the Licensing Act, 1872, they are indelibly impressed with the exemption as to value conferred by section 45 of that Act. That contention must be considered with reference to this scheme of legislation and the practice of justices with respect to the renewal of licences. It is important to bear in mind that there may be a fresh grant of a licence, or there may be the renewal of a licence where the licence is in effect continued as a fresh grant. I first approach the consideration of section 19 of the Wine and Beerhouse Act, 1869, under which justices cannot refuse a renewal certificate in the case of a licence for the sale of beer to be consumed on the premises, which was in force on the 1st of May, 1869, except on one or more of four specified grounds. That section is prospective in its character, and contemplates a future time when the question will arise whether a particular licence was "in force" on the 1st of May, 1869. It seems to me to be clear that the section contemplated the continuance of the licence from some date prior to the 1st of May, 1869, down to the date when the question arises, in the only way in which a licence can be continued—namely, by renewal from time to time. A licence cannot be said to have been "in force" on the 1st of May, 1869, unless it has been continuously renewed. If any doubt existed upon that matter, it has been removed by section 7 of the Wine and Beerhouse Act, 1870, which provides that section 19 of the Act of 1869 shall extend to licences granted by way of renewal from time to time of licences in force on the 1st of May, 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person. That was passed to remove a doubt, which seems to have existed, whether the transfer of a licence would not destroy its continuity. It makes it plain that section 19 is dealing with the case of a licence continued from time to time by way of renewal. That is the construction which I should place upon that section if I were unaided by the light of authority; but there is the very highest authority upon the point, in the decision of the House of Lords in *Freer* v. *Murray*, that this is the true construction of the section.

I now come to section 45 of the Licensing Act, 1872, which in its first clause provides that premises to which at the time of the passing of the Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent, or value, or rating as a qualification for receiving any such licence. That clause is somewhat obscure, and has puzzled and embarrassed commentators and counsel. The second clause is more intelligible. It runs thus: "Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale" unless they are of a certain value, which, if applicable to this case, would be the yearly value of £30. On what footing does the present case stand? We must see whether the premises were "not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon." To my mind we must construe that clause in a manner similar to the construction which has been placed upon section 19 of the Act of 1869. Reading it thus, it refers to those premises which were licensed at the time of the passing of this Act, and which continued licensed in the only way in which they could be continued licensed—namely, by the licence being renewed from time to time. The effect is to except those premises from the requirements of the section as to value. Continuity is of the very essence of the privilege intended to be preserved by the section. I do not think it is necessary to go through the cases, as they have already been referred to by the Master of the Rolls. They received the stamp of final approval in the House of Lords in *Freer* v. *Murray*. It is said that, in placing this construction on section 45, we are adding words to the Act. To my mind we are doing nothing of the kind. We are construing the section by saying that, to bring a case within the exception, there must be continuity in the licence by way of renewal. As I have said, I should feel disposed, if it were possible, to support the decision of the Divisional Court. But I can see no distinction in principle between the short break in the continuity of the licence in the present case, and a break of much longer duration. I agree, therefore, that this appeal must be allowed.

COZENS-HARDY, L.J., read the following judgment: The question raised by this appeal is whether it is lawful for justices, if in their discretion they think fit so to do, to grant a licence by way of renewal for the Council Inn at Manchester, a beerhouse which has been continuously licensed since 1868 with an exception of two days in 1886, the house being of an annual value less than £30, but exceeding £15. Although the interval during which the house was not licensed was extremely short, there has been a breach of continuity. The general discretionary power of the justices under the Act of 1828 was limited by section 1 of the Act of 1840, which prohibited the grant of a licence in a city like Manchester unless the value of the house was £15 per annum. This was the Act in force when the licence was first granted to the Council Inn. In 1872 an Act was passed altering the law in some respects, and the extent of the alteration now arises for our consideration. By section 46 the section of the Act of 1840 to which I have referred was amended in an unimportant point, but as so amended it remained in full force. Section 45, so far as material, is in the following words: "Premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent or value or

rating as a qualification for receiving any such licence. Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied." One of these conditions is that in a place such as Manchester the value must be £30 per annum. Now as a matter of construction it seems to me that this Council Inn, which was licensed in 1872 under the Act of 1840, is not within the enacting part of the section which imposes new conditions. It is expressly excluded from the operation of section 45, and is left subject to the Act of 1840. There is nothing to suggest that it can ever be brought within the operation of section 45. There are two classes of houses subject to distinct statutory provisions. If, therefore, I am at liberty to construe the Act of 1872 apart from authority, I think the view taken by the Lord Chief Justice and Lawrance, J., is correct, though I prefer to arrive at the same conclusion by relying not so much upon the opening words of section 45 as upon the unrepealed section of the Act of 1840. It is, however, argued that we are bound by principles laid down by the House of Lords in *Freer* v. *Murray*, to hold that the enacting part of section 45 applies to every case where there has not been an absolutely continuous enjoyment of a licence from 1872 downwards. I have not, however, been able to satisfy myself that there is any such analogy between section 19 of the Act of 1869, which was under discussion in *Freer* v. *Murray*, and section 45 of the Act of 1872 as would compel me to construe the latter as the appellant justices desire. Section 19 was a restriction upon the discretionary power of the justices under the Act of 1828. It disabled them from refusing a certificate in respect of a certain class of houses except for specified reasons. It applied only to licences "in force" on the 1st of May, 1869, where "an application for a certificate" was made. It was held by the Court of Queen's Bench that the application there referred to was an application for a renewal only, and that when once a licence had been dropped a subsequent applicant could not claim the benefit of the section. This was the interpretation put upon it by Parliament in subsequent declaratory statutes, and was adopted by the House of Lords. But there are no similar words in the Act of 1872. There is no reference to an application. The only reference is to the house itself. I do not feel the force of the objection that Parliament in 1872 must be considered to have had in view only the protection of vested interests. In truth, there is no vested interest under section 19 or otherwise to be protected in the case of the Council Inn. The renewal of the licence may be refused by the justices if they think fit, but I am not prepared to say that they are precluded from granting an application for renewal merely on the ground that the annual value of the house is not £30. It is needless to say that I have felt great hesitation in differing from the Master of the Rolls and Mathew, L.J. But after mature reflection I am unable to dissent from the view adopted by the Divisional Court.

*Appeal allowed.*

Solicitors for the appellants, *R. B. Wheatley, Son, & Daniel*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

Solicitors for the respondents, *Crowders, Vizard, & Oldham*, for *Hockin, Raby, & Beckton*, Manchester.

## High Court of Justice.

Chan. Div. Byrne, J. } Aug. 8, 12, 1902.

DAVIS v. TOWN PROPERTIES INVESTMENT CORPORATION (LIMITED). (*a*.)

*Landlord and tenant—Covenant for quiet enjoyment—Assignment of reversion—Acts done by assignees upon land acquired by them subsequently to the lease, and not from or under the lessor—Breach of covenant—Interference with access of air to chimneys.*

*In a covenant in a lease that the lessee shall peaceably enjoy the lands demised without any disturbance by the lessor or his assigns, or any person lawfully claiming from or under him, the latter words mean lawfully claiming under him the right to do the acts which cause the disturbance A covenant for quiet enjoyment in a lease must be construed with reference to the state of things at the date of the covenant, and cannot be enlarged so as to include acts done upon land subsequently acquired by an assignee of the reversion.*

*L. demised offices to the plaintiff with a covenant that the plaintiff should peaceably enjoy the offices without any disturbance by the lessor or his assigns, or any person lawfully claiming from or under him. L. afterwards assigned the reversion after the term to the defendant company. The defendants subsequently acquired the house next door to the demised offices, and having pulled it down rebuilt it much higher, and thus prevented the access of air to the chimneys of the offices and caused them to smoke.*

*Held, that, as the defendants had acted, not under colour of any title as assignees of the reversion, but in exercise of an independent right of property, acquired aliunde, and after the original lease, they had not committed any breach of the covenant.*

In June, 1897, a lease was granted by one Lee to the plaintiff David Davis of offices on the ground floor of No. 119, Colmore-row, Birmingham, for a term of fourteen years from September, 1897, at a yearly rent of £100. The lease contained a covenant for quiet enjoyment in the form hereafter mentioned. In September, 1898, the reversion in the offices No. 119, Colmore-row expectant upon the determination of the lease was assigned by Lee, the lessor, to the defendant company, the Town Properties Investment Corporation (Limited). In the year 1900 the defendant company purchased from one Barber, who had no connection with Lee, a house next door to No. 119, Colmore-row, and proceeded to pull it down and to erect upon the site new buildings of much greater height than the old buildings. This caused the chimneys of the offices, No. 119, Colmore-row, of the plaintiff to smoke, so as materially to interfere with the quiet enjoyment of one of his rooms.

The covenant for quiet enjoyment in the lease was as follows: "And the lessor doth hereby covenant with the lessee that the lessee paying the rent hereby reserved and observing the covenants and conditions herein contained and on the part of the lessee to be observed and performed shall and may peacably and quietly possess and enjoy the said offices during the said term without any eviction or disturbance by the lessor or any person lawfully or equitably claiming from or under him." And it was provided that the expression "the lessor" should include the executors administrators and assigns of the lessor where the context allowed.

The plaintiff brought this action for a declaration

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

that the acts of the defendant company constituted a breach of the covenant for quiet enjoyment, and for an injunction restraining the defendant company from allowing the buildings complained of to remain.

*Norton, K.C.*, and *E. Clayton*, for plaintiff.—A covenant for quiet enjoyment is not confined to acts which affect the title to the lands granted. Any act which interferes with the enjoyment of the land by the lessee is a breach of such a covenant (*Sanderson* v. *Mayor of Berwick-upon-Tweed*, 33 W. R. 67, 13 Q. B. D. 547), and causing chimneys to smoke by interfering with access of air is such an act: *Tebb* v. *Cave*, 48 W. R. 318, [1900] 1 Ch. 642. It is in effect a personal covenant. It is here expressed to bind the assigns of the lessor and consequently they are personally bound also: *David* v. *Sabin*, 41 W. R. 398, [1893] 1 Ch. 523, 37 SOLICITORS' JOURNAL. 248.

*Levett, K.C.*, and *Austen Cartmell*, for the defendant company.—The covenant must be construed with reference to the property of the lessor at the time it was made, and it cannot affect property subsequently acquired by him or his assigns: *Booth* v. *Alcock*, 21 W. R. 743, L. R. 8 Ch. App. 663. A covenant for quiet enjoyment does not enlarge the rights granted by the conveyance or lease (*Leech* v. *Schweder*, 22 W. R 633, L. R. 9 Ch. App. 463), and there could have been no grant or lease by the lessor or his assigns the defendant company, over the land adjoining the land leased at the date of the covenant. The act of the defendant company complained of was one which they had a right to do as owners of the adjoining land, and was not a direct interference with the property leased to the plaintiff, and consequently not within the covenant for quiet enjoyment even if done by the lessor: *Harrison, Ainslie, & Co.* v. *Muncaster*, 40 W. R. 102, [1891] 2 Q. B. 680, at pp. 684, 685. A covenant cannot be a personal covenant and at the same time run with the land. By section 11 of the Conveyancing Act, 1881, the lessor can bind his reversionary interest, but at the date of the covenant neither Lee nor the defendant company had any interest in the land upon which the buildings complained of are built. Upon the plaintiff's contention the operation would be fluctuating and enlarging as the owner of the reversion acquired fresh property. *David* v. *Sabin* is a different case. There the defendant had himself created the term out of which the incumbrances complained of were created. This action could not have been brought against Lee, as he has not, and never had, anything to do with this adjoining land. How, then, can it be brought against his assigns? The judgment of Fry, L.J., in *Sanderson* v. *Mayor of Berwick-upon-Tweed* must be taken with reference to the facts then before the court (per Lindley, L.J., in *Bryant* v. *Lefever*, 27 W. R. 612, L. R. 4 C. P. D. 172).

They also referred to *Manchester, Sheffield, and Lincolnshire Railway* v. *Anderson*, [1898] 2 Ch. 394, at p. 402, 47 W. R. Dig. 168.

*Cur. adv. vult.*

Aug. 12.—BYRNE, J.—The rebuilding with the ensuing result would not afford a right of action against a stranger: *Bryant* v. *Lefever*. On the other hand, it is such a substantial interference with the enjoyment of the property demised as to constitute a breach of a covenant for quiet enjoyment if caused by the lessor or any person lawfully or equitably claiming from or under him within the meaning of the covenant in the lease: [His lordship then read the covenant and section 11 of the Conveyancing Act, 1881.] The question here is whether or not the defendants are liable as for a breach of the covenant, they being assignees of the reversion of the demised premises; but not having done the act complained of under colour of any title as such assignees, but in exercise of an independent right of property acquired *aliunde*, and after the date of original lease, no question as to derogation from grant, or estoppel, arises. The true meaning and effect of covenants for quiet enjoyment as between lessor and lessee was fully considered in *Harrison, Ainslie, & Co.* v. *Muncaster*. Lord Esher, M.R., says in his judgment, 40 W. R., at p. 103, [1891] 2 Q. B., at p. 684: "In this case the first question is, Was the enjoyment of the plaintiffs' mine interrupted in the sense in which that word is interpreted in the covenant? I have no doubt that it was. Formerly it was thought that a covenant for quiet enjoyment only applied to an interference with the title of the covenantee, but upon more careful consideration it was held that it applied to an interference with the enjoyment of the thing demised; and it seems clear that there may be an interference with the enjoyment of property without any interruption to or interference with the title to it. The case of *Sanderson* v. *Mayor of Berwick-upon-Tweed* is a clear authority that the interruption contemplated by the covenant need not necessarily be an interference with the title, but may extend to an interference with the enjoyment; and that decision interpreted in that way was, in my opinion, authorized by the case of *Shaw* v. *Stenton*, 6 W. R. 327, 2 H. & N. 858, but it goes no further. In the first-named case Fry, L.J., who gave the judgment of the court, has stated an abstract proposition, and has used words which, if regarded merely as the statement of an abstract proposition, would carry the liability of the person giving such a covenant to a great length; but, looking at the words used, and bearing in mind what was the subject-matter of that particular case, it will be seen that our decision in the present case is entirely consistent with, and within the meaning of the language used in that judgment. 'It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted.' That is the first proposition, and in this case I shall determine that question of fact in favour of the plaintiffs; for to swamp a man's mines so that he cannot work them is certainly to interrupt the enjoyment of them. The judgment goes on, 'And where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor,' that is, by the acts of the person who has entered into the covenant, 'or those lawfully claiming under him.' I pause there for a minute. Not only must the enjoyment be interrupted, but it must be interrupted by the acts of the lessor or those claiming under him.' The last words require some definition and limitation. Considering what was being discussed I have no doubt that the proper meaning of these words is 'by the acts of the lessor or of those claiming under him the right to do the acts which caused the interruption.'"

It appears to me that the acts done by the defendants were not done by them claiming the right to do such acts as authorized by or claiming under the plaintiff's lessor, but in exercise of their rights under an independent title acquired subsequently to the date of the covenant. I think that the covenant must be construed having regard to the circumstances which existed at the date of the lease, and that the assignees of the reversion cannot be held liable for acts lawfully done under an independent title created subsequently to the lease. *David* v. *Sabin*, relied on by the plaintiff, is not an authority for the proposition that assignees of a reversion in one property are by reason of the existence of a covenant for quiet enjoyment thereby precluded from making lawful use of another property acquired by them in good faith. There is

much force in Mr. Levett's observation that to hold the plaintiff entitled to relief would be to hold that the rights and liabilities under the covenant are not defined as at the date of the covenant, but that they are liable to grow as the covenantor acquires new properties. I think that the case of *Booth* v. *Alcock* supports the view that the obligations of the lessor are to be considered as at the date of the lease. On consideration of the whole case I am of opinion that the plaintiff fails.

*Judgment for the defendant.*

Solicitors, *C. P. Eaton Taylor; F. A. K. Doyle*, for *S. T. Talbot*, Birmingham.

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Chan. Div. } Byrne, J. } May 7, 8, 9; Aug. 5, 1902.

WATTS *v.* BUCKNALL. (*a.*)

*Company—Prospectus—Non-disclosure of contracts—"Knowingly issue"—Waiver clause—Contracts to be waived not fairly disclosed—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

*The defendant, who was a director of a company, took part in issuing a prospectus inviting persons to subscribe for shares in the company. The prospectus did not disclose certain material contracts which had been entered into, as required by section 38 of the Companies Act, 1867. It, however, contained a clause stating that contracts relating to the formation and promotion of the company had been entered into, and that these "are, or may be," within the 38th section of the Act, and that applicants for shares were to be deemed to have waived all claims against directors and others for the section not being more fully complied with. The defendant did not know of the undisclosed contracts, and was content to leave the statements of the prospectus to others without further inquiry. The plaintiff took shares upon the faith of the prospectus and without notice of the previous contracts, and upon learning of them brought an action against the defendant for compensation.*

*Held, that the defendant had "knowingly issued" the prospectus, and that under the circumstances his ignorance of the undisclosed contracts was no answer to the action.*

*Held, also, that the waiver clause did not fairly disclose what it was that the intending investor should waive, and therefore did not protect the defendant from liability for non-disclosure of the contract.*

Action.

This was an action by a shareholder of a company against a director for having omitted from the prospectus any mention of material contracts entered into prior to its issue.

The company in question was the Worcestershire Brewery and Malting Co. (Limited), which was incorporated in December, 1896, for the purpose of acquiring two breweries known as "Bucknall's Brewery" and the "Delph Brewery," and certain licensed houses, plant, and effects of these breweries. In the same month a prospectus was issued inviting persons to subscribe for shares in the company.

The defendant, T. S. Bucknall, was one of the directors of the company, and his name so appeared upon the prospectus, and he took part in its preparation.

The prospectus gave (among other things) particulars of the property to be purchased and the purchase price, and stated that the vendors (who promoted the company and had acquired the properties to resell at a profit) were to pay the whole of the expenses of formation and registration of the company, except certain stamp duties and legal charges, and that a contract for purchase had been entered into, being an agreement dated the 1st day of December, 1896, between E. S. Claremont (who represented the vendors) of the one part and H. Broadbridge as a trustee on behalf of the company of the other part, and that copies of the contract could be inspected at the office of the company by applicants for shares until allotment. It also contained the following clause:

"During the negotiations for the purchase of the properties and the formation of the company contracts have been entered into between various parties with reference to the formation and promotion of the company, and the subscription of its capital, but to none of which the company is a party. The businesses agreed to be purchased, or some of them, will be taken over subject to all existing contracts, which are of the ordinary trade character. The contracts referred to in this paragraph are, or may be, contracts within the meaning of the 38th section of the Companies Act, 1867, and accordingly applicants for shares are to be deemed to have notice of the said contracts, and to have agreed with the company (as trustee for the directors and other persons liable) to waive all claims, if any, against them for not more fully complying with the requirements of the said section, and allotments will only be made upon this express condition."

The contract of the 1st of December, 1896, mentioned in the prospectus was one for the purchase of the properties of the company for £440,000. It provided, by clause 3, that the vendor should show a good title to the hereditaments purchased "in accordance with the contracts under which he purchased the same."

The plaintiff upon the faith of the prospectus applied for and had allotted to him upon the terms of the prospectus twenty 5½ per cent. preference shares of £10 each in the company, for which he paid £200. He subsequently discovered that prior to the issue of the prospectus there had been other contracts connected with the formation of the company which were admitted to be material to be disclosed; from some of these contracts it appeared that the vendors had agreed to purchase the properties sold to the company at a less amount than the sale price to the company. He therefore brought this action alleging that the shares he had taken were of no value, and he claimed a declaration that the defendant was liable to pay him compensation for his loss.

The defendant alleged that he did not know of the existence of the undisclosed contracts at the time of the issue of the prospectus. Further particulars of his knowledge and conduct at that time will be found in the judgment of the learned judge.

*Norton, K.C.*, and *J. Ricardo*, for the plaintiff.—The prospectus is fraudulent on the part of the defendant under section 38 of the Companies Act, 1867, because it omits to disclose material contracts. The defendant cannot be heard to say that he did not know of those contracts, as the contract of the 1st of December, 1896, mentioned in the prospectus mentions these previous contracts. Nor will the waiver clause in the prospectus save the defendant from liability. It does not sufficiently disclose the rights to be waived. It is tricky and misleading. There were admittedly contracts already entered into which were material to be disclosed, and yet it says that these contracts "are, or may be," within the

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

38th section: *Greenwood* v. *Leathershod Wheel Co.*, [1900] 1 Ch. 421, 48 W. R. Dig. 35, and *Cackett* v. *Keswick*, 50 W. R. 10 (now under appeal).

They also referred to: *Twycross* v. *Grant*, 25 W. R. 701, 2 C. P. D. 469; *Sullivan* v. *Mitcalfe*, 29 W. R. 181, L. R. 5 C. P. D. 455; and *Arnison* v. *Smith*, 37 W. R. 739, 41 Ch. D. 348.

*Levett, K.C., Rowden, K.C.*, and *A. M. Bremmer*, for the defendant.—The defendant did not know of the existence of the contracts in question, and did not knowingly issue the prospectus. To "knowingly issue" you must intentionally omit the contracts: see observations of Cockburn, C.J., in *Twycross* v. *Grant*, 25 W. R., at p. 717, 2 C. P. D., at p. 542; of Farwell, J., in *Baty* v. *Keswick*, 50 W. R. 14; and of Lindley, L.J., in *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82, at p. 103. Next, a waiver clause is valid: see Buckley on Companies (8th ed.), p. 656. The waiver clause here is not misleading, it sufficiently refers to all the contracts the omission of which is complained of. They all had reference "to the formation and promotion of the company." If they had not done so they would not have been material to be disclosed: *Greenwood v. Leathershod Wheel Co.* is distinguishable, for there the promoter was stipulating for his own contract to be waived. Again, the plaintiff must show that, if he had known of the undisclosed contracts he would not have taken his shares, and he has not done so.

*Norton*, in reply.—"Knowingly issue" means issue knowing of the prospectus. It does not refer to the contracts to be disclosed.

At the conclusion of the arguments his lordship said that he would reserve his judgment until after the Court of Appeal had given judgment in *Cackett* v. *Keswick*.

*Cur. adv. vult.*

Aug. 5.—BUCKLEY, J.—Most of the legal considerations involved in the present case have so recently been stated by Farwell, J., in the case of *Cackett* v. *Keswick*, affirmed on appeal since the present case was heard, 71 L. J. Ch. 641, 50 W. R. Dig. 32, that it is unnecessary now to repeat them. It has been clearly proved before me that the plaintiff applied for his shares upon the faith of the prospectus without notice of the contracts, and also that the defendant was a director "knowingly issuing" the same within the meaning of the section. It is not disputed that one or more of the contracts in respect of which the statutory requirements have not been complied with, were material to be known by an intending applicant for shares, and the substantial defences are, first, that the defendant did not in fact know of the existence of these particular contracts; and, secondly, that the plaintiff has waived any right he might otherwise have possessed by the terms of his application for shares and of the prospectus, the application being for an allotment upon the terms of the prospectus. The defendant took part in the preparation of the prospectus. Prior to 1889 he had been proprietor of Bucknall's Brewery. But in April of that year he had disposed of it. He read the whole of the prospectus. He did not ask to see the contract for purchase therein mentioned, Claremont to Broadbridge, of the 1st of December, 1896; he says he may have seen it, but did not read its contents. He never asked what the contracts were which were referred to in the waiver clause. Upon his own evidence he left all the matters referred to on the last page of the prospectus to the legal men, and he was willing to leave those statements to others, and again he says: "Any statements as to legal matters I was content to take from my co-directors. As to such matters as I did not understand and did not ask about, I was content to rely on my co-directors and the solicitors." I have not to deal with a case where a director has made inquiry about the contracts, or where he never had notice of the existence of contracts, or where, having attempted to discover the truth, he has himself been deceived, nor is it a case where he has been advised by his legal advisers that particular contracts are not such as need be referred to in the prospectus. He has been content simply to take the statements in the prospectus as they stand without further inquiry, and he has wilfully—that is, with knowledge that he is doing so—abstained from inquiry. It appears to me that this state of circumstances does not afford an answer to the fraud to be imputed in consequence of statutory enactment by reason of the omission to mention material contracts. The 38th section imposes an obligation the breach of which renders the director of a company as liable as he would have been independently of the section in an action of deceit, had it been proved that he had acted fraudulently—that is, if he had wilfully made a misrepresentation, or had made a representation recklessly and without caring whether the statement was true or false. To hold otherwise would be to hold that the 38th section has no application in cases where a director could prove that he was too careless to verify what he was putting forward in the prospectus, or even where he joined in putting forward a prospectus simply because his co-directors asked him to do so. He is responsible for what is stated in the prospectus, and in cases under the 38th section he is responsible as for a fraudulent document. I am disposed to think that, having regard to the terms of the section, the plea of ignorance on the part of a director can only be maintained where the facts would enable him to establish a right to say that the prospectus was not a document for which he was responsible, or, in other words, that he had in fact been defrauded or deceived into giving his sanction to a document which was not his.

The other point is as to the effect of the waiver clause in the prospectus; and it is now clearly established that a man may waive or release his statutory right to have the date and names of parties to material contracts set out in a prospectus. Every device to avoid giving to intending shareholders that information which the law says they should have is from time to time resorted to. My view is that it is a true statement of the law to say that no protection can be afforded to those responsible for the issue of a prospectus under a waiver clause which they invited subscribers to submit themselves to, unless they fairly disclose what is the nature of the rights which they ask should be released or waived. Large print, little print, italics, red ink, and other attractive devices in other parts of the prospectus to lead the unwary away from the true path of inquiry are only specimens of the art of deceiving, and an apparent candour may be a most potent engine of deception. In the present case there are at least six documents proved besides that mentioned in the prospectus (I leave out those not satisfactorily proved) to disclose which would have had a most material bearing upon a decision whether or not to apply for shares, and I do not think that the present prospectus sufficiently discloses the fact, which appears from the documents not specifically mentioned in the prospectus, of the enormous loading in the way of promotion profits which was in existence at the date of its issue. I say that the prospectus does not fairly disclose what it is that the intending investor is asked to waive; and I notice particularly the words "are or may be" in respect of contracts about which there is not a

shadow of doubt. I find also the collocation of ordinary trade contracts with promoting contracts. These are elements in arriving at the conclusion I have come to, which is that there is not an honest and fair statement of the nature of the contracts which persons applying are invited to waive. There must be judgment for the plaintiff for £200 and interest at 4 per cent. from the date at which the last dividend was paid, and costs.

*Judgment for the plaintiff.*

Solicitors, *Joseph Davis; Ashurst, Morris, Crisp, & Co.*, for *W. N. Talbot*, Kidderminster.

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K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) June 17, 1902.

WALTER *v.* YALDEN. (*a.*)

*Limitation Statutes—Recovery of land—Surrender of lease—Merger—Real Property Limitation Act,* 1874 (37 *&* 38 *Vict. c.* 57), *s.* 2

*A tenant cannot by the surrender of his lease convey to his landlord any better title than he could grant to a third person by assignment or underlease.*

*In* 1837 *A. granted a lease of three lives to B. In* 1885 *B. surrendered his lease to A. The last of the three lives dropped in* 1895. *In an action by A. against C., a trespasser, who had by himself or his predecessors been in possession for more than thirty years,*

*Held, that the Statute of Limitations began to run as against the landlord in* 1895 *and not* 1885

*Held, further, that a lease for years was not "a particular estate on which any future estate or interest was expectant" within the meaning of section* 2 *of the Real Property Limitation Act.* 1874, *and that, therefore, the period fixed by the Act was twelve years and not six.*

Appeal from the decision of the judge of the Berkshire County Court, sitting at Reading, holding that the plaintiff was entitled to recover possession of about half an acre of land situate in the manor of Barkham.

In 1837 the then lord of the manor granted a lease of the land to one Pothecary for ninety-nine years or three lives, whichever period expired first.

The plaintiff, in 1882, purchased certain hereditaments, including the defendant's land, and a conveyance was executed, but by some error the land in question was not conveyed to him.

In 1884 a conveyance was executed by Mr. Leveson Gower, the then lord of the manor, conveying to the plaintiff the manor of Barkham and certain other hereditaments.

In 1885 Pothecary surrendered his lease to the plaintiff.

The last of the three lives died on the 4th of February, 1895.

In 1900 a conveyance was executed at the vendor's expense, reciting that by a clerical error a certain hereditament had been omitted from the conveyance of 1882 conveying to the plaintiff the land in question, and in August, 1901, the plaintiff commenced this action for ejectment.

The defendant claimed the benefit of the Statute of Limitations.

The county court judge gave judgment for the plaintiff.

The defendant appealed.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

*St. Gerrans*, for the defendant.—By reason of the surrender in 1885 the lease became merged in the freehold, and the statute runs as against the plaintiff from that date. The property in question did pass by the deeds of 1882 and 1884. The plaintiff had then acquired a good title, and could have turned the defendant out: *Rankin* v. *M'Murtry*, 24 L. R. Ir. C. L. 290. Then the period fixed by section 2 of the Real Property Limitation Act, 1874, is six years. It is clear law that a lease for years can be a particular estate (*White* v. *Earl of Devon*, 45 W. R. 27, [1896] 2 Ch. 562) and this is a particular estate on which a future estate is expectant within the meaning of the section.

*Buckmaster, K.C.* (*Walsh* with him), for the plaintiff.—The deeds of 1882 and 1884 did not pass the property to the plaintiff. But even if they did, the surrender by Pothecary would not accelerate plaintiff's right as against the defendant, who had acquired an absolute right as against Pothecary. Pothecary's title was gone and he had nothing he could assign to anyone else: *Ecclesiastical Commissioners* v. *Rowe*, 29 W. R. 159, 5 App. Cas. 736. As regards the second point, the words of the second section of the Real Property Limitation Act, 1874, do not apply to this case. It is admitted that a lease may be a particular estate, but the language of the section is directed to lands in settlement and not to leases created by the owner.

Lord ALVERSTONE, L.C.J.—In this case the county court judge has decided that Mr. Walter, the plaintiff, made out a good title to justify a judgment in his favour to recover possession of the messuage. The material facts appear to be that in 1837 the then lord of the manor leased the property to a gentleman named Pothecary for ninety-nine years or three lives; and it is agreed that the last of these lives dropped on the 4th of February, 1895. It is said, and the conveyance appears to have been put in, that in 1867 Mr. Yalden, the defendant, purchased the property as a freehold from somebody of the name of Watts, and there is nothing before us to show that Yalden at any time held under Pothecary or purported to be his assignee or sub-lessee. In 1882 there was a conveyance to Mr. John Walter of certain named lands, and it is said that this particular property was intended to have been conveyed by that deed. The conveyance of the property was by plan and schedule of the property, and one can see that the coloured plan does not include this particular site. In 1901 there was a conveyance of this specific piece of property, and the conveyance recites that it was omitted by accident from the conveyance of 1882. In 1884 there was a conveyance of the manor of Barkham by Mr. Leveson Gower to Mr. John Walter, and of certain other properties which were not shown to be lands of the manor, and which, upon the face of the conveyance, as I read it, if I am right, are not stated to be lands of the manor. In 1885 Mr. John Walter, stating that he had got, and no doubt believing that he had got, the freeholds of the manor, and that he had also got the freehold of the property which had been the subject of this lease, accepts a surrender from Pothecary. Now, it has been argued by Mr. Buckmaster that we ought to assume that Mr. John Walter, or, rather, the present plaintiff, did not get the property except under these deeds of 1882 and 1901. We are not prepared to decide that question. We are not prepared to say that we can base our judgment upon the view that the property may not have passed under the conveyance of 1884; and if it had been necessary to deal with that particular matter for the purpose of deciding the rights of the parties it is

possible there might have to be some further inquiry. I do not know that we have sufficiently considered what is the actual effect of the lease of 1837 and the conveyance of 1884, but there certainly may have been some ground for the argument which Mr. St. Gerrans has addressed to us, that Mr. John Walter was entitled to the freehold in 1884, and that, therefore, there was a surrender. There are two other points, both of which must, in our opinion, be decided in favour of the plaintiff. It is first contended that by virtue of the provisions of the second section of the Real Property Limitation Act of 1874 the important period in this case was six years from the death of the last life in the leases —namely, 1895. It was contended that the term of years was a particular estate under that section, and that the estate taken by the reversioner was a future estate or interest under that section. I think it is clear, on the consideration of the arguments which have been addressed to us, that that cannot be maintained. If that were so, a person who granted a lease is entitled to the reversion as a future estate within the meaning of that section. I do not think it is possible to maintain that argument, and I think that that section was intended to apply to future estates created by the reversioner, and certainly not to the mere reversion itself after the term of years, and therefore the argument that the term must be limited to six years from the expiration of the leasehold term seems to me to fail.

The other point is certainly one which is of some difficulty, and has merited the very able argument which has been addressed to us. It was suggested, on behalf of the appellant, that inasmuch as there was, or assuming there was, a surrender to a person entitled to the freehold in 1885, therefore for the purpose we are now considering the time must be taken to have commenced to run in 1885. Mr. Buckmaster's argument is that that is not so, and that the effect of the possession by Mr. Yalden is that he had acquired a right which could not be defeated by the lessee, or by the reversioner during the term of the lease. It is contended by the appellant that as the trespasser acquires that which would be a fee simple, that as soon as the term is merged in the freehold the time runs, and that you cannot look to the unexpired term of the lease in order to fix the time when the Statute of Limitations begins to run. One or two considerations show that argument cannot be right. It is quite plain that if Mr. Yalden has by so many years' possession acquired the right to the possession of the property as against Pothecary, the latter could not deprive him, so to speak, of any right he has gained by assignment or by underlease, and it seems to me to follow, not that the person who is in possession becomes liable on the covenants of the lease, or is to be treated as being in the position of the lessee, but that the surrender cannot operate so as to deprive him of the title he has got as against the persons against whom he is entitled to claim possession. It seems to me that that is really what is intended to be expressed in the passage which has been read from Darby and Bosanquet's book, at p. 294. In other words, if you apply it to the ordinary case of a lease, the ordinary right of a landlord to resume possession does not arise until the lease has expired. The trespasser is in possession. The landlord may not know or does not know under what terms he has originally entered, or how he has got into his possession; but it seems to me that the right of entry of the landlord does not arise for the purpose of ascertaining the commencement of the period of limitation, until the expiration of the term, otherwise you would enable the person against whom the possession was rightfully claimed by virtue of the length of holding to defeat the operation of that possession in his own favour by some transaction which the person who has been in possession for twenty years was not a party to. The result is this, that even assuming for the purpose of the argument—though I express no opinion upon it—that the freehold was Mr. John Walter's in the year 1885, the time under the Statute of Limitations did not commence to run until the expiration of the lease granted in the year 1837, and therefore that Mr. Walter's claim is not barred. For these reasons I think that the judgment of the county court judge was right, and that the appeal must be dismissed.

DARLING, J.—I agree.

CHANNELL, J.—I am of the same opinion. I think the important and difficult question we have to consider is whether or not anyone got a right of entry in 1885 upon the execution of this deed which purports to be a surrender of the lease. I think the law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give title to another person by his assignment. If he has created underleases, these leases remain, notwithstanding his surrender; and if he has created underleases he cannot assign his term to anyone else so as to put an end to those underleases. But that, I think, is only an illustration of what he can and cannot do. The point is, that he has no power to effect by a surrender what he could not do by an assignment to a third person, the reason being that he cannot convey to his landlord any more than to anyone else, anything that he has not got himself. Then if that is so, inasmuch as in 1885 Pothecary had lost all title as against the persons in possession of this particular land, he could not have assigned a right of entry to anybody else, and no more could he assign it to his lessor. The result is that no right of entry arose in the lessor, whoever he was, Mr. Leveson Gower or Mr. Walter, and no right of entry arose until the last life dropped on the 4th of February, 1895. In that view it is unnecessary to consider whether or not in 1885 Mr. Walter had got the legal estate in this land or a mere equity. Personally I am inclined to think that, so far as we do know the facts, the deed of 1884 had conveyed to him not only the manor, but all rights whatever they were that Mr. Leveson Gower had got in reference to this piece of land that had been leased in 1837. I think it did myself, but I agree that we ought to know something further about the facts before we can definitely decide this matter. But in the view we are taking it is quite unnecessary to decide that question one way or the other. The only remaining question is, assuming that the right of entry arose on the 4th of February, 1895—which, I understand was more than six years before the commencement of these proceedings—whether the period within which the action was to be brought was six years or twelve. That depends on the statute of 1874, and as to that, although it is admitted by Mr. Buckmaster that the term of years may be a particular estate, yet he says, and I think rightly says, that the reversion expectant on a term of years cannot be a future estate within the meaning of the words "if the person last entitled to any particular estate on which any future estate or interest was expectant"; if it is not a future estate within the meaning of that, the estate or interest of the lessor is an existing estate all during the term of the lease, and it cannot be considered to be a future estate. It is observable that the words "future estate" come in in the latter part of the section, not in the earlier part. The earlier part clearly does

relate to a landlord coming into possession on the expiration of a term of years. This part does not refer to that, but to something else, and the reason of it, in all probability, is that, in other cases, the person coming into possession does claim through his predecessor. He claims through a similar title, whereas the lessor claims in a totally different way at the expiration of the title which he himself has created.

*Appeal dismissed; leave to appeal granted.*

Solicitors for the plaintiff, *Soames, Edwards, & Jones*, for *Cooke, Cooper, & Barry*, Wokingham.

Solicitor for the defendant, *A. W. Mills*, for *J. Ratcliffe*, Reading.

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## IN BANKRUPTCY.

K. B. Div. (Wright, J.) — May 13, 1902.

*In re* BOROVSKY & WEINBAUM.
*Ex parte* SALAMAN. (*a.*)

*Bankruptcy—Extradition—Property found on bankrupt at date of arrest—Retention by police—Claim by trustee in bankruptcy—Evidence of crime—Order for delivery up of property—"Competent authority" to make order—Belgian Extradition Treaty*, 1876. *art.* 12—*Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *ss.* 9, 10.

*The police magistrate who orders the extradition of a prisoner to Belgium is "the competent authority" to order the delivery of the property found upon the prisoner to the Belgian authorities under article* 12 *of the Belgian Extradition Treaty*, 1876 (*Hertslet's Treaties, vol.* 14, *p.* 172).

Application by the trustee in bankruptcy for the delivery up of property found on and in possession of the bankrupts at the date of their arrest and retained by the police.

The bankrupt Borovsky was a Russian subject domiciled in London, and the bankrupt Weinbaum was a naturalized British subject.

They carried on in partnership the business of dealers in precious stones in London and Antwerp under the style of "Borovsky & Weinbaum."

On the 10th of March, 1902, they were arrested in London on an extradition warrant granted at the instance of the Belgian Government for offences committed in Belgium.

The police found upon them or in their offices certain bills of exchange, jewels, and cash, some of which were alleged to be material evidence for the prosecution instituted in Belgium.

On the 14th of March a receiving order was made against the bankrupts. They were adjudicated bankrupt, and Mr. Salaman was appointed trustee in the bankruptcy.

On the 19th of March they were made bankrupt in Belgium, where a M. Yseux was appointed curator of their estate.

On the 19th of April the police magistrate at Bow-street made an order for the extradition of the bankrupts, but declined to make any order as to the property found upon them, on the ground that he was not "the competent authority" to do so within article 12 of the Belgian Extradition Treaty, 1876 (see Hertslet's Treaties, vol. 14, p. 172), which is as follows:

"12. Every article found in the possession of the individual claimed at the time of his arrest shall, if the competent authority so decide, be seized, in order to be delivered up with his person at the time when the surrender shall be made. Such delivery shall not be limited to the property or articles obtained by stealing or by fraudulent bankruptcy, but shall extend to everything that may serve as proof of the crime. . . . The rights of third parties with regard to the said property or articles are nevertheless reserved."

The magistrate having declined to make any order, the property remained in the custody of the Commissioner of Police, against whom the trustee in the English bankruptcy made the present application. The curator in the Belgian bankruptcy also appeared and made a claim to the property.

*Muir Mackenzie*, for the English trustee, applied that the property should be handed to the trustee as forming part of the property of the bankrupts divisible among their creditors.

*Sutton*, for the Commissioner of Police, opposed the application on the ground that the usual practice was for the police to hand over such property found on a prisoner as was evidence of the crime with which he was charged.

He cited *Dillon* v. *O'Brien*, 16 Cox Cr. Cas. 245, 35 W. R. Dig. 64.

*Edwardes Jones* appeared for the Belgian curator.

WRIGHT, J., held that the magistrate was "the competent authority" to order the delivery of the property to the Belgian authorities, and directed the commissioner of police to apply to him for such an order. His lordship also intimated that application might be made to the Home Secretary for the inclusion of a stipulation in the order of extradition that the property should be returned to the authorities in England after the conclusion of the trial in Belgium in order that it might be handed over to the trustee in the English bankruptcy without prejudice to the rights of the Belgian creditors to prove in the English bankruptcy.

Solicitors to the trustee, *Osborne & Osborne*.

Solicitors for the Commissioner of Police, *Wontner & Sons*.

Solicitors for the Belgian curator, *Crawley, Arnold, & Co.*

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(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

## Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) } July 29, 1902.

NEW RIVER CO. *v.* ASSESSMENT COMMITTEE OF THE HERTFORD UNION. (*a.*)

*Poor law — Rating — Rateable value — Waterworks — Intake from river — Sum paid for right to take water — Assessment.*

*A waterworks company had the right by statute to take a certain amount of water from a river by means of an intake where there was a building containing appliances for measuring the water passing through the intake into a channel communicating therewith. The company were required by statute to pay to the conservators of the river certain sums for the right to take the water.*

*Held, that, in rating the intake, beyond the ordinary value of the land with the building on it its enhanced value in respect of its special fitness for taking water from the river and the user made of it for that purpose must be taken into account, but that the sums paid for the water were not elements in its rateable value.*

*Judgment of the* Divisional Court (49 *W. R.* 619, [1901] 2 *K. B.* 620) *reversed.*

Appeal from the judgment of a Divisional Court (Ridley and Bigham, JJ.) on a case stated by the court of quarter sessions for the Hertford Division of the county of Hertford upon an appeal against a rate whereby the New River Co. were rated in the sums of £787 plus £3,280 gross and £650 plus £3,180 rateable value. The case is reported in 49 W. R 619, [1901] 2 K. B. 620.

1. The history of the New River Co. and of their right to take water from the River Lea is contained in their charter and in the following statutes: 3 James 1, c. xviii.; 12 Geo. 2, c. xxxii.; the Lea Navigation Improvement Act, 1850 (13 & 14 Vict. c. cix.); the River Lea Water Act, 1855 (18 & 19 Vict. c. cxcvi.); the Lea Conservancy Act, 1868 (31 & 32 Vict. c. cliv.); the Lea Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.)

2. Shortly stated, the facts appearing from the said charter and statutes are as follows:

3. The New River Co. were formed under a charter granted in 1618 by King James I. for the purpose of bringing water from certain springs at Chadwell and Amwell, in the county of Hertford, to London.

4. For many years prior to the year 1738 the company had taken considerable quantities of water out of the River Lea, the point of intake being at a place called Chalk Island, in a channel of the River Lea called the Manifold Ditch, from which the water so taken flowed by means of an artificial cutting into the New River.

5. In the year 1738, by the statute 12 Geo. 2, c. xxxii., the company were permitted under section 5 of the said Act to take a specified quantity of water from the River Lea through the Manifold Ditch, and the Manifold Ditch and the water running through it were (by section 11) vested in the company, who were directed (by section 17) to pay to the trustees appointed to carry out the Act two capital sums amounting to £3 250 and two annual sums amounting to £350. All those sums were (by section 18) to be applied to purposes relating to the navigation and purity of the water of the River Lea and the costs of passing the Act. The company were also required by section 3 of the said Act to keep in repair the lock near the Ware Mills.

6. In 1850 the statute 13 & 14 Vict. c. cix. gave the trustees of the River Lea the right to sell surplus water from the River Lea to certain water companies, and the New River Co. for three years made an annual payment of £1,500 for water so purchased by them and supplied at an intake near Tottenham, in the county of Middlesex. The said intake has not been used since the year 1855, but it might still be used.

7. In 1855, by the statute 18 & 19 Vict. c. cxcvi., ss. 4 and 5, the annual payments under the abovementioned statutes ceased, and in lieu of such payments an annual sum of £1,500 and a capital sum of £42,000 were directed to be paid by the New River Co. In return for the said payments and other payments to be made by the East London Waterworks Co. this statute (by section 9) vested in the New River Co. and the East London Waterworks Co. all the water flowing in the River Lea except so much as was required for navigation. The trustees of the River Lea were (by section 43) directed to expend £30,000 of the said capital sum of £42,000 in specified improvements relating to the navigation of that river. The Act also contained provisions for the regulation of the quantity of the water to be taken by the New River Co. from the River Lea through the Manifold Ditch, and required the company to construct a new gauge, which new gauge, with a house or building to contain the same with the requisite machinery, was erected by the company in or about the year 1859 near the point of intake.

8 In 1868, by the statute 31 & 32 Vict. c. cliv., the New River Co. were directed (by section 103) to pay the annual sum of £600 to the Corporation of Hertford, and (by section 131) the New River Co. and the East London Waterworks Co. were directed to pay an additional aggregate yearly sum not exceeding £1,000 (of which the New River Co. were to pay one-third to the Conservators of the River Lea, who, by that Act, became the successors of the said trustees) for purposes therein specified relating to the purity of the water of the River Lea.

9. Since the year 1868 the New River Co. have paid to the conservators of the River Lea, under the said statutes, an annual sum of £1,833 6s. 8d., and have paid to the Corporation of Hertford an annual sum of £600.

10. By the Lea Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.), s. 25, which received the Royal assent on the 30th of July, 1900, from and after the 1st of January, 1901, the aggregate yearly sum payable by the New River Co. and the East London Waterworks Co. under section 5 of the Act 18 & 19 Vict. c. cxcvi. (referred to in paragraph 7 hereof), is to be increased to £8,000, of which £3,750 is to be paid by the New River Co., and from and after the same date the additional aggregate yearly sum payable by the said two companies under section 131 of the statute 31 & 32 Vict. c. cliv. (referred to in paragraph 8 hereof), is to be increased to £2 000, and that section is to be read and construed accordingly.

11. The parish of St. John Urban, in respect of which the rate in question was made, was formed under the Local Government Act, 1894, and comprised a portion of the previously existing parish of St. John, Hertford (the part within the borough of Hertford), and in addition thereto a part of the liberty of Little Amwell (such part as was within the borough aforesaid).

12. From 1876 to 1894 the New River Co.'s property in the said parish of St. John was rated at £350, and in the said liberty of Little Amwell at £500, and those figures had not been materially altered since 1859.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

13. Upon the new parish of St. John Urban being formed the property of the company therein was rated at £350 in respect of that portion which was in the parish of St. John, and at £300 in respect of that portion which was taken from the old liberty of Little Amwell. The portion left in the old liberty of Little Amwell, which had then been constituted the new parish of Little Amwell, was rated at £200. The rating of the property of the company in the new parish of St. John Urban therefore stood at the same valuation as in 1876.

14. Until January, 1900, the said property of the company in the parish of St. John Urban had never been assessed at more than £650 rateable value.

15. In January, 1900, by a supplemental valuation list, subsequently confirmed by the assessment committee, a further sum of £3,180 was added to the rateable value in the assessment of the said property in the occupation of the company under an entry in which the company were rated for property described as "Intake from the River Lee." On the 24th of May, 1900, the rate in question was made in accordance with the said supplemental valuation list. The following is a copy of the said rate:—

| No. | Name of Occupier. | Name of Owner. | Description of Property rated. | Name or Situation of Property. | Estimated Extent. | Gross Estimated Rental. | Rateable value of Buildings, &c. | Amount of Rate at 1s. 2¼d. in the £ on Agricultural Land and 2s. 6d. in the £ on other hereditaments. |
|---|---|---|---|---|---|---|---|---|
| | | | | | a. r. p. | £ | £ | £ s. d. |
| 132 | New River Company | New River Company | Chadwell Spring — portion of New River, gauge-house, sluice, and appurtenances | Kings Meads | 5 2 38 | 787 | 650 | 78 10 10 |
| 653 | New River Company | New River Company | Intake from River Lea | Kings Meads | — | 3,260 | 3,180 | 384 5 0 |

16. The company duly appealed against the said rate, the grounds of their said appeal, so far as they are material to this case, being—(1) that the company were overrated; (2) that the company did not occupy any rateable hereditament in the said parish coming within the description of intake from the River Lea; and (3) that no rateable hereditament coming within that description had any existence in the said parish.

17. The said appeal came on for hearing on the 15th of October, 1900, when the above-stated facts were proved or admitted.

18. It was further proved and admitted that the said sum of £3,180 was arrived at by the professional valuer who made the said supplemental valuation list by taking 4 per cent. upon the capital sum of £42,000 (namely, £1,680) and the annual sum of £1,500 directed to be paid under the above-mentioned statute of 1855, but the assessment committee admitted that, although these sums might be *primâ facie* evidence, they were not necessarily the measure of rateable value.

19. It was also proved that the actual intake from the River Lea consisted of a certain structure with the land upon which it stands, that the company had put a grating across the mouth or opening of the Manifold Ditch, where water issues from the said river, to prevent timber and other things from floating into the intake, and that they had erected posts in the bed of the river to protect the intake, and that they were in occupation of the said posts, and that in and by the item of £650 the said intake, grating, and posts were rated at their full structural value, that the area of the said land was about three poles, and that its annual value as land (apart from its user as an intake) did not exceed £5, which was also included in the said sum of £650. It is at this point that the specified quantity of water which the company are authorized to take from the River Lea enters the Manifold Ditch and flows thence into the New River.

20. For the assessment committee it was contended—(1) That beyond the rating of the intake at its structural value and value as land it ought to be rated in an additional sum as having an enhanced value in respect of the user made of it by taking water from the River Lea into the channel of the company; (2) that the sums of money which the company had paid under the said statutes were evidence that the land and the structure erected thereon had some additional value beyond the structural value thereof in respect of the user made of them as aforesaid, and that such additional value was sufficiently great to support the rate appealed against; (3) that the additional payments directed by section 25 of the Lea Conservancy Act, 1900, were evidence to show what (in the opinion of Parliament at the date of the passing of that Act) the user of the intake was worth to the company.

21. The company contended—(1) That all the rateable property of the company in the parish was already rated in the item £650; (2) that no addition ought to be made to the said assessment of £650 in respect of the water flowing over the said intake or of the user of the intake by such water flowing over it; (3) that the said intake ought not to be assessed upon or with reference to the moneys represented by the item £3,180, which were paid by the company for the purchase of water and the right to divert water from and control the water in the River Lea, or with reference to the sums payable under the said Act of 1900.

The court of quarter sessions dismissed the said appeal.

The question for the court was whether the said hereditament was rateable upon the principle contended for by the assessment committee. If it was so

rateable the judgment was to stand; if not, then either the gross and rateable values were to be reduced respectively to the sums of £787 and £650, or the court was to make such other order herein as it should think just.

The Divisional Court allowed the appeal, and ordered that the rateable value should be reduced as contended for by the company.

The assessment committee appealed.

*Balfour Browne, K.C., Danckwerts, K.C.*, and *Ryde*, for the assessment committee.

*Marshall, K.C.*, and *R. D. Muir*, for the New River Co.

*Cur. adv. vult.*

July 29.—COLLINS, M.R., read the following judgment. This is an appeal from the Divisional Court reversing the decision of quarter sessions on a case stated by them. The question raised is on what principle ought the intake by means of which water passes from the River Lea on to the New River system to be rated. That the intake is a rateable hereditament in the occupation of the New River Co., though disputed before the assessment committee, is not now in controversy, nor can it be questioned that water passes through it in quantities measured by proper appliances on to the New River system. The real question, it seems to me, between the parties is that formulated by the New River Co. in paragraph 21 (2) of the case and answered by the assessment committee in paragraph 20 (1). Those paragraphs are respectively as follows: [His lordship read the paragraphs, and continued:] The case is, however, complicated by additional contentions formulated by each side respectively, while the quarter sessions have stated the question to be whether the said hereditament is rateable on "the principle" contended for by the assessment committee. If the quarter sessions mean by "the principle" that which I have set out above as formulated in the first paragraph of the assessment committee's contentions I should feel no hesitation in adopting it. I think it is right and the counter-contention of the New River Co. wrong. The authorities appear to me to be quite clear on this point. The New River Co. has by statute a very valuable right of appropriating water drawn from the River Lea. It is absolutely necessary for them to get access to the River Lea in order to appropriate that water in the given quantities, and the point at which they take it is fixed by statute, and is presumably the point best adapted to their needs. The land which they occupy for the purpose of securing and passing the water into their system must have an added value by reason of its special fitness for this purpose. If it were the only spot over which they could carry out the diversion and thus achieve the enjoyment of the valuable right conferred upon them, they would obviously be prepared to pay a high rent for its use, and a rate which ignored this element of value would be obviously wrong. This is one of the commonplaces of rating law, and it is not necessary to refer to authorities upon it It is repeated in many cases and is laid down in express terms in the case so much relied upon by the now respondents, *Talargoch Mining Co* v. *St. Asaph Union*, 16 W. R. 860, L. R. 3 Q. B. 478. So much for what seems to be the main point in the case before us.

There remains, however, the complication which I have referred to, and it is introduced by other findings. As appears by the case, large sums have been exacted by successive Acts of Parliament from the New River Co., presumably in return for the privileges conferred upon them. Now it is quite clear that no sum paid for a privilege not annexed to the land proposed to be rated ought to come into the discussion. The case just cited is a clear authority that a sum of money paid for the privilege of diverting a stream is not an element in arriving at the rateable value of the channel into which it was diverted. It is easy to give illustrations showing that this must be right in principle. Suppose a person buys the right to take and carry away all the gold in a given area, and suppose he is obliged to occupy other land in order to reach and carry away the gold. Could the price paid for the right to get the gold away be any element in measuring the rateable value of the land used and occupied as a means of access? Suppose the gradients were such that the ore could be rolled down by its own weight on a tramway across the land so occupied. The price paid for the right to get the gold could not enter into the rating of the tramway, though the value of the privilege would affect the price which the owner would give for the means of access. It was contended for the appellants that the principle of the Amwell spring case—*Rex* v. *New River Co.*, 1 M. & Sel. 503—applied to this, and that water let in laterally by gravitation under the provisions of a statute was just as much an element in the rateable value of the hereditament as water welling up to the surface by the operation of natural laws. But suppose the occupier of adjoining land had bought from the occupier of the land on which the Amwell spring comes to the surface the right to convey it across the land of the purchaser and sell it, would the rateable value of this latter land be measured by reference to the price paid by its occupier for the water? Clearly not, though the land would get an additional value so far as it furnished a convenient channel for carrying the water to its market. The right of the New River Co. here is merely to occupy land suitable for the convenient appropriation of something which is in no sense a part of or annexed to the land occupied, and the sum paid as the price of the water can have no direct bearing on the rateable value of the land occupied for the purpose of most conveniently appropriating it. The quarter sessions, as I have said, have formulated the question as being whether the hereditament is rateable on "the principle" stated by the assessment committee, and if that principle is to be found in the passage I have cited I think it is sound. But the contention of the assessment committee is stated in three paragraphs, of which it is the first, and if all three are meant as expressing "the principle," then I think that, though the payments made were intended to cover elements of rateable value, there is ground for supposing that the sessions have approved the view that the price paid for the water itself is a factor in assessing the rateable value of the hereditament. The assessment committee's second and third contentions are as follows: [His lordship read the contentions, and continued:] The second, perhaps, does not travel outside the true principle, but I think the third undoubtedly does; and having regard to the statement in paragraph 18 of how the figures in the rateable value were arrived at, it seems probable that an inadmissible element was introduced into the calculation. As far as I can follow the reasoning of the Divisional Court, they seem to have proceeded on the basis of structural value only, adopting absolutely the second contention of the New River Co., "that no addition ought to be made to the said assessment of £650 in respect of the water flowing over the said intake or of the user of the intake by such water flowing over it," on the ground apparently that this element formed no part of the structural value. For the reasons I have already given I cannot agree with

this view. I think the standard of structural value is not the true one to apply to such a case. There is an added element of value in this case by reason of the special fitness of the land and structure for a particular profitable purpose. I think the case must go back to the sessions for rehearing and determination in view of our opinion. There will be no costs either here or in the Divisional Court or at quarter sessions.

MATHEW, L.J., read the following judgment: I agree that the case must go back to the court of quarter sessions for rehearing. The assessment committee and the court of quarter sessions appear to have lost sight of the fact that the water diverted from the River Lea was vested in the New River Co. This was provided for by the statute of 12 Geo. 2, c. xxxii., s. 11, and the Act of 1855 (18 & 19 Vict. c. cxcvi.) s. 9. Under the former Act the quantity to be taken was restricted, and provision was made for securing a sufficiency of water for the navigation of the River Lea. For that and other purposes mentioned in the Act the New River Co. was directed to pay two capital sums amounting to £3,250, and two annual sums amounting to £350. These sums were not paid for the use of the intake or entrance into the channel between the River Lea and the New River. The channel and the intake had existed and were used long before the Act passed. The ground for taxing the New River Co. in this way would seem to be the provision which vested in the New River Co. for the purpose of their undertaking the water which they were permitted to take from the River Lea. By the later Act (18 & 19 Vict. c. cxcvi) the sums which the New River Co. were required to pay under the former statute were increased to a capital amount of £42,000, and an annual sum of £1,500. The quantity of water to be taken was restricted and the company were required to construct a new gauge with a house or building to contain it, and proper appliances for measuring the water at the intake. Of the £42,000, £30,000 were to be expended for specified improvements in relation to the River Lea and its navigation. For some years prior to 1900 the New River gauge-house, sluice, and appurtenances were assessed at a sum of £650, which was divided between the parishes in which these different properties of the company were situate. In 1890 the intake from the River Lea was for the first time separately assessed at the sum of £3,180. The way in which this assessment was arrived at is stated in paragraph 18 of the case—four per cent. on the capital sum of £42,000—viz., £1,680, was added to the annual sum of £1,500 directed to be paid under the statute of 1855, and this sum, £3,180, was treated —it is not easy to say why—as the amount which the hypothetical tenant would pay for the intake. It was contended in the argument before us that this assessment ought not to be interfered with. It was urged that the value to the New River Co. of the water passing into the channel should be taken into account. The intake, it was said, was analogous to the spring in the case of *Rex* v. *New River Co.*, and therefore the sum of £3,180 might properly be treated as the annual value of the water passing over the intake from the River Lea. But the hypothetical tenant would have no right to interfere with the flow of water for any other purpose than that of measurement. The analogy of the spring wholly fails, for the owners of the spring would have no independent right to the water, and the value of the water to them would therefore be properly taken into account. Then it was said that the question was one for the justices, and that where the only objection to the assessment was an excessive valuation the court could not interfere. But this argument would justify an arbitrary valuation on an estimate of what an owner might exact if he were free to bar the intake and stop the supply of water to the New River Co. But any such mode of assessment is clearly inadmissible. The intake, it seems to me, is like the junction between the lines of two railway companies. The contention of the assessment committee would lead to this result, that in assessing the point of contract of the two lines, the value of the traffic passing to and from either line should be taken into account and form an element in arriving at the assessable value of the junction. This calculation would have the effect of appropriating to a particular parish a large part of the assessable value of the whole undertaking.

The justices are bound by well-established rules in making their valuations, and are forbidden to admit, as elements of value, matters which are not properly assessable. It is the more important in this case that the justices should be reminded of the conditions upon which assessments can be properly made, because it would seem that, if this valuation be upheld, the amount may be increased to the sums which the New River Co. are bound to pay under the Act of 1900 (63 & 64 Vict. c. cxvii.), s. 25, although those sums are appropriated for the purposes specified in the Act of 1855, and have no relation whatever to that intake. The true mode of assessing the property in question is to ascertain whether the land over which the water of the New River Co. passes from the River Lea has an enhanced value in respect of the user made by the New River Co. In other words, whether its fitness for the purpose for which it was used would justify any and what increase of the rent which a tenant might reasonably be required to pay for the access from the River Lea to the New River. It should be borne in mind that the subject-matter of assessment is like an entrance to a property through a gateway. The land occupied by the gate may be held to be made more valuable by the purpose to which it is put. The court of quarter sessions will be guided by any evidence laid before them, but it would seem that any estimate of entrance value might be moderate in amount.

COZENS-HARDY, L.J.—I have had an opportunity of reading the judgment of the Master of the Rolls, and I entirely agree with it. I do not think it is necessary to add anything to it.

*Appeal allowed, and case remitted to quarter sessions for rehearing.*

Solicitors for the assessment committee, *J. N. Mason & Co.*, for *T. J. Sworder*, Hertford.

Solicitors for the New River Co., *Thompson & Debenhams.*

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From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — July 16, 17, 18, 1902.

BYRNE v. REID. (a.)

*Partnership—Article empowering a partner to nominate and introduce a new partner — Refusal of other partners to accept nominee—Remedies of nominee.*

*Under partnership articles a partner was entitled to nominate and introduce into the firm, for the whole or any part of his share, a son or any other male person. The partner having nominated his son by writing addressed to the other partners, they refused to accept the*

(a.) Reported by H. W. LAW, Esq., Barrister-at-Law.

*son as a partner, and the father accordingly brought an action claiming a declaration that the son was duly nominated and introduced into the firm.*

*Held, on the facts, that the son was validly nominated and introduced, and that under these circumstances the remedy did not lie in damages only, but that the son, though not entitled to specific performance, was entitled to other equitable relief as having become a partner in equity.*

*Discussion by* Stirling, L.J., *as to the relief afforded to partners by courts of equity.*

This was an appeal from a decision of Joyce, J., in an action relating to the admission of a partner into the business of a hay salesman, under a partnership deed of the 19th of September, 1892.

Henry Byrne, who had been a partner under an older partnership agreement, was under the deed of 1892 to be entitled to a nine-twelfths share in the business, and James Reid, Samuel Chalkley, and Ralph Walton Moore, who were then taken into partnership, were each to have a one-twelfth share, with power to acquire each an additional one-twelfth, which in course of time they did.

By clause 29 of the deed, Mr. Byrne was to have the power at any time during the continuance of the partnership term (which was fourteen years) to nominate by will or otherwise and introduce into the firm for the whole or any part of his share in the business and profits, any son or sons on their attaining twenty-one, or any other male person or persons over twenty-one, and the person introduced was thenceforth during the residue of the term to carry on business in partnership with the other partners and to execute a proper deed binding himself to observe the terms and conditions of the partnership. Any person introduced who was in the employ of the firm was to continue to receive his salary.

By clause 31 differences between the partners were to be referred to two arbitrators. The deed also contained provisions to take effect on the death or retirement of Mr. Byrne, by which his share was to be taken over by the remaining partners.

On the 10th of February, 1898, Mr. Byrne communicated in writing to Messrs. Reid, Chalkley, and Moore his nomination as a partner, entitled to one-twelfth, of his son Stanley Byrne, who had been for some years a clerk in the business. The nomination was dated from the address of the firm and ran as follows: "Dear Sir,—In accordance with the articles of partnership I hereby nominate my son Stanley C. Byrne to one-twelfth share of profits of the business carried on as above, and to receive in addition to the salary he is now receiving a further sum which shall amount to £400 per annum.'

On the 15th of February, 1898, Mr. Byrne gave the other three partners written notice of his intention to retire from the partnership. Disputes arose between the partners, and Messrs. Reid, Chalkley, and Moore refused to accept Stanley Byrne as a partner. Mr. Byrne accordingly commenced this action against them and Stanley Byrne as defendants, claiming (amongst other things) a declaration that Stanley was duly nominated and introduced into the firm.

By a consent order dated the 29th of March, 1901, certain questions of fact were directed to be decided by Joyce, J., and other questions were referred to an arbitrator, Messrs. Reid, Chalkley, and Moore by their counsel undertaking to execute all deeds and instruments relating to the admission of Stanley to the business on which parties should agree or which the arbitrator might decide to be necessary to give effect to the decision of the judge. On the hearing of the questions referred to Joyce, J., his lordship held that the nomination of Stanley by Mr. Byrne was a valid one, and that he introduced and was entitled to introduce Stanley into the firm accordingly, and that Stanley did not abandon his right to become a partner, although in view of the refusal of the other partners to accept him he did not actually become a partner. His lordship further held that Mr. Byrne and Stanley were not entitled to have his right to become a partner enforced by an order for specific performance, and that the remedy lay in damages only.

Mr. Byrne and Stanley appealed from this judgment so far as it declared that Stanley never actually became a partner and that the nomination could not be enforced by specific performance, and asked for a declaration that the other defendants were bound to admit Stanley as a partner.

*Younger, K.C.*, and *MacSwinney*, for Mr. Byrne.—The court will enforce this agreement to take Mr. Byrne's nominee into partnership.

They cited *Wainwright* v. *Waterman*, 1 Ves. jun. 311; *Piggott* v. *Bagley*, M'Cle. & Y. 569; and *Stocker* v. *Wedderburn*, 5 W. R. 671, 3 K. & J. 393.

*Hughes, K.C.*, and *Tannar*, for the defendants Reid, Chalkley, and Moore.—Such an agreement as this cannot be enforced specifically. If the other partners object to admit the nominee it is not really to anyone's advantage to enforce it.

They cited *Ehrmann* v. *Ehrmann*, 43 W. R. 125, 72 L. T. Rep. 17.

*A. J. Chitty*, for Stanley Byrne.

VAUGHAN WILLIAMS, L.J.—I have found considerable difficulty in this case, and some of the arguments used could not, I think, be supported. But I have persuaded myself I need not deal with these points, on account of the undertaking at the end of the consent order of the 29th of March, 1901. [His lordship then reviewed the facts of the case, and held on them that Mr. Byrne had duly nominated and introduced Stanley, and that the defendants other than Stanley were bound to comply with the undertaking in the consent order.]

ROMER, L.J., delivered judgment to the same effect.

STIRLING, L.J.—I agree with my learned brethren as to the facts of this case, but I wish to say something as to the questions of law which have been raised during the argument. The first is as to the construction of the 29th article of partnership. [His lordship read this and said that in his opinion it gave Mr. Byrne the right to nominate Stanley, who on accepting the nomination was entitled to carry on the business in partnership with the other partners, and further, that the nomination of the 10th of February, 1898, was a valid nomination.] On the question of the effect of this nomination the only real authority seems to be the passage in the judgment of the Lord Chancellor in *Lovegrove* v. *Nelson*, 3 Myl. & K. 1, dealt with by Lord Lindley at p. 368 of his book on partnership (6th ed.). This passage is as follows: "To make a person a partner with two others their consent must clearly be had, but there is no particular mode or time required for giving that consent, and if three enter into partnership by a contract which provides that on one retiring one of the remaining two, or even a fourth person who is not a partner at all, shall name the successor to take the share of the one retiring, it is clear that this is a valid contract which the court must perform, and that the new partner would come in as entirely by the consent of the others as if they had adopted him by name." And Lord Lindley says: "If partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement. Persons who enter into

such an agreement consent prospectively and once for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission. Such an agreement as this is the basis of every partnership the shares in which are transferable from one person to the other. Those who form such partnerships, and those who join them after they are formed, assent to become partners with anyone who is willing to comply with certain conditions." I think, in this case, Stanley Byrne became, in the eye of a Court of Equity, a partner, and entitled to equitable relief as such. This relief does not as a general rule include specific performance of an agreement to become a partner; but there are other forms of equitable relief which are applicable, such as an injunction to prevent one partner from excluding another; or an account, or the execution of any necessary and proper deeds for defining the interests of the partners, or for giving effect to them; and lastly, there is the relief of dissolution in a proper case. Having regard to the consent order, we have here only to consider the facts and the question whether there are any deeds or instruments which may have to be executed with reference to the introduction of Stanley into the business. I think it is clear that Stanley, in accordance with the 29th article, must execute a deed binding himself to observe the terms and conditions of the partnership; and further, that there are other deeds to the execution of which by the other partners he will be entitled. The arbitrator may say that they ought to execute a deed more clearly defining the relationship between the partners as in *England* v. *Curling*, 8 Beav. 129; and in *Page* v. *Cox*, 10 Hare 163, Turner, V.C., held that under articles empowering the widow of a partner to carry on the business with the survivor a trust was created attaching to the partnership property. So here, I think, such a trust is created, to which Stanley is entitled to have effect given by a document vesting the legal title to the property in him to the extent of his share. In my opinion, therefore, Stanley is entitled to some other relief of this kind, and not to damages only, and the appeal must be allowed.

*Appeal allowed.*

Solicitors, *Wood & Sons; Letts Brothers; Oliver, Richards, Parker, & Byrne.*

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Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 11, 1902.

MORTON & Co. *v.* WOODWARD. (*a.*)

*Master and servant—Employers' liability—Accident—Compensation—Review of weekly payment—Termination of incapacity—Jurisdiction of arbitrator—Workmen's Compensation Act,* 1897 (60 & 61 *Vict.* c. 37), *Schedule I.* (12).

*Where, in proceedings under the Workmen's Compensation Act,* 1897, *an arbitration is instituted by the employers, under paragraph* 12 *of the First Schedule to the Act, for the purpose of ending a weekly payment, on the ground that the incapacity of the workman has ceased, it is the duty of the arbitrator to consider the question when the incapacity ceased. The jurisdiction of the arbitrator is not limited to the making of an award to take effect from the date of the award.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from an award of the judge of the Liverpool County Court in an arbitration under the Workmen's Compensation Act, 1897.

The arbitration in this case was instituted by the employers under paragraph 12 of the first schedule to the Act.

The workman, John William Woodward, who was was employed as a riveter, met with an accident in the course of his employment on the 14th of May, 1901, which resulted in serious injury to his left eye. No question was raised by the employers as to the workman's being entitled to compensation under the Act, and on the 28th of August an agreement was entered into between the employers and the workman for a weekly payment by them to him of 18s. 3d., being half the amount of his weekly wages before the accident, during his incapacity or until the said weekly payment should be ended, diminished, or redeemed. A memorandum of this agreement was filed in the county court on the 13th of September. In the meantime the employers, having come to the conclusion that the workman's incapacity was ended, and that he could return to his work and earn wages, had called upon him to be examined by a medical man on their behalf.

He was so examined on the 2nd of September, and the medical certificate was to the effect that he had completely recovered from the effects of the accident and was able to resume his former duties.

He did not go back to his work, and on the 12th of November the employers, who had up to that date continued to pay him the agreed weekly sum, filed a request for arbitration under paragraph 12 of the first schedule to the Act, asking that the weekly payment might be reviewed and ended.

The hearing of the arbitration commenced before the county court judge on the 13th of December, when the employers put in the certificate of their own medical man. The workman declared himself to be dissatisfied with this certificate, and the county court judge, after expressing an opinion that the medical evidence was insufficient, proceeded to act under paragraph 11 of the first schedule and paragraph 13 of the second schedule to the Act, and ordered that the workman, who was prepared with medical evidence on his own behalf, should be examined by one of the medical referees appointed by the Secretary of State. The question on which the county court judge asked for a report was whether John William Woodward had now fully recovered from the accident, and was quite fit for work and able to follow his employment.

The workman was examined by Mr. Shears, one of the medical referees, who made a report on the 2nd of January, 1902, as follows: "John William Woodward's remaining right eye has good sight and is free from disease. In my opinion a one-eyed man runs a slight additional risk to this eye in a dangerous occupation, such as that of a boiler-maker. If, however, the parties concerned have decided to incur this slight risk, I see no reason why J. W. Woodward should not at once return to his former occupation. I am of opinion that for some weeks J. W. Woodward will not be restored to his full earning capacity, and for the following reason: Owing to the loss of one eye he will have difficulty in correctly judging of the distance of objects. This would particularly apply to the striking of a rivet with a hammer, but with practice this awkwardness would disappear, and he will learn to correctly judge of distances with his one eye. As a one-eyed man he would probably experience more difficulty in obtaining work from new employers."

On the 11th of April, 1902, the case came again before the county court judge, when the workman

said that his condition was the same as it had been when he was examined by the medical referee and when he was first examined on the 2nd of September, and the employers expressed their willingness to take him back at full wages.

The county court judge declined to hear medical evidence on behalf of the workman, and made the following award: "I find that the respondent, John William Woodward, has been since the 2nd of September last and now is able to earn the same amount of wages as he had earned previously to the accident mentioned in the application for arbitration herein, and I order that the weekly payment of 18s. 3d. payable to the respondent under the above-mentioned Act under or by virtue of an agreement come to between the applicants and the respondent on the 28th of August, 1901, and a memorandum of which agreement dated the 3rd of September, 1901, was duly recorded at this court on the 13th of September, 1901, in respect of personal injury caused to the respondent by accident arising out of and in the course of his employment, be diminished to the weekly sum of one penny as and from the 16th of April instant, but this award is made without prejudice to the rights and remedies of the respondent under the said agreement for the arrears of the said weekly payments up to the said 16th of April instant inclusive."

Paragraph 11 of the first schedule to the Act is as follows: "Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the second schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submt himself to such examination, or in any way obstructs the same, his rights to such weekly payments shall be suspended until such examination has taken place." Paragraph 12 is as follows: "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

The employers appealed from the award of the county court judge, and there was also a cross-appeal on the part of the workman.

*Ruegg, K.C.*, and *Leslie Scott* (*Denis O'Conor* with them), for the employers.—Compensation is only payable during incapacity, and the evidence is clear that the workman's incapacity had come to an end on the 2nd of September, 1901. Even if the certificate of the employers' medical man is not conclusive on that point, the certificate of the medical referee is conclusive to show that incapacity had ceased on the 2nd of January, 1902; and at the second hearing before the county court judge, on the 11th of April, 1902, the workman himself admitted that he was then and had been all along in the same condition as on the 2nd of September. The award, therefore, ought to have been that the weekly payment should be diminished as from the 2nd of September. Secondly, at any rate the payment should have been diminished as from the 12th of November, 1901, the date when the proceedings to review the payment commenced. The question which has arisen between the parties is whether the incapacity has ceased. By section 1, sub-section 3, of the Act that question, having arisen in proceedings under the Act, had to be settled by arbitration. The question, therefore, for the arbitrator to determine was whether the incapacity had ceased at the time when the arbitration commenced. It was not competent to the county court judge to award the workman compensation for several months after his incapacity ceased. The learned judge made the mistake of thinking himself bound by paragraph 12 to order the payment to be diminished as from a date not earlier than his award. But the words "during the incapacity" in paragraph 1 (*b*) governs the whole of the schedule.

*J. E. Bankes, K.C.*, and *Lord*, for the workman.—The award of the county court judge is right. The workman, however, has given notice of cross-appeal in case the court should accede to the argument put forward on the part of the employers. The certificate of the medical referee, when carefully read, shows that the workman's wage-earning capacity had not been fully restored at the time when that certificate was given. The county court judge had no right to reject the certificate of the medical referee and accept the former certificate of the employers' medical man. The learned judge was informed that doctors were ready to be called on each side, and that they did not agree as to the man's condition, but he did not hear the evidence of those doctors. Admitting that the certificate of the medical referee amounted to a certificate that incapacity had ceased, paragraph 11 only makes that certificate conclusive evidence of the man's condition at the date of the examination; it is not conclusive as to his condition at any other date, either before or after the examination. There was no evidence before the county court judge on which he could properly find that the workman was able on the 2nd of September to earn the same amount of wages as he had earned before the accident.

COLLINS, M.R.—In this case the workman, who was a riveter in the employment of the applicants, met with an accident on the 14th of May, which resulted in the loss of one eye. The employers at once began to pay him compensation, and the parties came to an agreement for the payment or a weekly sum during incapacity, and that agreement was duly registered. But a time came when the employers considered that the workman was fully restored to capacity for earning wages, and on the 12th of November, 1901, they made an application, under paragraph 12 of the first schedule to the Workmen's Compensation Act, for an order that the weekly payment might be stopped. At the hearing before the county court judge, which took place in December, it appeared that the workman had on the 2nd of September, 1901, submitted himself to a medical examination by a doctor on behalf of the employers. The examination resulted in a report by the doctor certifying that the workman had completely recovered from the effects of the accident and was able to resume his former duties. That result, however, had not been communicated to the workman. The report was read to him at the hearing, and in answer to the county court judge he expressed his dissatisfaction with it. The learned judge, being of opinion that the medical evidence was insufficient, made an order for a report to be made to him as to the workman's condition by one of the medical referees. The medical

referee was unable to make his report till the 2nd of January, 1902. He then gave his certificate, in which, after pointing out that there were certain lingering incapacities in the workman, or at any rate certain drawbacks to full capacity for work, he expressed the opinion that after a short interval he would by practice be able to do his regular work notwithstanding the loss of one eye. The matter came on again before the county court judge in April, when he arrived at the conclusion which he has embodied in his award. [His lordship read the award.] It is alleged on the part of the employers, and I think it is clear from the terms of the award, that the county court judge was of opinion that he had no jurisdiction to deal with the question at what date the incapacity ceased before the hearing. I think he was wrong in so holding. The question in dispute between the parties was whether at the date when the employers commenced proceedings to end the weekly payment the workman was incapacitated. The court did not escape the duty of deciding that question because the hearing was postponed. It is true that the certificate of the medical referee, though it was by law conclusive evidence of the condition of the man at the time of the examination, was not necessarily conclusive evidence of his condition at an earlier date. But it was essential to consider the date when the dispute as to whether incapacity had ceased was first formulated. The compensation was to be paid during incapacity. It was therefore necessary that the county court judge should address his mind to the question when the incapacity ceased, and this he does not appear to have done. He says in his award that the incapacity had ceased at the date of the certificate of the employers' doctor, but at the first hearing he held that that certificate was insufficient evidence. Therefore, unless the parties can come to some agreement, the case must go back to the county court judge in order that he may ascertain at what date the incapacity ceased.

MATHEW and COZENS-HARDY, L.JJ., concurred.

*Case remitted.*

Solicitors for the employers, *W. Hurd & Son*, for *Oliver Jones, Billson, & Co.*, Liverpool.

Solicitors for the workman, *Helder, Roberts, & Co.*, for *H. F. Neale*, Liverpool.

## High Court of Justice.

Chan. Div. } July 1, 7, 1902.
Byrne, J. }

DELVES *v.* GRAY. (*a.*)

*Vendor and purchaser—Trustees with power of sale—Resale before completion to trustee—Specific performance—Damages—Substitution of name of purchaser's nominee in conveyance for name of purchaser.*

*A purchaser from co-trustees is not entitled to resell to one of such co-trustees while the original contract remains executory, nor will such purchaser be entitled under such circumstances either to specific performance or damages against the trustee to whom he has agreed to sell, nor independently of contract to have such trustee's name inserted in the conveyance in the place of his own.*

Trial of action.

This was an action for specific performance, in which the plaintiffs, who had been appointed by an order of the High Court trustees for the purposes of the Settled Land Acts, 1882-1890, of certain copyhold premises known as Mount View, in the village of Frant, in the county of Sussex, and were exercising the powers of a tenant for life under the said Acts on behalf of an infant, claimed specific performance of a contract for the sale of the same dated the 17th of January, 1902, against the defendant Mr. George Gray.

Gray counterclaimed for specific performance of a contract dated the 17th of February, 1902, between himself and David Delves, one of the plaintiffs, for the purchase by Delves from him of the same premises, or, in the alternative, damages.

The facts of the case were as follows: Under an order of the Chancery Division of the High Court, bearing date the 12th of December, 1901, the plaintiffs were empowered to sell the property, a reserve price having been fixed by the court. The defendant attended the sale and bought the property for £800. Afterwards, when the title had been investigated, the defendant discovered that there would be a considerable fine payable on admission and that enfranchisement would be expensive. He accordingly induced Delves to agree to sub-purchase the property from him for the sum of £800. His solicitors thereupon requested the plaintiff's solicitors to insert Delves' name in the assurance of the premises for his own. This the plaintiffs' solicitors, on Delves' behalf, refused to do, and the plaintiff Delves further, in his defence to the counterclaim, claimed relief upon the ground that the performance by him of the said agreement would involve him in a breach of trust.

*Levett, K.C.*, and *Jolly*, for the plaintiffs.

*Norton, K.C.*, and *Hon. M. Macnaghten*, for the defendant.—The fact that the person who contracts to purchase is a trustee, as is the plaintiff Delves, is no reason why a decree for specific performance should not be made against him. A trustee under such circumstances may purchase subject to the liability of having the matter reopened by his *cestui que trust*. Anyway the defendant is entitled to have Delves' name substituted for his own in the assurance of the premises.

*Levett, K.C.*, replied.

The following cases were referred to in the argument: *Ex parte Hughes*, 6 Ves. 617; *Campbell* v. *Walker*, 5 Ves. 678; *Williams* v. *Scott*, 49 W. R. 33, [1900] A. C. 499; *Parker* v. *McKenna*, 23 W. R. 271, L. R. 10 Ch. App 96.

BYRNE, J.—For the purposes of the present case it does not appear to me to be material to consider whether or not the position of a trustee for sale in reference to the purchase of the trust property is defined with absolute logical accuracy in the phrase most frequently used—namely, that a trustee for sale cannot purchase from himself nor from himself and his co-trustee or co-trustees, because I find a sufficient statement of the law applicable to the circumstances of the present case in the judgment of Mellish, L.J., in *Parker* v. *McKenna*, L R. 10 Ch. App., at p. 125, which is as follows: "The main question appears to me to depend upon this, how far a trustee or agent for sale is precluded from purchasing from his own purchaser the property which he is entrusted to sell. In my opinion, as long as the contract remains executory, and the trustee or agent has power either to enforce it or to rescind or alter, as long as it remains in that state he cannot repurchase the property from his own purchaser except for the benefit of his principal. It appears to me that that follows from the established rule that he cannot purchase the property on his own account."

Then, also, in the judgment of the Privy Council

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

in *Williams* v. *Scott*, [1900] A. C., at p. 507, Sir Ford North, in giving the opinion of their lordships, says, after dealing with the facts of the case, which is a somewhat complicated one: "It may be that the true account of the transaction is that suggested in the letter of the 9th of January, 1899—namely, that after John Austin had instructed to buy he desired to get rid of the purchase, and David Austin" (who was trustee) "agreed to take the land off John's hands and stand in his place and relieve him of his contract. This might account for the form of the conveyance. But this, it will be observed, is quite a different thing from an affirmance of John's contract to John, and a subsequent sale by John as owner to David, the state of facts to which Mr. White deposes. If these were the true facts, the transaction would be invalid upon a different ground—namely, that so long as the contract with John was executory only, and John had neither paid his purchase-money, nor taken up his conveyance, and the trustees, who were vendors, had power either to enforce, rescind, or alter the contract, it was not competent for David Austin to slip into John Austin's place or take over John Austin's contract for his own behalf: see *Parker* v. *McKenna*."

I have to deal with an action brought by trustees for the purposes of the Settled Land Acts selling in the exercise of the powers of a tenant for life, on behalf of an infant under an order of the court, and the relief sought is specific performance of a contract to purchase certain copyhold property. There is also a counterclaim by the purchaser asking for specific performance or damages against David Delves, one of the plaintiff trustees, as sub-purchaser from the defendant. The matter still rests in contract, because the purchaser refuses to accept a proper assurance from the plaintiffs and claims the right to have the name of the plaintiff Delves substituted for his own. This is no answer to the action unless the defendant can establish the counterclaim. The short facts are that, after the defendant had agreed to purchase, he found out that there would be a fine payable on admission, which was considerable in proportion to the value of the property, and that the enfranchisement would be very expensive, and he persuaded the plaintiff Delves to enter into a contract to purchase from him, at the same price, and on the same terms, except that a very considerable proportion of the purchase-money was to remain on mortgage at 4 per cent. There is no mistake as to the meaning or intention of the second transaction. The defendant Gray said, in the course of his cross-examination: "My idea was that I was to lend Delves £700, and he was to take my place." Delves acted in good faith, but he was properly advised by his solicitors that, being a trustee, he could not purchase the trust property, and declined to allow his name to be inserted in the assurance as purchaser instead of Gray. I think that Gray is bound to complete his contract, and judgment must go against him in the action. He is not in a position to enforce specific performance against Delves, not being able to confer upon him a marketable title, nor is he entitled to damages. In law he must be deemed to have known that Delves was incapable of purchasing under the circumstances.

It was suggested that, independently of the contract, Gray, as purchaser, was entitled to have the name of Delves inserted in the assurance as his nominee, acting on the general practice that a purchaser may, in ordinary cases, take a conveyance to a nominee for himself; but I know of no principle or authority, which compels vendors to convey to one of their own number who declines to accept the nomination, and under circumstances which may certainly expose them to the risk of the suggestion of being parties to a breach of trust hereafter. The counterclaim must be dismissed with costs.

[On his lordship's being asked to state that he dismissed the counterclaim without prejudice to any claim against Delves that the defendant might think proper to bring after the completion of the purchase, his lordship refused to put into the order any statement to that effect, observing that he had dealt only with the claim raised on the defendant's part, and did not wish to say more than was necessary to decide the point. At the same time his lordship considered that Delves' contract was one which, if he wished to complete, the court might, with a little alteration, approve.]

*Judgment for plaintiff; counterclaim dismissed.*

Solicitors, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *W. E. Cripps, Son, & Daish*, Tunbridge Wells; *Collyer-Bristow, Hill, Curtis, & Dods*, for *Stone, Simpson, & Mason*, Tunbridge Wells.

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Chan. Div.
Farwell, J. } July 29, 1902.

*In re* ACCLES (LIMITED).
HODGSON *v.* ACCLES (*a.*)

*Company—Debenture-holder's action—Sale by order of court—Purchase-money in court—Trustees' remuneration.*

*Trustees for debenture-holders who by the terms of their trust deed are entitled to remuneration, to be paid by the company, are not, in the absence of express provision in the trust deed, entitled to be paid such remuneration in priority to the debenture-holders, out of proceeds paid into court of a sale of the mortgaged property, in a debenture-holder's action.*

Further consideration.

This action, which was commenced on the 23rd of April, 1898, was brought by the plaintiff on behalf of himself and all debenture-holders of Accles (Limited) in order that the property comprised in the debenture-holders' security might be realized.

A receiver having been appointed, and judgment having been obtained, the property comprised in the security was, by a further order of the 16th of January, 1899, ordered to be sold.

After an abortive attempt at sale by public auction, the property was sold by private treaty and the purchase-money was paid into court.

After certain payments, including a dividend of 12s. 6d. in the pound to the debenture-holders, had been made thereout, a summons for further consideration was issued.

The proposed minutes of the order to be made on further consideration provided for the payment to the trustees for the debenture-holders of certain sums claimed by them as remuneration under the provisions of the trust deed.

The balance of the purchase-money being insufficient to meet the claims of the debenture-holders, certain debenture-holders, who were not parties to the action, attended by their solicitor before the the master and objected to these proposed payments on the ground that the debenture-holders were entitled to be paid the amount due to them in priority to the trustees. The summons was adjourned to the judge, and by him into court for the determination of this question. The clause in the trust deed under

(*a.*) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

which the trustees claimed their remuneration provided that the company should pay to each of the trustees certain sums as and by way of remuneration for their services, and that the trustees should be at liberty to accept such remuneration.

Clause 35 of the debenture trust deed was as follows: "The trustees and every receiver, attorney, manager, agent, or other person, appointed by the trustees hereunder shall be entitled to be indemnified out of the mortgaged premises in respect of all liabilities and expenses incurred by them in the execution of the trusts hereof, or of any powers, authorities, or discretions vested in them or him pursuant to these presents, including liabilities and expenses consequent on any mistake, oversight, error of judgment, forgetfulness, or want of prudence on the part of the trustees or any such appointees, and against all actions, proceedings, costs, claims, and demands in respect of any matter or thing done or omitted in anywise relating to the premises; and the trustees may retain and pay out of any moneys in their hands upon the trusts of these presents the amount of any such moneys and also the remuneration of the trustees as hereinbefore provided.

*Waggett*, for the trustees, relied upon the practice in such cases, which is thus stated in Palmer on Debentures, p. 81: "Where an action is brought to enforce the debentures or debenture stock the remuneration allowed to trustees is always provided for out of the trust premises."

*S. Dickinson*, for the executors of a deceased trustee.

*Austen Cartmell*, for the objecting debenture-holders.—The right of the trustees is only to be paid by the company or out of trust property which is actually in their own hands.

FARWELL, J.—In my opinion this remuneration cannot be given. There is in the trust deed a contract by the company that it will pay the remuneration, but I find no contract by the debenture-holders that they will pay it, and no contract that it shall be paid out of the mortgaged property. It is provided by clause 35 of the trust deed that the trustees may retain the amount of their remuneration out of moneys in their hands; but this gives them no hold upon the moneys in court, and, in my opinion, the other part of this clause is fatal to their contention, for it provides that the trustees shall be entitled to be indemnified, out of the mortgaged premises, for liabilities and expenses incurred by them, but stops short of saying that they shall be entitled to their remuneration out of the mortgaged premises. The relation of trustee to *cestui que trust* implies that the trustee shall be indemnified for his expenses, but excludes remuneration of the trustee except by express contract, and I cannot extend this contract.

Solicitors for debenture-holders other than the plaintiff, *Pritchard, Englefield, & Co.*, for *Court*, Liverpool.

Solicitors for plaintiff and for the trustees, *Wilson, Bristows, & Carpmael.*

Solicitors for the representatives of a deceased trustee, *Broughton, Nocton, & Broughton.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) } Oct. 30.

THOMAS (*Appellant*) *v.* PRITCHARD (*Respondent*). (*a.*)

*Inland Revenue — Excise — Practice — Costs under the Summary Jurisdiction Acts — Power to grant to Crown — Finance Act* (61 & 62 *Vict. c.* 10), *s.* 4—*Summary Jurisdiction Acts*, 1848 (11 & 12 *Vict. c.* 43), *s.* 18, *and* 1879 (42 & 43 *Vict. c.* 47), *s.* 53.

*In pursuance of section 53 of the Summary Jurisdiction Act*, 1879, *which provides that prosecutions under the excise laws are to be governed by the Summary Jurisdiction Acts, costs can now be awarded to and against the Crown in cases under those laws.*

Case stated by magistrate.

The special case set out the following facts: At the Town Hall, Cardiff, an injunction was preferred against the respondent by one Edgar Thomas, one of his Majesty's officers of Inland Revenue under the Finance Act, 1898 (61 & 62 Vict., c. 10), s. 4, for having on his premises on the 13th of January, 1902, a cask which was being subject to a process for the purpose of extracting spirit absorbed in the wood thereof. The information was heard on the 28th of February, when the magistrate found the offence proved, and fined the respondent £5 without costs. The solicitor for the appellant applied for costs, but the magistrate refused to grant them, but consented to state a case.

By section 18 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), it is provided: "And be it enacted that in all cases of summary conviction . . . it shall be lawful for the justices or justice to award and order in and by such conviction and order that the defendant shall pay to the prosecutor or complainant respectively such costs as to the justices or justice shall seem just and reasonable in that behalf, and in cases where such justices or justice instead of convicting . . . shall dismiss the information or complaint, it shall be lawful for him or them in his or their discretion . . . to award and order that the prosecutor or complainant shall pay to the defendant such costs as to such justices or justice shall appear just and reasonable."

Section 35 of the same Act provides (*inter alia*) "That nothing in this Act shall extend or be construed to extend to any information or complaint or other proceeding under or by virtue of any of the statutes relating to her Majesty's revenue of excise or customs, stamps, taxes, or post office."

Section 53 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), proceeds (*inter alia*): "That the Summary Jurisdiction Act shall, notwithstanding any special provisions to the contrary contained in any of the statutes relating to her Majesty's revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs, apply to all informations, complaints, and the proceedings before a court of summary jurisdiction under or by virtue of any of the said statutes."

The magistrate refused to make an order as to costs on the following grounds:

1. That the Finance Act, 1898 (the statute creating the offence), makes no provision for the payment of costs to the Crown.

2. That section 53 of the Summary Jurisdiction Act, 1879, makes no provision for payment of costs to the Crown, but simply applies the procedure of the Summary Jurisdiction Acts to informations, complaints, and other proceedings which a court of

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

summary jurisdiction has jurisdiction to hear and determine under the "statutes relating to her Majesty's revenue under the control of the Commissioners of Customs.

3. That section 18 of the Summary Jurisdiction Act, 1848, is general in terms, and does not expressly provide for the payment of costs to the Crown.

4. That a general rule of law authorizing costs to be given between subject and subject does not override the rule of law that the Crown neither pays nor receives costs: *Reg.* v *Beadle*, 5 W. R. 498, 7 E. & B. 492.

5. That in cases where it is intended that the Crown shall receive or pay costs the Legislature signifies such intention by express enactment: *cf.* 16 & 17 Vict. c. 107, s. 263, and 18 & 19 Vict. c. 90.

The question for the opinion of the court was whether a court of summary jurisdiction upon convicting a person of an offence under the Finance Act, 1898, had power to order him to pay costs in addition to the fine.

*Sir E. Carson, S.G.* (*Rowlatt* with him), for the Crown.—The statute of 1848 gave costs in all cases under the Summary Jurisdiction Acts, and section 35 of that Act excluded prosecutions under the Inland Inland Revenue Acts from the scope of the Acts. Then there came section 53 of the Act of 1879, which provided that the Summary Jurisdiction Acts should apply to Inland Revenue cases. Therefore you have an express enactment applying the Summary Jurisdiction Acts to these cases, and the Crown is entitled under those Acts to receive costs. The case is governed by *Moore* v. *Smith*, 7 W. R. 206, 1 E. & E. 597.

*Holman Gregory*, for the respondent.—I admit the proposition that this case turns on the construction of section 53 of the Act of 1879, but that section only brings the Crown under the general law in respect of matters of procedure and does not override the rule that the Crown does not pay or receive costs except in cases where costs are given by statute. *Moore* v. *Smith* applies only to informations in the High Court. This case is governed by *Reg.* v. *Beadle*.

*Sir E. Carson* replied.

Lord ALVERSTONE, L.C.J—This case is not free from difficulty. It is a rule of law that the Crown is not bound by an Act of Parliament unless express words or words clearly implying that it should be are inserted in the statute. This principle is illustrated by two cases, both of which have been cited to us. In the first, *Reg.* v. *Beadle*, the court came to the conclusion that the words of the statute which was there being considered were not sufficient to bind the Crown, and that an order made against it for costs could not be supported. In *Moore* v. *Smith* the court came to the opposite conclusion and found that the words of 20 & 21 Vict. c. 43, which made the Crown a party to certain informations, were sufficient to enable it to receive costs under that Act. Lord Campbell, who was party to both judgments, laid it down in his judgment in the latter case that express language was not necessary to bind the Crown, and Crompton, J., agreed with him.

In the present case there are two important Acts. The first is the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). In that Act express words were inserted to except excise and revenue cases from the operation of the Summary Jurisdiction Acts In that state of things the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), was passed. By section 53 of that Act the special exemption of the Crown in respect of excise and revenue prosecutions, contained in the Act of 1848 are repealed. The Crown is there referred to in terms, and in order to establish the respondent's case he has to say that the provisions of the Summary Jurisdiction Acts as to costs do no apply to the Crown. I think it was intended by the framers of this Act that the Crown should get costs, and that this was one of the cases in the mind of Wright, J., in his judgment in *In re Archbishop of Canterbury*, 50 W. R. 476, [1902] 2 K. B. 503, at p. 573.

I only wish to add that this case shows the absolute necessity for legislation on the subject.

WILLS and CHANNELL, JJ., concurred.

*Appeal allowed.*

Solicitor for the appellant, *Solicitor to the Inland Revenue.*

Solicitors for the respondent, *Riddell & Co.*, for *Lewis, Morgan, & Co.*, Cardiff.

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K. B. Div. (Bigham, J.) June 22, 26; Aug. 7, 1902.

GLAMORGANSHIRE COAL CO. (LIMITED) AND OTHERS v. SOUTH WALES MINERS' FEDERATION AND OTHERS. (*a*.)

*Trades union—Master and workman—Procuring breach of contract of service—Whether malice essential to illegality.*

*It is not unlawful for workmen to induce their fellow-workmen to break a contract of service if it be done* bonâ fide *and without any desire to injure the master.*

*In* 1901 *the South Wales Miners' Federation issued a manifesto ordering the men to stop work on certain days known as "stop days." This action occasioned great damage to the masters, but was induced by the workmen's* bonâ fide *belief that the price of coal would be thereby raised. In an action for damages by the masters,*

*Held, that no action would lie, as it was an essential element of an action in respect of procuring a breach of contract that actual malice should be proved against the defendant.*

This action was first set down before Bigham, J., and a special jury, but during the third day of hearing the jury were discharged, and it was agreed that the whole matter in dispute, including the amount of damages to be awarded in the event of the plaintiffs succeeding, should be decided by the judge without a jury.

The plaintiffs were the Glamorgan Coal Co. (Limited) and seventy-three other companies and colliery owners, members of the South Wales Coal Owners' Association, and the action was brought against the executive officers and trustees of the South Wales Miners' Federation to recover damages to the amount of £100,000, on the ground that the defendants or their agents had wrongfully or maliciously induced the miners in the plaintiffs' employ to commit a breach of their contract under the sliding scale agreement.

The plaintiffs further asked for an injunction restraining the defendants from committing similar acts in the future, and a declaration that the property and funds of the federation were liable for such costs and damages as might be awarded in the present action.

The fact that the miners had broken their contract was not denied by the defendants, but it was denied that the defendants had induced them to

(*a*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

do so. In the alternative, the defendants said that if their servants had induced the miners to commit a breach of a contract, that the notices sent out to the miners were sent out by the men's representatives on the sliding scale committee, and that the object of ordering the stop-days was to raise the price of coal, which would be equally to the benefit of the plaintiffs and defendants, and not with the object in any way to injure the plaintiffs.

It was also contended that the Federation could not *per se* be guilty of the acts complained of, and therefore could not be sued in the action, and that the acts of the men's representatives on the sliding scale committee were not wrongful, but were legally justifiable.

*Sir E. Clarke, K.C., B. F. Williams, K.C., Montague Lush, K.C.*, and *Trevor Lewis*, for the plaintiffs.

*Rufus Isaacs, K.C.*, and *Holman Gregory*, for the defendant federation.

*S. T. Evans, K.C.*, and *Bailhache*, for the sliding scale committee.

The facts and arguments of the case appear sufficiently from the judgment.

Aug. 7.—BIGHAM, J., read the following judgment: This is an action brought by the Glamorgan Coal Co. (Limited) and seventy-three other plaintiffs against the South Wales Miners' Federation, its trustees, its officers, and a number of members of its executive council, to recover damages for wrongfully and maliciously procuring and inducing the workmen in the plaintiffs' collieries to break their contracts of service with the plaintiffs. In the alternative the plaintiffs also sue the defendants for wrongfully, unlawfully, and maliciously conspiring together to do the acts complained of. The plaintiffs claim both damages and an injunction. The defence consists of denials of the material allegations in the statement of claim, and of a plea that the acts complained of were done, if at all, with reasonable justification and excuse. The case came on to be tried before me with a special jury on the 22nd of July last, but after the trial had lasted three days the jury was discharged, and all questions of law and fact, as well as the ascertainment of the damages, if any, were by consent left to me. The facts I find as follows: The plaintiffs are seventy-four limited liability companies associated together for the protection of their own interests under the style of the Monmouthshire and South Wales Coal Owners' Association. They work upwards of 200 collieries in the South Wales district, and in these collieries they employ about 100,000 men. The defendants are, first, the men's federation, a body registered under the Friendly Societies Acts; secondly, the trustees of the federation; thirdly, Mr. Brace (the vice-president), Mr. Onions (the treasurer), and Mr. Richards (the secretary of the federation); and lastly, six men, who are members of the executive council of the federation, and who are also members of workmen's half of a body known as the Joint Sliding Scale Committee, to which I shall have to refer later on. The trustees are joined as defendants merely in order to enable the plaintiffs to reach the funds of the federation in the event of a judgment being recovered for damages against that body. It appears that for the last twenty or twenty-five years the masters and the men in the South Wales colliery district have worked together under an agreement, called the sliding scale agreement, by which the rate of wages paid to the men is made to depend on the price for the time being of a certain agreed class of coal. That is to say, as the price of such coal rises or falls, so the rate of wages moves up or down. It is thus to the interest, not only of the masters, but also of the men, to keep up the price of coal, but at the same time not to drive it up to such a point as will unduly interfere with the demand. Against the producers of coal there are always arrayed a number of coal dealers, known as merchants or middlemen, who buy coal to be shipped to foreign ports, or for resale in the South Wales market. The interest of those men is, of course, to keep down prices, so that they may buy as cheaply as possible. They frequently sell large quantities of coal for forward delivery at prices below those current for immediate delivery, trusting to supply themselves later on by purchases from one or other of the many collieries at prices which will make their bargains remunerative. This has the effect of depressing the market, and on more than one occasion, and particularly in the years 1896 and 1897, the masters and men have tried together to devise some scheme to so regulate the output of the miners, by means of stop days or otherwise, as to counteract this effect. There has, however, always been a difficulty in getting a sufficient number of the colliery proprietors to fall in with any scheme having for its object the restriction of output, and thus nothing has been done. On the 1st of April, 1898, a strike broke out in the South Wales district, and the collieries were closed from that date to the 31st of August. On the 1st of September work was resumed throughout the district. At the collieries of forty-seven of the plaintiff companies it was resumed under an agreement which embodied the old sliding scale. By this agreement it was provided that a joint committee of masters and men should be formed, which should be called the Joint Sliding Scale Committee; and that it should be comprised of twelve members representing the forty-seven firms, and of twelve men elected by the colliers in the employment of those firms. Each half of the committee was to have its own secretary, elected from its own twelve members, and it was contemplated that each half might from time to time meet separately to discuss matters affecting its own interests. One of the principal objects of the joint committee was to to ascertain, by audits of the sales of the forty-seven firms, the average price of coal, for the purpose of regulating wages thereby. The agreement contained many other provisions in addition to the provisions for the formation of the joint committee, but it is only necessary to refer to one of them. It is clause 23 of the embodied sliding scale agreement, and it is as follows: "It is hereby agreed that all notices to terminate contracts on the part of the employers, as well as employed, shall be given only on the first day of any calendar month, and to terminate on the last day of the same month." Although only forty-seven of the plaintiffs were parties to this agreement, and were alone to be represented on the Joint Sliding Scale Committee, the men employed by the other twenty-seven plaintiffs went back to work on the same terms, both as to wages and notice, as those contained in the agreement. On the 11th of October, 1898, the defendant federation was formed, and practically all the miners in the South Wales district became members of it. They number about 128,000, and they include all, or very nearly all, the men who work for the plaintiffs. The members at once proceeded to elect a president, a vice-president, a treasurer, and a secretary. They also elected an executive council, consisting of twenty-five men, who were to manage the affairs of the federation. The federation was subsequently—viz., in February, 1899—registered under the Friendly Societies Acts By its rules, its objects are declared to be to provide funds to carry on the business of the federation; to take into consideration the question of trade and

wages; to protect workmen generally; regulate the relations between them and employers; and to call conferences to deal with questions affecting the workmen, of a trade wage and legislative character. On the 5th of November, 1898, the executive council met and resolved, "That this council in its entirety shall from time to time transact the whole of the business arising out of the sliding scale agreement, notwithstanding that only twelve of the said council can appear before the employers to deal with the Sliding Scale Joint Committee." and, having passed this resolution, they then proceeded to elect twelve of their own body to serve on the joint committee. The forty-seven plaintiff companies objected to this election upon the ground that the council represented all the miners in South Wales, whereas the joint committee was to be composed only of the representatives of the forty-seven firms, and of the men who worked for those firms. Thereupon another election was held, at which only the men in the collieries of the forty-seven firms voted. They, however, chose the same twelve men as had been chosen by the executive council, so that the masters took nothing by their objection. The effect of this was, in my opinion, that the twelve working men who formed the working men's half of the Joint Sliding Scale Committee, became the mere mouthpiece of the federation, of which, as I have said, they were all members. The federation prospered greatly, so that by the end of 1900 it found itself in the possession of funds amounting to £100,000. The price of coals also rose, and with it the rate of wages. But in October or November, 1900, the council of the federation seem to have felt some apprehension that this prosperity was being threatened by the merchant and the middleman. It is at this season of the year that the foreign Governments and others make their contracts for forward delivery of coal, and the prices at which these contracts were being effected alarmed the council, and foreshadowed a fall in prices. Whether the fear was well founded or not I cannot say, but I am satisfied by the evidence that it was honestly felt. On the 5th of November, 1900, Mr. Abraham, M.P., the president, made a speech at a meeting of the council of the federation from which I take the following passage: "There is an attempt being made by middlemen and merchants to bring about an undue reduction in the price of coal; 80 per cent. of the employers are trying to counteract this movement, but three or four large firms appear to desire that it should be successful. I therefore suggest that steps be taken to bring about a stop day throughout the coalfield as a protest against this action." Thereupon a resolution of the council was passed ordering a stop day for Friday, the 9th of November, and a further resolution was passed, that a general conference of the federation should be convened for the 12th of November. In the meanwhile the following manifesto was ordered to be circulated: "Fellow Workmen. Your council, having seriously considered the present condition of the coal trade, are strongly of opinion that an organized attempt is being made to unduly interfere with trade and prices to such an extent as will prejudice the interest of the members of the federation. With a view of preventing the industry being exploited by merchants and middlemen, we have unanimously resolved that a general holiday be taken throughout the coalfield by all colliery workmen on Friday next, the 9th of November, 1900. We also request you upon that day to hold general meetings for the purpose of appointing delegates to attend a conference at the Cory Memorial-hall on Monday next, the 12th of November, 1900, to consider and determine our future policy, as embodied in the following resolution: That the conference hereby authorizes the council to declare a general holiday at any time they think it necessary for the protection of your wages and the industry generally. —W. A. ABRAHAM." This manifesto had the desired effect, and on the 9th of November all the colliers in the coalfield, including the men working in the plaintiffs' collieries, stopped work. No notice of any kind was served on the masters, and they knew nothing of the matter until they saw a report of Mr. Abraham's speech in the newspapers of the 6th of November. This stoppage on the 9th of November is the first matter of which the plaintiffs complain in this action. On the 12th of November, 1900, the conference which had been convened for that day was held, and at it a resolution was passed authorizing the council of the federation to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally. Having regard to what happened twelve months later, and to the present contentions of the federation, this resolution, which was passed by the conference in compliance with the request of the executive council in their manifesto, is of considerable importance. The representatives of the masters on the Joint Sliding Scale Committee were annoyed at the course which the executive council had adopted, and on the 13th of November, 1900, they held a meeting at which the working men's representatives on the committee were present. The latter assured the masters that the action of the council had not been taken with a view to injuring the owners, or to interfering with the relations between owners and workmen, but only to show middlemen that they were not to be allowed to do with the markets what they had done in the past. This assurance the masters accepted, recording their acceptance in a memorandum in the minute-book of Joint Sliding Scale Committee. The memorandum is as follows: "That, whilst accepting the assurances of the workmen's representatives that they thought they were acting for the good of the coal trade in having ordered a general stoppage of work at the collieries on Friday last, the owners' representatives are unanimously of opinion that the principle involved in such a stoppage is unsound, and the action is illegal, and will not achieve the object which the workmen's representatives apparently had in mind, and the owners' representatives protest against the course followed, for, so far from assisting the trade, such action is calculated to damage it, both temporarily and permanently. And, further, the owners' representatives are of opinion that, the stoppage having been in contravention of all established customs at the collieries, and so far-reaching in its effects, the general body of the associated owners will have to be consulted upon the course which the workmen have seen fit to adopt." On the 28th of November the associated owners met, and, after negativing the expediency of prosecuting the men, resolved as follows: "That the owners' side of the sliding scale committee point out to the workmen's representatives that a resolution has been passed by the association that, if the men make any future illegal stoppage the owners will take proceedings against the men." Thus this incident was closed; and, if nothing further had happened, I am satisfied that it would have been forgotten. I wish to say of it that I think the masters were right in accepting the assurances of the men. I am quite satisfied that in ordering the stop day the federation acted as they thought in the best interests of the men, and without any intention, malicious or otherwise, of injuring the plaintiffs.

I must now deal with the events which lead up to the ordering of the other stop days, in October and November, 1901, of which the plaintiffs complain. It is necessary to consider them with some care, inasmuch as the federation by their counsel allege that they did not order these stop days, and that they cannot therefore be held responsible for them. In this connection it is to be remembered that on the 22nd of July, 1901, the House of Lords had decided in the *Taff Vale case*, 50 W. R. 44, that a friendly society could be sued, and its funds reached, to answer any damages that might be recovered against it. On the 12th of October, 1901, the defendant Brace, the vice-president of the federation, made a speech to the miners, in which, after congratulating them on the flourishing position of the federation finances, he insisted that unless some steps were taken to prevent the depression of prices, which was likely to result from what he called the cut-throat competition in the trade, the workmen's wages would be seriously diminished; and in this connection he referred to the low prices at which contracts for coal had recently been made. He concluded by saying that "if there was the slightest tendency to a slump in prices brought about by unfair competition the executive council of the federation, in whom power was invested by the whole of the workmen, according to the conference resolution, would immediately declare a series of stoppages, with a view to regulating the supply according to the demand." Four days later, on the 16th of October, 1901, Mr. Brace made another speech, in which, referring to his speech of the 12th of October, he intimated that if a stop was ordered it would not be by the federation, but by the workmen themselves. On the 19th of October Mr. Richards the secretary of the federation, made a speech to a body of miners, in which, replying to the possibility of a stop day being ordered, he said that the executive council would have to move carefully, in view of the decision of the House of Lords in the *Taff Vale case*, and that, if any notice of a stop was found necessary for the purpose of keeping up wages, it would come from the sliding scale committee. About the same time, on the 18th of October, 1901, Mr. Onions, the treasurer of the federation, made a speech, in which, after observing upon the comparatively low prices at which some large contracts for coal had recently been made, he stated that some general action would have to be resorted to by the workmen to protect themselves, and that, in the face of the recent decision in the *Taff Vale case*, they would have to exercise great care. He added: "It would be better to take some action to save themselves now than to be compelled later on, when wages had been reduced to starvation point, to take drastic measures." Those speeches preceded a meeting of the executive council of the federation, which was held on the 23rd of October, 1901, and they foreshadowed what was to be done at the meeting. The federation, or its officers, obviously desired that one or more stop days should be declared, but, having regard to the decision of the *Taff Vale case*, they desired that the order for the stop days should be issued by some other body than their own, by some body which had no funds with which to answer any judgment that might be recovered in the event of the order turning out to constitute an actionable wrong. At the meeting of the executive council held on the 23rd of October, 1901, there were twenty-two members present, ten of them being also members of the working men's division of the Joint Sliding Scale Committee. The vice-president, Mr. Brace, and the treasurer, Mr. Onions, were there. Mr. Brace appears to have called attention to several contracts for forward delivery of coal which had been made at many shillings below the average price as ascertained at the last sliding scale audit, and thereupon a discussion ensued as to whether the federation should take steps to counteract the bad effects of the contracts. Then it seems to have been moved that the executive council should not take upon itself the responsibility of declaring any stop day; and to that an amendment was proposed that, if any stop days were to be ordered, the orders should be issued by the executive council of the federation, no other body having any authority to do so. The amendment being put, only three voted for it, while nineteen voted for the original motion. Thus it stands recorded on the minute-book of the federation that the council of the federation should take no responsibility for ordering stop days. Immediately after this vote had been taken all the members of the council who were not members of the sliding scale committee left the room; and the remainder, by some process not explained, resolved themselves into the working men's half of the Sliding Scale Joint Committee and proceeded in that capacity to declare two stop days—the 25th and 26th of October, 1901—and thereupon the following manifesto was published: "To the workmen employed at the South Wales and Monmouthshire Collieries. It having come to the knowledge of your representatives on the sliding scale committee that large contracts have already been made at considerably lower prices than the average price declared by the last sliding scale audit, and the result of those contracts upon annual and other contracts about to be made, which must of necessity mean a heavy reduction in wages, it was unanimously resolved that the workmen shall observe as general holidays Friday and Saturday next. (Signed) W. BRACE, ALFRED ONIONS, ENOCH MOREL, THOMAS EVANS, D. WATTS MORGAN, C. B. STANTON, THOMAS THOMAS, D. D. BEYNON, DARONWY ISAAC, EVAN THOMAS, THOMAS RICHARDS." Telegrams were then sent to all the collieries in South Wales, notifying the fact that the stop days had been declared. It is of importance to observe that with many of these collieries the sliding scale committee, as a committee, had no concern, for that committee only represented the forty-seven firms before-mentioned, and the working men's representatives on this committee were elected only by the men working in the collieries of those firms. Yet the committee took upon themselves to do that which the federation alone had authority to do—namely, to order stop days in all the collieries in South Wales. One other fact. The cost of printing the manifesto and of sending out the telegrams was paid out of the funds of the federation, and the organization of the federation was used for the purpose of making the stop days known to the men throughout the district. Subsequently two other stop days were ordered, one for the 31st of October and one for the 6th of November. They were also declared at meetings of what was called the working men's half of the sliding scale committee; but, as before, communications to the men were distributed by means of the organization of the federation and the cost was defrayed out of the federation funds. The result of all this was that the men stayed away from work on the four days, and so broke their contracts with their masters.

It was argued on behalf of the federation that they, the federation, could not be held responsible for the consequences of stop days, for the reason that the federation had expressly refused to meddle in the matter, as appeared by the resolution of the 23rd of October. I do not, however, think this argument well founded. It is true that the hand of the working men's representation on the sliding scale committee

is made to appear as directing these stop days, but I cannot doubt that the hand was guided and controlled by the federation itself. In truth, it was the federation who were acting, the name of the sliding scale committee being used as a blind, a very transparent blind, to conceal what was being done. The writ was issued on the 22nd of November, 1901. After the writ was issued Mr. Evan Thomas, one of the defendants, and a prominent official of the federation, speaking at a meeting of miners as to the way the stop days would affect the right of haulers to a certain bonus payable to them by the masters, said, "When a stop day is declared, it is expected that every one will morally abide by it, but if the haulers do not they are in a sense acting disloyally towards the federation, and it will certainly mean that the executive council will either have to give this policy up or to do something else to meet the difficulty of carrying this policy out." It is true that within two or three days of this speech being reported Mr Evan Thomas wrote to the newspapers to say that he had used the expression "executive council" by a slip; and that he ought to have said sliding scale committee. But, for my part, I think this official made no slip at all, and he was quite right when he attributed the stop day to the executive council of the federation.

A number of witnesses were called before me on the part of the plaintiffs and on the part of the defendants. Mr. Dalziel, secretary of the owners' association, stated that he did not suggest that in giving the advice to stop in November, 1900, there was any intention of injuring the masters, and the resolution of the masters passed on the 13th of November confirms Mr. Dalziel in that view. Then it appears that in October, 1901, circumstances similar to those that led up to the stoppage in 1900 again occurred, and that these circumstances afforded the only reason for ordering the stop days in October and November, 1901. There was no quarrel between the masters and the men, and, so far as I can see, no illwill. The men objected to the course of business adopted by the middlemen, and in this objection some, at least, of the masters seem to have shared. The evidence satisfies me that the action of the federation, and of the other defendants in 1901, was dictated by an honest desire to forward the interest of the workmen, and was not, in any sense, prompted by a wish to injure the masters. Neither the federation nor the other defendants had any prospect of personal gain from the operation of the stop days. Having been requested by the men by the resolution of the 12th of November, 1898, to advise and direct them as to when to stop work, the federation and the other defendants, who were its officers, in my opinion, did to the best of their ability advise and direct the men. Whether they advised them wisely I cannot say, though I am inclined to think not. But I am satisfied that they advised them honestly and without malice of any kind against the plaintiffs.

I have to decide, in these circumstances, whether an action in tort will lie against the defendants. The advice and guidance of the defendants was solicited and involved, if followed, as the defendants knew, the breaking of subsisting contracts. It was followed, as the defendants wished it should be; and damage resulted to the masters; but there was no malicious intention to cause injury, no profit was gained for themselves by the defendants, and their sole object was to benefit the men, whom they were advising and directing. These circumstances, in my opinion, disclose no cause of action. In all the cases cited to me, where the action has been for damages for procuring the breach of contract, the element of actual malice—that is to say, a real intention to harm the plaintiff—has been regarded as essential. In *Lumley* v. *Gye*, 1 W. R. 432, 2 E. & B. 216, the allegation was that the defendant "maliciously procured the servant to break her contract," and the judgment rests on the malice so imputed to the defendant. It is true that Crompton, J., in that case says that it must be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, whereby the master is injured, commits a tort. If this means that mere notice of the existence of the contract of service raises an irrevocable presumption of malice, I do not think it is good law. If a brother believes that his sister is in a service that is injurious to her health, cannot he advise her to break her contract without rendering himself liable in tort to the master? In such a case, in my opinion, it would be impossible to say that an action would lie. It may be different in cases where the servant is taken into service by the defendant with notice of the existing contract, or is kept in such service after notice of the contract, so that the defendant gets a benefit; in such cases there may be some evidence of malice; though I have a difficulty in persuading myself that by giving a servant, whom I know to be a truant, half-a-day's work to save him from starvation I run the risk of making myself liable in tort to his master. If the cases to which Crompton, J., refers be pushed to their logical conclusion, it would seem that if a man, having entered into the service of another to do a particular piece of work, say to sweep out a stable, goes away refusing to do the work, no one with notice of the facts can ever afterwards employ that person without rendering himself liable in tort to the man who originally employed him. Mere notice cannot, in my opinion, be at most more than some evidence of actual malice, rebuttable by showing that, in fact, no malice existed. The cases to which Crompton, J., refers are cases either of enticing servants from the service of their masters or of harbouring them after they have improperly left the service, and with notice, and the expressions enticing and harbouring appear to me to suggest a malicious intention to injure the master. Erle, J., declined to limit the principle upon which he based his judgment in *Lumley* v. *Gye* to contracts of service. He declared the principle to be of universal application, and he states it in these words: "He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or breach of contract." Wightman, J., puts the case in the same way: "It was undoubtedly *primâ facie* an unlawful act on the part of Miss Wagner to break her contract, and, therefore, a tortious act of the defendant maliciously to procure her to do so." Both these learned judges evidently thought that actual malice was essential to the cause of action. In *Bowen* v. *Hall*, 29 W. R. 367, 6 Q. B. D. 333, the action was against the defendants for wrongfully receiving and harbouring a servant after notice of his being the servant of the defendants. Bovill, C.J., in delivering a judgment in which Lord Chancellor Selborne concurred, 6 Q. B. D., at p 337, states the facts upon which the judgment is based: "We are of opinion," he says, "that the act of the defendants was done with the knowledge of the contract between the plaintiff and the servant; was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff; was done from a wrong motive, and would, therefore, justify a finding that it was done in that sense maliciously." Having found these as the facts, he proceeded to state the law as laid down in *Lumley* v. *Gye* in the following terms: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act may as

a natural and probable consequence of it produce injury to another, and which in the particular case does produce such an injury, an action in the case will lie." And later on he says: "Merely to persuade a person to break his contract may not be wrongful in law or fact . . . but if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore actionable, if injury ensues." This again seems to me to show that to support an action for procuring a breach of contract it is essential to prove actual malice. Lord Macnaghten, in *Quinn* v. *Leathem*, 50 W. R. 139, [1901] A. C. 495, at p. 510, speaking of the decision in *Lumley* v. *Gye* says: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractural relations recognised by law, if there be no sufficient justification for the interference." If this is the true rule, as it appears to me it may be, then in order to get a cause of action there must be an interference without sufficient justification; in other words, if from all the circumstances it appears that the interference was justified, the cause of action does not exist. In the case of the *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 37 W. R. 756, 23 Q. B. D. 598, 40 W. R. 337, [1892] A. C. 25, when it was brought before the Court of Appeal, Bowen, L.J., put the case in very much the same way. He says (6 Q. B. D., at p. 613), "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage, another in that other person's property or trade is actionable, if done without just cause or excuse;" and at p. 614 he says, "The intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it, is forbidden." Thus it seems that the mere procurement of a breach of contractual rights is not necessary actionable; and that it will not be actionable, if it appears to have been sufficiently justified (per Lord Macnaghten), or if it appears to have been done with just cause or excuse (per Bowen, L.J.). What may be a sufficient cause or excuse is perhaps difficult to determine. But Bowen, L.J., gives some indication of what may or may not amount to a sufficient cause or excuse. He says (6 Q. B. D., at pp. 618-619 of the *Mogul case*), "Then comes the question, Was it done with or without 'just cause or excuse'? If it was *bonâ fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist, not the less because what was done might seem to others to be selfish or unreasonable; see the summing up of Erle, J., and the judgment of the Queen's Bench in *Reg.* v. *Rowlands*, 17 Q. B. D. 671. But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal, which had to decide, would have to analyze the circumstances, and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse." One may with advantage borrow for the benefit of traders what was said by Erle, J., in *Reg.* v. *Rowlands* of workmen and of masters: "The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Then do the facts in the present case constitute a justification or excuse? I think they do. I have already found that there was no malice, no desire to injure; then why was the order to stop issued? It was issued because the men had asked the council of the federation to advise them from time to time as to when they should stop. Stopping, no doubt, involved a breach of the men's contract with their masters. But, if a man asks another for advice as to whether or not it is wise to break a contract, is not the person asked entitled (so long as he acts honestly) to give the advice, and if the advice is followed, do not the circumstances afford the man who gave it a sufficient excuse within the meaning of the rule? Solicitors, parents, and friends are over and over again consulted as to whether it is better to continue to perform a disastrous contract, or to break it and submit to a claim for damages. Do they by giving the advice, and so procuring the breach, make themselves liable in tort? Or does not the fact that they were asked for advice, and gave it honestly, afford a sufficient excuse for what they did? A man may persuade himself to break his contract, and the only consequence is that he renders himself liable in damages for the breach; he certainly does not thereby create a further cause of action against himself in tort. Then why should his friend, who advises him, and perhaps prevails upon him, to do the same thing incur the consequences of such a course of action.

In the present case I find that the federation and all the other defendants acted honestly, and without any malice, and in ordering the stop days did no more than that which they conceived to be in the best interests of the men whom they represented, for whom they were acting; and I find, moreover, that they had lawful justification or excuse for what they did in this, that having been solicited by the men to advise and guide them on the question of stop days, it was their duty and their right to give the advice and to secure that the advice should be followed.

Taking the view which I do of the facts of this case, it is only necessary to say a few words as to the cause of action founded on conspiracy. An actionable conspiracy exists when a number of men combine either to do an unlawful act or to do a lawful act by unlawful means. I have already said that in my opinion the acts of the individual defendants were not unlawful, and there is good authority for saying that a combination entered into for the mere purpose of doing a lawful act cannot constitute an actionable conspiracy. In order to give a cause of action, the combination to do the lawful act must be entered into with a malicious intention of damaging the plaintiff, and must cause him damage. Here no such conspiracy ever, in fact, existed, for there never was any malicious intention. My judgment, therefore, must be for the defendants on both branches of the plaintiffs' claim. If this case is taken further and my judgment is reversed, it will then become my duty to inquire into the question of damages; but even at the risk of being told that I am going outside my province, I strongly advise the parties to consider whether they cannot end this litigation. I doubt if it serves any useful purpose, and I am sure that it creates bitterness of feeling, and makes the relations between the masters and the men difficult and un-

pleasant. The plaintiffs must pay the defendants' costs except the costs incurred by the federation in putting forward the defence that the federation was not responsible for the acts done in in October and November, 1901. Those costs the federation must itself bear; and the federation must also pay such part of the plaintiffs' costs as is attributable to meeting that defence.

*Judgment for defendants, with costs. Stay of execution granted.*

Solicitors for the plaintiffs, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

Solicitors for the defendants, *Riddell & Co.*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

## House of Lords.

From C. A. (Scotland). May 15, 1902.

PARISH COUNCIL OF RUTHERGLEN *v.* PARISH COUNCIL OF GLASGOW. (*a.*)

*Poor law—Law of Scotland—Wife deserted—Acquiring settlement.*

*Under the Scotch law, where a husband deserts his wife, she cannot acquire a settlement for herself; the fact of the desertion cannot avail to alter the liability of the husband's parish to support his wife and children.*

Appeal from a decision of the Court of Session in Scotland, 38 Scot. L. R. 528.

The question was whether Mrs. Faulds, who was deserted by her husband in 1893, had acquired by residence a settlement for poor law purposes in the parish of Rutherglen.

The birth settlement of both husband and wife was the Barony parish of Glasgow, now part of the respondents' parish.

In 1893 the wife applied to the Barony parish for relief for herself and her five children, who were under age, and her application was granted. Later Mrs. Faulds left the Barony poorhouse, taking her eldest child with her.

After the release of her husband from prison for desertion, he contributed nothing to the support of his wife and the child she took with her; but he sent small sums to the respondents for the maintenance of the other four children up to 1896, when he ceased to contribute.

Mrs. Faulds resided continuously in the appellants' parish without application for parochial relief for three years and ten months, until she became chargeable to the parish.

The case was argued before seven judges, and a majority held that the wife had acquired a settlement in the appellant parish.

*Graham Murray, L.A., Orr Deas*, and *W. C. Henderson*, for the appellants.

*Shaw, K.C., Clyde, K.C.*, and *R. B. Pearson*, for the respondents.

Their lordships took time for consideration.

Lord ROBERTSON.—For the clearer discussion of the important general question raised by this appeal, I intend to assume, without reservation, that Alexander Faulds had deserted his wife from and after the 16th of October, 1893. By the time she became chargeable she had resided for the statutory period (without begging or receiving relief) in the appellants' parish, and if it be legally possible for the wife of a living Scotsman who himself has a parochial settlement in Scotland to acquire an industrial settlement for herself in a different parish from his, and so to relieve her husband's parish, then the appellants are liable. But the starting point of the case is that the respondents are the parish of the husband's settlement; and what they have got to make out is that they are freed from their liability for his wife by the fact that he deserted her; for but for the fact of his desertion, it is not, in the meantime at least, maintained that her separate residence in Rutherglen would of itself avail. Why this distinction should be drawn, and what is the special virtue of desertion in releasing the husband's parish from liability to maintain his wife are, however, questions which it is difficult to evade, and this will recur in what I have to say. The question before your lordships' House is simplified by the clearness with which it is stated in the opinions of the learned judges. What their lordships have held is, to quote the words of Lord Kinnear, that "it is settled now in law that the desertion by a husband of his wife is the death of the husband, and that the desertion by the husband puts the wife in the position of earning a residential settlement for herself, because it enables her or compels her to earn her own living, and to earn her own living as if she was an unmarried woman or a widow." Now, there is certainly some show of authority for this proposition, although of itself it sounds rather startling, and although the boldness of its expression invites criticism. But, while the majority of the seven judges, whose decision is under review, may have been right in thinking themselves bound by the more recent instead of by the earlier statements of the law on the subject, I am sorry that so strong a court as was constituted to consider this question did not critically examine the grounds upon which the formula rests, for they might ultimately have deemed themselves free to act on their independent judgment. The very careful argument to which your lordships have listened has compelled such an examination by this House; and, as far as I am concerned, I am unable to support the judgment appealed against. First of all, the proposition that the desertion of the husband is equivalent to his death is, no doubt, suggested by the juridical position of a widow under the Scottish poor law. A widow, it had been held in *Heritors of Crieff* v. *Heritors of Fowlis-Wester*, 4 Ct. Sess. Cas., 2nd Ser., 1538, in 1842, can acquire a residential settlement for herself, and for children living with her in a parish where she has resided industriously as the head of the family. This seems a very sound proposition, and for present purposes I have nothing to say against it. The woman in that case has no husband; she is under no disability, and there is nothing and nobody to prevent her from acquiring a settlement for herself. But when it is proposed to assimilate to a woman having no husband a woman who has one, a question of the gravest principle arises. Now, this question did arise in Scotland five years after the *Crieff case* in *Gray* v. *Fowlie*, 9 Ct. Sess. Cas., 2nd Ser., 811, in circumstances which, for practical purposes, are exactly the same as the present (the husband being a living but deserting Scotsman with a Scottish settlement), and it was decided by the whole court (by nine to four) that a deserted wife was not in the same position as a widow, but presented a case distinguished by the most vital difference. The case was deliberately considered. All and more than all the arguments which have been submitted to your lordships' House on the present occasion on behalf of the respondents are to be found in the judgments of the minority of the court.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

It was then said that the law recognized in a deserted wife capacities to act independently, in contracts and in suits, which made it reasonable that she should be held to acquire by her independent and industrious residence an independent settlement, and this view was supported by full illustrations of the common law. The reply of the Lord Justice-Clerk Hope shows that this view of the question, at its best, was fully realized and fully met. His lordship pointed out, in a passage of great merit, that the Scottish law in the chapter referred to did no more than come to the aid of a deserted wife by relaxing her disabilities so far as is necessary for the business of life in her isolated position, that the law in making such exception did not proceed on any view that the marriage was dissolved, or the woman's status altered, or that third parties can plead liberation of obligations towards her because of the husband's illegal conduct in deserting her. The right to separately contract and separately sue, where this conduced to or facilitated her gaining her living while left alone, did not, in the view of the Lord Justice-Clerk, and of the majority in *Gray* v. *Fowlie*, involve any change of liability on the part of third parties to support her as the wife of the deserter. Now, if this case of *Gray* v. *Fowlie* stood alone, it is admittedly directly in point; it is a decision of the whole court, and it meets, directly, the argument on the common law rights of a deserted wife, which at your lordships' bar has been indicated rather than developed. No one can pretend that *Gray* v. *Fowlie* is not in diametrical opposition to the doctrine that desertion is the same as death; and what is said is that *Gray* v. *Fowlie* is no longer law. Now I think it is true that, in later decisions, the Divisions of the Court of Session have disregarded this decision of the whole court, and have pronounced judgments inconsistent with it, but it has never been formally overruled. What is more, from *Gray* v. *Fowlie* down to the present time, there has been no revival of the theory that the common law capacities of a deserted wife led to, or opened the door for, her acquisition of a residential settlement in the parish where she had exercised those capacities. As will immediately appear, the cases which set up the doctrine that desertion is death were not cases of a residential settlement at all, but of a maiden settlement. The theory that desertion is death may be good or bad, but it does not pretend to rest on the common law about deserted wives being able to contract and to sue. How the newer and conflicting doctrine came into vogue was thus: A series of cases occurred in which, instead of the deserting husband having, as in *Gray* v. *Fowlie*, a Scottish settlement, he had (or was supposed to have) no settlement available for attack by the relieving parish. This was the case in *Hay* v. *Skene*, 12 Ct. Sess. Cas., 2nd Ser., 1019; in *Gibson* v. *Murray*, 16 Ct. Sess. Cas., 2nd Ser., 926; and in *Carmichael* v. *Adamson*, 1 Ct. Sess. Cas., 3rd Ser., 452. What was said in those cases was that you must find a settlement somewhere, and that as the husband had none you must turn to the wife's own settlement (which in all these three cases was her maiden settlement, and not a residential settlement). Now, in passing it may be observed that in more recent times there would probably not be held to be any compelling necessity to discover for the relieving parish some other parish liable to it; and also that where the husband was an Englishman it did not follow that the relieving parish had no remedy under the 77th section of the Act of 1845 merely because that remedy was troublesome. But I will assume, as the court did, that the husband had no settlement; and this is, past all doubt, the ground of decision in the first and most referred to of these three cases—*Hay* v. *Skene*. The theory of *Hay* v. *Skene* was that a wife does not lose her maiden settlement unless she gets one from her husband in exchange. This is most distinctly laid down by every one of the three judges who were parties to the decision, and, indeed, is repeated to elaboration in the leading opinion. This, moreover, is stated as the justification for distinguishing the case from *Gray* v. *Fowlie*—"here the wife has direct interest in the question raised;" that is to say, in *Gray* v. *Fowlie* she got, and here she did not get, a new settlement. Now, it is observable that, in the later development of the doctrine, this case of *Hay* v. *Skene* was appealed to as settling that desertion was the same as death. In the reported judgments there is no direct expression of such a theory. The view taken was that the woman had her own settlement all along, until she or her husband got another, whereas in *Gray* v. *Fowlie* she exchanged her own for her husband's. From the decision in *Hay* v. *Skene* Lord Moncreiff dissented, on the ground the proposed judgment was in conflict with the decision of the whole court in *Gray* v. *Fowlie*, and Lord Moncrieff, who had been in the minority in the decision of *Gray* v. *Fowlie*, says: "The principle is that a wife cannot be separated from her husband except by death, divorce, or other legal process, and must be considered as still part of himself, for whom no claim can be made except through him and against parties liable on his account. But the plea of the pursuer assumes a *persona standi* in the wife apart from her husband, to the effect of creating rights in one third party against another without any provision to that effect in any statute." *Gibson* v. *Murray*, the second of the cases I have named, is distinguished from the present by two vital differences; first, it is the case of a husband having or assumed to have no settlement; and, second, it is not a case of desertion at all but of death, the dispute being whether, the husband being dead, the children took their own birth settlement or their mother's maiden settlement. Its bearing is therefore too remote to justify further comment. *Carmichael* v. *Adamson* has much more importance, for several reasons. Here we have, launched for the first time, this maxim that desertion is equivalent to death—received as it was by Lord Justice-Clerk Inglis with the remark that he could "find for it no reasonable or intelligible ground." The question in the case was whether an Englishman, assumed to have no settlement, having deserted his wife, the settlement of his child was that of its own birth or its mother's birth and the whole court held that it was the latter. The minority was headed by Lord Justice-Clerk Inglis, and included Lord President Colonsay. I have grouped these three cases together because they are all cases where the husband had no Scottish settlement. We next come to a case—*Mason* v. *Greig*, 3 Ct. Sess. Cas., 3rd Ser., 707—where it was held to be doubtful in fact whether he had or had not a Scottish settlement, and the decision is to that extent unsatisfactory. It was a First Division case in the time of Lord Colonsay. The respondents can fairly claim at least two of the judges as acquiescing in the desertion-equal-death theory, and it is ascribed by Lord Ardmillan to *Hay* v. *Skene*. *Johnston* v. *Wallace*, 11 Ct. Sess. Cas., 3rd Ser., 699, is another case of a man without a Scottish settlement deserting his wife; he was an Irishman by birth. It was decided on the authority of *Carmichael* v. *Adamson*, the Lord President Inglis remarking that he could not say that that decision obtained any support from him, "but it is now a settled rule." Now, down to this point it cannot be said that there was any decision or even *dictum* to the effect that the same rule would be applied where the deserting husband had a Scottish settlement. But,

curiously enough, this was said afterwards, *obiter* in *Greig* v. *Simpson*, 3 Ct. Sess. Cas., 4th Ser., 642, by Lord President Inglis, who had most strenuously resisted the rule to which he now yielded, but it was said in a case in which the dispute was between the birth settlement of the husband (of course Scottish) and his alleged residential settlement (also, of course, Scottish)—said, too, on the authority of a decision (*Beattie* v. *Greig*, 2 Ct. Sess. Cas., 4th Ser., 923) about a deserting Englishman. *Greig* v. *Simpson* accordingly seems a rather significant case. The "rule" that desertion is equal to death had now hardened into inflexibility and had lost all relation to its original principle. The question to be decided in that case was whether by efflux of time (five years), during which the man was *de facto* absent from the parish where he had acquired an industrial settlement, he had not lost it; and the decision was that, having deserted his wife, he must be held to have been dead and therefore not absent, and not to have lost the settlement. The great lawyer who thus followed and extended decisions from which he had vigorously dissented cannot but have seen in this application of the rule a new confirmation of his original opinion that it had no "reasonable or intelligible ground." This closes the catena of cases on which the respondents rely. Of them all there is but one (*Mason* v. *Greig*) where, on any possible view of the facts, the deserting husband had a Scottish settlement. The most definite statement of judicial opinion in favour of the respondents on the case of a deserting husband having a Scottish settlement occurs, as I have shown, in a case where neither of the disputants represented either the wife's maiden settlement or her residential settlement, and where, therefore, the vital element in the present controversy was wanting. In these circumstances, on a review of the authorities, *Gray* v. *Fowlie* stands out as the only decision directly determining the present question, and it is a decision of the whole court. Its authority might be adequate for the decision of the present appeal. But some of the more recent judgments on which the respondents rely are irreconcilable with *Gray* v. *Fowlie*, and the "rule" that "desertion is death" is in direct conflict with the principle of *Gray* v. *Fowlie*. It seems to me to be, therefore, impossible to avoid dealing with the question on a somewhat broader ground than at first sight might seem adequate for the disposal of the case. It is not necessary to go back to the origins of the poor law, but it is well to remember that, while by the old Scots Acts birth and residence gave statutory right to relief in the parishes of birth or residence, the two other modes of acquiring such rights—viz., parentage and marriage—are, in the words of the Lord Justice-Clerk Inglis in *M'Crorie* v. *Cowan*, 24 Ct. Sess. Cas., 2nd Ser., 723, "engrafted on statute law by the necessary application to the statutory system of certain essential and inflexible rules of the common law in the relations of husband and wife and of parent and child." We are taken, therefore, at once to the common law of husband and wife, and the general rule about such matters as are on hand is so clear that the only question is whether some exception arises where a wife is deserted. In order to judge of this question, however, it is needful to notice the ground of the general rule. For this purpose I am going to refer to a case, not cited at the bar, but highly relevant to the the present question, in which this subject was considered by the whole court—the case of *M Crorie* v. *Cowan*. The question before the court was whether the Scottish birth settlement of the wife of an Irishman, resident in Scotland, but having no settlement in Scotland, could be made liable for moneys expended on her maintainance in a lunatic asylum by the parish from which she has been sent to the asylum under the Lunacy (Scotland) Act. "To that question," said Lord Justice-Clerk Inglis, "I am prepared to give an unhesitating answer in the negative, on the broad and simple ground that a married woman is in law incapable of having any settlement in her own right, or independently of her husband. If her husband has a settlement that also is her settlement. If her husband has no settlement, just as little has she. She is, in my opinion, as completely incapable of possessing a settlement in her own right during the subsistence of the marriage as she is of having a separate domicil from her husband or of enjoying any other personal status or franchise in her own right." I turn to the joint opinion, in the same case, of the Lord President (Colonsay) and Lords Ivory, Curriehill, Ardmillan, and Kinloch, and I find this as the ground of their judgment: "The demand is resisted (*inter alia*) on the ground that by her marriage with Donaldson her birth settlement was suspended or put in abeyance, and that it cannot revive so long as the marriage subsists; that, being a married woman, she cannot have any settlement of of her own apart from her husband, or any settlement that is not his settlement; that her fate in that respect is linked to his; and that the circumstance which here occurs of her husband not having a settlement in any parish in Scotland does not exclude the application of the general rule. We are of opinion that, in reference to the present case, this defence is well founded, that it is sufficient for the decision of the settlement, and that the parish of Monkton (the wife's maiden settlement) ought to be assoilzied." I cite these considered utterances of eminent judges as enunciations of the geneal law and its grounds; and the grounds are of high and peremptory principle. But occurring, as this case did, after *Hay* v. *Skene*, it is evident that *M'Crorie* v. *Cowan* was sent by Lord Justice-Clerk Inglis to the whole court because of *Hay* v. *Skene*, and in *M'Crorie* v. *Cowan* the Lord Justice-Clerk Inglis declared himself "unable to reconcile the judgment now to be pronounced with the decision in the case of *Hay* v. *Skene* or to save the authority of that case in pronouncing this judgment." His lordship examined the grounds of decision in *Hay* v. *Skene*, and pronounced them unsound: "The loss of the maiden settlement does not depend on the acquisition of another settlement, but on the complete merging of the person of the wife in that of the husband by force of the marriage." As I am referring to *M'Crorie's case* I may explain that, as it is not a case of desertion, its bearing on the series of cases now before the House is through the principles which it laid down. But historically it is quite clear that it went to the whole court because of that relation to *Hay* v. *Skene*; and, again, that *Carmichael* v. *Adamson*, which occurred the following year, and as already seen, was a case of desertion, went to the whole court because the Lord Justice-Clerk Inglis again saw that, after the decision in *M'Crorie* v. *Cowan*, the rule of *Hay* v. *Skene* could only be reapplied, if reapplied at all, by the whole court. After *Carmichael* v. *Adamson* the Lord Justice-Clerk Inglis seems to have seen that nothing more could be done in the Court of Session, and he gave (in *Greig* v. *Simpson*) free play, or perhaps more than free play, to the rule.

The general principle, then, being that the wife is disabled by marriage from having a settlement of her own, how does the fact of desertion effect a change? I have already referred to the judgment of Lord Justice-Clerk Hope as containing an admirable discussion of this question, and I

repeat that the common law in the case of separation goes no further towards enlarging the capacities of the wife than is required by the necessities of her efforts at self-maintenance. But all these legal facilities lead no distance towards changing her settlement, and the only reason suggested for that result—viz., the justice of making the community which—conjecturally—has profited by her residence bear the burden of maintaining her is founded on totally different considerations, not relating to the interests of the wife at all, but to the equities of parishes. But, further, what is now asked is that we should hold that the fact of desertion operates as a release of the liability of the wrongdoer's parish and deprives the wife of her claim against that parish. I cannot say that I think this a very rational proposal, but it is at least plain that it bears no relation to the aid given by the law to separated wives, and can claim no support from that chapter of law. I may add that the inapplicability to the present question of the common law appealed to is further illustrated by the fact that the law so appealed to is at once too wide and too narrow for the present case. In some of the aids given to separated wives the law takes no account of the reason of separation, while in others the husband must be abroad in order to give rise to them. It seems to me that the true principle to be applied in all these cases is that laid down by the Lord Justice-Clerk Inglis in the case of *M'Crorie* v. *Cowan*, that it is of universal application, and that adherence to this principle is the only solution of the numberless complications which otherwise arise. The same rule which was laid down by your lordships' House in *Adamson* v. *Barbour*, 1 Macq. 376, in the case of children applies to the wife. The wife is a part of the husband's family. The fact of the husband's desertion cannot avail to alter his own parish's liability for wife any more than for children. But the existence of children in the present case affords another test of the question. One of the children, Catharine, was living with her mother in the appellant's parish. In which parish is Catharine's settlement—in her father's or her mother's? This challenge was not met by the respondents, and their difficulty in answering it is increased by the fact that there are other four children who have not been living with their mother. Where is their settlement? The only way in which these questions can be answered rationally and in accordance with *Adamson* v. *Barbour* is by keeping the whole family to the settlement of its head. I regret that it should be necessary to pronounce a judgment which may disturb a certain amount of practice, and I entirely share the reluctance of the learned judges to unsettle poor law decisions. But what has already occurred has shown how an erroneous maxim once asserted is drawn into analogies and deductions alien even to its original conception. The only safeguard against such consequences is adherence to clear and dominant principles, and I have the satisfaction of knowing that the motion which I support does no more than re-establish the doctrine of the earliest and most authoritative Scottish case upon the subject.

Earl of HALSBURY, L.C., Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, and LINDLEY concurred.

*Interlocutors appealed from reversed. Respondents to pay to the appellants their costs in this House and below.*

Solicitors for the appellants, *Burchells & Co.*, for *H. B. & F. J. Dewar*, Edinburgh, and *Montgomerie & Flemings*, Glasgow.

Solicitors for the respondents, *Grahames, Currey, & Spens*, for *Charles George*, Edinburgh, and *R. P. Lamond & Turner*, Glasgow.

## Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) } Aug. 11, 1902.

CORPORATION OF TRURO v. ROWE. (*a*.)

*Fishery—Oyster fishery—Depositing oysters on foreshore—Incident to right of fishery—Lease of foreshore by municipal corporation—Validity—Sea Fisheries Act*, 1868 (31 & 32 *Vict. c.* 45), *s.* 41—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 105, 106, 107, 250.

*A claim to the exclusive occupation of part of the foreshore belonging to a stranger for the purpose of depositing freshly dredged oysters thereon cannot be supported at common law as incident to the right of fishing for oysters.*

*Decision of* Wills, J. (50 *W. R.* 151, [1901] 2 *K. B.* 870), *reversed.*

Appeal from the judgment of Wills, J., reported in 50 W. R. 151, [1901] 2 K. B. 870.

The action was brought to recover damages for alleged acts of trespass on a part of the foreshore of the estuary of the Truro River, of which the plaintiffs were lessees, and for an injunction to restrain the defendant from committing the acts of trespass alleged.

The plaintiffs were an ancient corporation incorporated by royal charter, and by a charter of 31 Eliz. it was provided that the corporation "may and shall be for ever at all future times persons fit and capable in law to hold, purchase, receive, and possess lands, tenements, liberties, privileges, jurisdictions, franchises, and hereditaments, of what kind or nature soever they be, to them and their successors in fee and perpetuity, and also goods and chattels and other things whatsoever of what nature or kind soever they may be, and to give, grant, demise, and assign lands, tenements, and hereditaments, and all and singular other acts and deeds to do and execute by the same name."

By an order of the Board of Trade made under the Sea Fisheries Act, 1868, and confirmed by the Oyster and Mussel Fisheries Order Confirmation Act, 1876, the power of regulating the oyster and mussel fishery in a part of the estuary of the Truro River was conferred upon the plaintiff corporation.

By an indenture dated the 4th of June, 1897, the plaintiffs, in order to enable them more efficiently to carry out their powers under the said order, obtained from the lord of the manor a lease of certain parts of the foreshore of the said estuary for fourteen years from the 29th of September, 1896, at a yearly rent of £15.

The oysters, when freshly dredged from the oyster beds in the fishery, were unfit for the market owing to the water being contaminated with copper from the washings of the copper mines in the vicinity, and the fishermen had from time immemorial been in the habit of depositing oysters, when dredged from the fishery, for a considerable time upon a portion of the foreshore leased to the plaintiffs as aforesaid in order to get rid of the copper.

The defendant and other fishermen exercised this right, each having a particular space for depositing his oysters, which space was allocated by an arrangement amongst the fishermen themselves and was staked out by withies stuck in the bed of the river. The defendant, in accordance with this custom, was in the habit of depositing the oysters dredged by him upon a particular space on the plaintiffs' foreshore.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-Law.

The plaintiffs, claiming as lessees of the foreshore under the lease of the 4th of June, 1897, brought the present action against the defendant, alleging that the acts of the defendant in depositing the oysters on the foreshore as above described were acts of trespass committed on the foreshore.

The jury at the trial found (1) that the acts done by the defendant did not constitute an actual occupation of the soil; (2) that such acts were merely incidental to the fishing for oysters; and (3) that the oyster fishery could not be practically carried on without a storage.

Wills, J., gave judgment for the defendant.

The plaintiffs appealed.

*Duke, K.C., R. J. Parker*, and *J. A. Hawke*, for the plaintiffs, contended that the acts of the defendant were acts of trespass on the plaintiffs' soil.

*J. A. Foote, K.C.*, and *Bodilly*, for the defendant, contended (1) that depositing the oysters on the foreshore was a necessary incident to the right of fishing, and that such a right as was claimed might exist at law; and (2) that the plaintiffs had no power to take a lease of the land.

*Cur. adv. vult.*

Aug. 11.—COZENS-HARDY, L J., read the judgment of the court as follows: The title of the lord of the manor to the foreshore of the estuary of the Truro river (in which term "foreshore" I include for convenience not only the foreshore proper but also the fundns) is not in dispute. The plaintiffs have taken a lease of the foreshore from the lord of the manor. Wills, J., has upheld the title of the plaintiffs under the lease. I think this decision was correct. It may be justified by reference to the ancient charters of the corporation, the rights under which are expressly saved by section 250 of the Municipal Corporations Act, 1882. It is not, and cannot be, disputed that the defendant, as a member of the public, has rights of fishing over the foreshore covered with water. The facts are admitted. The defendant dredges oysters in deep waters and deposits them in a particular section of the foreshore indicated by sufficient boundary marks, partly for cleaning, partly for fattening, and partly to be ready for distant markets. By his statement of defence the defendant claims this as a right—(1) by virtue of a several fishery, (2) by virtue of a local custom, and (3) by virtue of his possession of the ground. By his evidence in the witness-box he treated the ground as his ground and the oysters as his oysters. If it is important to consider *quo animo* certain acts are done, the statements of the doer are surely the most material, if not the only material, elements. Here the evidence is all one way. But the judge was asked to accept, and apparently accepted, the statements of the defendant's counsel in preference to the uncontradicted evidence. And we have been urged to hold that the defendant only deposits the oysters on the foreshore as an incident of fishing, and that, in short, he is only putting the oysters into the water where anyone may get them. I cannot adopt this view. It makes the action a mere farce. It seems to me plain that the parties intended to try, and did try, the important question whether the defendant has a right to appropriate a section of the foreshore for his own purposes, for storing his own oysters, to the exclusion of the rest of the public. In my opinion such a claim cannot be suggested as a common law right. No authority has been produced in favour of it. Unless interrupted the defendant might acquire a title against the plaintiffs. The findings of the jury were—(1) that the acts done did not constitute an actual occupation of the soil, but were only incidental to the fishing for oysters; (2) that oyster fishing could not practically be carried on without what has been called storage; and judgment was entered for the defendant with costs. The findings of the jury can only be supported on the assumption that all the contentions raised in paragraphs 8, 9, and 10 of the defence were either abandoned by or decided against the defendant, and that the defendant relied solely upon his rights as a member of the public, and in particular that he did not claim any property in the oysters deposited in his section of the foreshore. The plaintiffs, in their statement of claim, on the other hand, have raised contentions which they did not attempt to justify. Under these circumstances it does not seem right that judgment should be entered *simpliciter* either for the plaintiffs or for the defendant. The proper course will be to vary the judgment by making such a declaration as is needed to settle the real questions raised between the parties in this action. Declare that the defendant, in common with the rest of his Majesty's subjects, is entitled to enter on the hereditaments demised by the indenture of lease in the statement of claim mentioned, and on every part thereof, for the purpose of fishing for and taking and carrying away oysters and other shellfish, and also for the purpose of depositing oysters and other shellfish thereon, but is not entitled to the exclusive occupation of any part of the said hereditaments, and is not entitled to any such oysters or other shellfish so long as the same shall continue so deposited. Having regard to the unfounded claims made by both parties, there should be no costs either in the court below or of this appeal. But the costs which the plaintiffs have paid to the defendant must be returned.

*Appeal allowed.*

Solicitor for the plaintiffs, *J. A. Bartrum*, for *R. Dobell*, Truro.

Solicitor for the defendant, *Sydney James*, for *J. Messer Bennetts*, Truro.

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From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — June 10, 11, 1902.

CACKETT v. KESWICK. (a.)

*Company — Prospectus — Director — Promoter — Shareholder — Contract by directors and promoters — Omission from prospectus — "Fraudulent" prospectus — Waiver clause — Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

*The directors and promoters of a company in process of formation agreed with a firm that, in consideration of the latter's underwriting* 10,000 *shares in the company, the firm was to receive* 12,000 *vendor shares as a commission therefor, but* 10,000 *shares were in fact for the use of the firm's name on the prospectus on their approving of the soundness of the undertaking; and, further, that the firm was to be appointed commercial agents for the company, whose registered office was to be situate at its address, while a member of the firm was to go on the prospectus as chairman of the company. The prospectus of the company did not disclose this agreement, but contained a waiver clause, that there might be various trade contracts and business arrangements of which intending subscribers were to be deemed to have notice.*

*Held, that the contract was one which it was material to an intending investor to know, that the waiver clause*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*did not give such intending investor fair and sufficient notice of the omission, and that by reason of its omission from the prospectus the prospectus must be deemed fraudulent within section* 38 *of the Companies Act*, 1867, *though such omission was not in fact made with any fraudulent intent.*

*Decision of* Farwell, J. (50 *W. R.* 10). *affirmed.*

This was an appeal from a decision of Farwell, J. (reported 50 W. R. 10).

The plaintiff Cackett, an architect, residing at Newcastle-on-Tyne, claimed relief for non-disclosure in a company prospectus of a contract in breach of section 38 of the Companies Act, 1867, on the faith of which he had applied for shares which were allotted to him.

The defendants were William Keswick, a member of the firm of Matheson & Co., of 3, Lombard-street, London, E.C., who since its incorporation had been chairman of the board of directors of the Panuco Copper Co. (Limited), Samuel Watkin Carlton, a metal merchant, the vendor to the company and also one of the directors, and Edmund Cook Wheater, a stockbroker in Newcastle.

The last two defendants had been engaged in the formation and promotion of the company.

The company was incorporated on the 24th of May, 1899, with a capital of £500,000, divided into shares of £1, and with the object of acquiring copper mines situated at Monclova, in the Republic of Mexico.

In the same month a prospectus was issued to the public, as the plaintiff alleged, by the defendants inviting subscriptions for 333,334 shares, in which Mr. Keswick and Mr. Carlton were named as directors and the firm of Messrs. Matheson & Co. were described as commercial agents to the company.

The prospectus, after referring to a certain trade agreement dated the 3rd of January, 1898, and setting forth the objects of the company and extracts from reports of experts showing the probability of successful working of the mine and the prospect of large profits, proceeded as follows: "The directors, with other underwriters, have guaranteed the subscription of part of the company's capital, and will receive a commission from the vendor for so doing. The following contracts have been or will be entered into: An agreement dated the 8th of February, 1899, and made between the Panuco Copper Mining Co of the one part and Samuel Watkin Carlton of the other part, under which the vendor agreed to purchase the mine and other property to be acquired by this company. An agreement also dated the 8th of February, 1899, and made between the same parties as the last-mentioned agreement, extending the time fixed for the completion thereof. An agreement dated the 10th of March, 1899, and made between the said Samuel Watkin Carlton of the one part and the said Edmund Cook Wheater of the other part, providing for the division of the profits of the resale to this company. An agreement between the said Samuel Watkin Carlton of the one part and this company of the other part, for the resale to this company at a profit. There may also be various trade contracts and business arrangements in addition to the before-mentioned agreement of the 3rd of January, 1898. As these contracts and arrangements and the above-mentioned underwriting agreements may constitute contracts within the meaning of section 38 of the Companies Act, 1867, applicants for shares shall be deemed to waive the insertion of the dates and names of the parties to any such contracts, arrangements, or agreement, and shall accept the foregoing as a sufficient compliance with section 38 of the Companies Act, 1867, or otherwise."

By the form of application for shares accompanying the prospectus it was provided that the applicant agreed with the company, as trustee for the directors and other persons liable, to waive any further compliance with section 38 of the Companies Act, 1867, than that contained in such prospectus.

The plaintiff, who was an architect residing at Newcastle-on-Tyne, on the faith of the prospectus, as he alleged, applied for 500 shares in the company on the 26th of May, and paid the full nominal value in cash.

The company did not prove successful, and an order for compulsory winding up was made on the 4th of April, 1900.

A dividend of 4s. a share had since been paid, but the plaintiff alleged that the assets would only be sufficient to pay a small further dividend.

After the winding-up proceedings had commenced, the plaintiff discovered that on the 10th of March, 1899, the firm of Messrs. Saunders, Fielding, & Carlton, metal workers, in which the defendant Carlton was a partner, had written to Messrs. Matheson & Co. a letter in the following terms:

"Messrs. Matheson & Co., 3, Lombard-street,
"10th March, 1899.

"Dear Sirs,—*In re Panuco Copper Co.*—We beg to confirm the following arrangement made with you to-day—namely, that in consideration of your underwriting 10,000 shares in the above company about to be formed, you are to receive 12,000 vendors' shares as commission therefor. You are also to be appointed commercial agents for the company and the registered offices are to be located at your address. It is further agreed that your Mr. Keswick will go on the prospectus as chairman of the company.—Yours faithfully, SAUNDERS, FIELDING, & CARLTON."

It was admitted that in pursuance of the contract contained in this letter Messrs. Matheson & Co. underwrote 10,000 shares, were appointed commercial agents of the company, whose registered offices were located at their address, and that they received 12,000 shares.

In view of the existence of this contract the plaintiff contended that the statement in the prospectus as to the contract entered into, was misleading and untrue, and alleged that if he had known of the said contract he would never have applied for shares.

Accordingly he claimed a declaration that the prospectus of the company was fraudulent on the part of the defendants, who knowingly issued the same without specifying the date and names of the parties to the contract contained in the letter of the 10th of March, 1899, and damages.

Farwell, J., held that the prospectus must be deemed fraudulent within the meaning of the Companies Act, 1867, s. 38, and ordered an inquiry as to what sum ought to be allotted to the plaintiff by way of compensation having regard to the price paid by him for his shares and the real value of the shares on the day after the contract.

The defendant Keswick appealed.

*Rufus Isaacs, K.C.*, and *Muir Mackenzie*, for the appellants, referred to *Sullivan* v. *Mitcalfe*, 29 W. R. 181, 5 C. P. D. 455; *Twycross* v. *Grant*, 25 W. R. 701, 2 C. P. D. 469; *Gover's case*, 24 W. R. 125, 1 Ch. D. 181; *Greenwood* v. *Leathershod Wheel Co.*, [1900] 1 Ch. 421, 48 W. R. Dig. 35; *In re Olympia (Limited)*, [1898] 2 Ch. 153, 46 W. R. Dig. 32.

*Upjohn, K.C.*, and *Martelli*, for the respondent, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I always approach these cases under section 38 of the Act of 1867 with a strong feeling of repugnance to the duty which I have

to perform, because I think that the section, which, in effect, provides that people who omit to mention in a prospectus a contract which would be material to an intending investor to know—I am adopting here Thesiger, L.J.'s, limitation of the section—though honest men and acting honestly, are to be deemed fraudulent, is one which no judge can give effect to not only without a feeling of repugnance but without a feeling that that which he is doing does not really tend to the maintenance of commercial honesty and commercial morality. To herd together under a collective word like "fraudulent" people who are honest and people who are dishonest in my mind cannot possibly tend to the maintenance of commercial morality. We have in this case a statement of the conclusion arrived at by Farwell, J. He says: "I desire to state clearly that I find no ground whatever for imputing to any of the defendants any fraudulent intention of or any scheme for fraudulently concealing this contract." And the question which we have to decide on this appeal is whether or not upon the facts of the case the issue of this prospectus is an issue which the section compels us to hold to be deemed fraudulent upon the part of these men whose conduct Farwell, J., has thus characterized. Having said that I will now proceed to deal with this case and see how far the facts bring it within this section.

I have already said that I do not propose, and I do not think any judge ever has proposed, to read section 38 as a section in which the words are to be literally construed. If they were to be literally construed the section would really be impossible of just application at all, and therefore I take Thesiger, L.J.'s, limitation in *Sullivan* v. *Mitcalfe*, and I ask myself whether this contract is a contract which it would be material for a would-be investor to know before he made his investment. I cannot doubt myself but that this is a contract which it would be material to an investor to know. Even if the contract had been exactly the contract contained in the letter of the 10th of March, 1899, I should have come to that conclusion. I mean by that if there had been no statement on behalf of the defendants as to what the real contract was I should have said that this letter ought to have been disclosed in the prospectus. I cannot doubt myself but that every investor, or would-be investor, in this company would think it a matter of importance that he should know before investing that these were the terms of an agreement under which, amongst other things, Mr. Keswick agreed to appear on this prospectus as chairman of the company, and the promoters agreed that he should be entitled to the position; and when one sees that upon the face of the letter his firm was to underwrite, receiving in shares 120 per cent. for so doing, it seems to me that it is still more abundantly clear that it was a letter which it was material for anyone to see before determining whether he would take shares in this company or not. When one gets to facts outside the letter which are not mentioned in it, that Messrs. Matheson were intended to get the ordinary remuneration as commercial agents quite outside any remuneration provided for in this agreement, and that they were to receive £1,500 a year for locating the new company in their office, and providing the necessary clerical staff, I think they emphasise the materiality of this letter to a would-be investor. It is said that this letter does not contain the real agreement, and Farwell, J., emphasizes that by saying (and it is after he has heard the whole case): "No one now contends that this letter expresses the real bargain with precise accuracy. It is common ground that the whole 12,000 shares were not the commission for underwriting 10,000 shares; 2,000 only were attributable to this commission, and the balance of 10,000 is said by the plaintiff to be for the use of the names of Matheson and Keswick on the prospectus, and it is said by the defendants to be remuneration for acting as commercial agents of the company." I do not think it makes any real difference on this point whether we take the plaintiff's view or whether we take the defendants' view. It seems to me that, even if we treat it as being remuneration to Messrs. Matheson for acting as commercial agents for this company, it was very material for a would-be investor to know that Messrs. Matheson, a member of whose firm was by this very agreement entitled to become chairman of the company, were to receive this sum of £10,000 in vendors' shares. I think it right to dwell upon this part of the case because, speaking for myself, I have a little difficulty—I do not think it is shared by my brethren—in formulating the proposition, about this which is said to be the true contract. It has not been suggested here that there was such a mistake about this contract as would have entitled the parties to have a rectification of the contract. It is rather put that this was an understanding, but if it was not the contract binding between the parties and the letter of the 10th of March was in law and in fact the contract binding between the parties, I have my doubts, not as to whether an oral contract, where there is the oral contract and nothing else, comes within the scope of section 38, but whether, where you have a contract in such a form that as between the parties it excludes any other term whatsoever, a sort of understanding between the parties ought to be mentioned if that understanding was of such a nature that it could not be enforced between them. I daresay there may be some mode of expressing this so as to leave in the statement evidence as to the payment of the £10,000 as remuneration for acting as commercial agents—a contract or a part of a contract—but I have not myself quite arrived at a conclusion as to how such a proposition would in the face of the evidence in the present case have to be stated. I have a difficulty about that; but taking the view that I do of this letter, it seems to me that there is no need for me to attempt to formulate such a proposition at all. I think that this contract, notwithstanding the fact that this or that passed at the interview, even if it be regarded as the only enforceable contract which was entered into between the parties, is a contract which ought to have been mentioned in the prospectus for the reasons which I have given.

So much for that part of the case. I think that the contract comes within section 38. That being so, the only question left is the question as to the waiver clause. I should not like myself to say that in every case where contracts are known to exist the statement that there may be contracts which ought under section 38 to be disclosed would of necessity make the waiver clause tricky or misleading or cause it to be calculated to deceive, which, I think, is the safer expression to use. I think that in each case you must look first at the collocation of words, and I think in this particular case that the break in the first two sentences has a tendency to make the words "there may be" refer rather to the existence of the contract than to the fact of the contract being of such character as to fall within the section. All I wish to guard against is it being supposed that the use of the words "may be" must always make the waiver clause misleading. I think you have first to look at the collocation of words as I have said, and secondly you have to look at the facts and see what is the nature of the contracts which in fact had been entered into and are known to the directors. I gave an example during the argument of a supposed

shipping company in which the promoters had secured the services of captains and engineers and others who were versed in the particular seas on which the proposed ships of the new company were to run, and the contracts with them were not disclosed. I cannot conceive that because it was said there may be a contract which ought to be scheduled under section 38 it would, in the case of contracts of that character, make the waiver clause so misleading as to prevent the promoter or whoever was the defendant in the action relying upon it as against the shareholders who had taken shares upon the basis of the waiver clause. On the other hand it is obvious that with regard to some important contracts—with regard to a contract I should say of the character of the contract contained in the letter of the 10th of March, 1899, certainly if you take it in the way Farwell, J., did, who treated it on the evidence apparently according to the contention of the plaintiff as being a contract for lending the name—to use the words "may be," even qualified with the words "which ought to be mentioned under section 38," would make such a waiver clause misleading or calculated to deceive, and in this particular case I do think that the waiver clause, having regard to its exact terms, and also to the nature of the contract which was not mentioned, is a clause which cannot be relied upon as preventing a shareholder who took his shares upon the basis of that clause from suing for damages under section 38. I think that the advice that the letter of the 10th of March, 1899, did not require to be mentioned because of the general words in the waiver clause about the underwriting agreements was not sound. If it was an error of judgment it is one which anyone might make. We all make errors of judgment, especially on questions of law, and that sometimes when the people are solicitors, sometimes when they are barristers, and sometimes when they are judges. I only express my opinion that that was an error of judgment and that this letter would not have been covered by the waiver clause even treating it as expressing the very terms of the contract.

I wish to add, and very emphatically, that I entirely agree with what I understand to be the meaning of the observations of the Master of the Rolls in *Greenwood* v. *Leathershod Wheel Co.* I understand those observations to mean that there nothing in the enacted law as it stands to prevent a waiver clause being enforced if it is honestly made and is not misleading, and if that is the case I do not think we have any power, sitting here as judges, to legislate and say we hold that a waiver clause cannot be entered into so as to debar a person who has taken shares from suing under the provisions in section 38. Of course one knows there is a class of cases in which a person cannot contract himself out of the benefit of a statute, but no one suggests that section 38 of the Act of 1867 comes within that class of case. I think, therefore, that this appeal ought to be dismissed, and dismissed with costs.

ROMER, L.J.—I agree with the conclusion arrived at by my lord and Farwell, J. I confess that for myself this seems a clear case, and I need only add a very few words. In the first place I cannot doubt that the true contract which was made by the defendant Keswick was one which under the provisions of section 38, ought to have been specified in the prospectus, and that the omission of it from the prospectus compels the court to deem the prospectus fraudulent upon the part of the defendants. But I should like to say that, wholly apart from the provisions of section 38 in my opinion, in common fairness to an intending investor to whom a prospectus of this kind is issued, such a contract as we have to deal with ought to be specified and referred to in the prospectus. Intending investors, to my mind, in common fairness ought to know of the existence of such a contract as this, and I am bound to say that, in my opinion, in this case section 38 works no injustice.

I will only further say with regard to the so-called waiver clause that it gives no fair or sufficient notice to any intending investor that such a contract as this exists, and that the investor is to waive the omission of its details from the prospectus. Further, I think that in the circumstances of this case it was not open to the appellant here to say that the waiver clause had the meaning and operation now contended for on his behalf. I agree in thinking that the appeal should be dismissed with costs.

STIRLING, L.J.—I am of the same opinion on both points. I think that the contract—by which I mean the real contract made between Mr. Keswick and the promoters is one which ought to have been disclosed. It was a contract made by the promoters of the company with a gentleman who was to be not merely a director but the chairman of the company, and the effect of it was that the firm of which that gentleman was a member were to receive from the promoters a large sum by way of remuneration for the performance of certain services to the company. The nature of these services is stated by the gentleman himself in his evidence. He says that his firm, Messrs. Matheson & Co., were adopting the Panuco Co., that they were to take it into their office and that they were to have the responsibility over a considerable period without especial remuneration in the form of commission, and that it would take a great deal of attention, that it would be necessary to construct a railway, to develop the mines, to undertake the selection of the right people, to investigate fully the property, to survey the country for the railway, and to do many things before it would be possible that the mine would give results—and with reference to these matters services were to be rendered by the firm. It may be observed that some of these things are matters which in the ordinary course would have to be dealt with by the board of directors as such, and further that they would not fall within the scope of the ordinary duties of commercial agents which the firm of Mathesons were to be. The question is, would the knowledge of such a contract affect the mind of a reasonable intending investor thinking of taking shares in this company? It seems to me where we find promoters dealing with a director the fact that the firm of which the director is a member is getting a large benefit in a contract made between the promoters and the chairman of the company is one that naturally would influence the mind of an intending investor in these circumstances.

Then it is said that the plaintiff is prevented from availing himself of any remedy under the statute because he has waived the benefit of the statute by the terms of his contract. I entirely agree with what has just been said by the Lord Justice, that we are not to hold that it is impossible for an intending shareholder in a company to exclude himself from the benefit of the statute by an express stipulation of this kind; but when persons who issue a prospectus make statements in that prospectus with reference to contracts as to which the benefit of the statute is to be excluded, the statements must be in all respects well founded and direct the attention of the intending shareholders to the nature of the contract which has been completed and entered into. In my judgment that condition is not fulfilled by the

terms of this prospectus. I think the contract, being what I have stated it to be, is not comprised in any one of the classes of contracts which are referred to in the waiver clause upon a fair construction of that clause. But it is said, and Mr. Keswick has relied upon it, that, having taken great pains, as he evidently did, with reference to the prospectus, and having obtained legal advice as to whether or no everything had been done which ought to have been done in the prospectus, he ought not to be held liable. Unfortunately for him, as it appears to me, he never communicated to those who advised him the real nature of the contract. However unfortunate the omission so to do may be, it seems to me that under these circumstances he is not entitled to avail himself of the benefit of the waiver clause. I agree, therefore, that the decision of Farwell, J., should be upheld.

*Appeal dismissed.*

Solicitors, *Stephenson, Harwood, & Co.; Rowcliffes, Rawle, & Co.*, for *Clayton & Gibson*, Newcastle-on-Tyne.

## High Court of Justice.

Chan. Div. Kekewich, J. — Nov. 11.

*In re* VERRELL'S CONTRACT AND THE VENDOR AND PURCHASER ACT, 1874. (*a.*)

*Vendor and purchaser—Leaseholds—Sale by executor—Non-existence of debts.*

*An executor can sell leasehold property, either for the purpose of paying debts (even after twenty years from the testator's death) or for the purpose of defraying other expenses of administering his testator's estate; but where an executor-vendor gives the purchaser notice that there are no debts, and does not assert that the sale is made for the purpose of defraying other expenses of administration, he cannot make out such a title as can be forced upon a purchaser.*

In re Whistler, 35 *W. R.* 662, 35 *Ch. D.* 561, *and* In re Venn and Furze's Contract, 42 *W. R.* 440, [1894] 2 *Ch.* 101, *distinguished.*

This was a vendor and purchaser summons taken out by the purchaser under the following circumstances: Ambrose Verrell, who died in 1884, by his will appointed his wife (the vendor) sole executrix and trustee, and gave all his real and personal estate unto his trustee upon trusts for conversion and to invest the proceeds thereof, and after payment of his debts, funeral and testamentary expenses, to retain the income thereof for her own use during her widowhood, and after her death or second marriage upon the usual trusts in favour of the testator's children.

The said will contained the following proviso: "Provided always, and it is my wish that, unless circumstances otherwise require it, my leasehold estates shall not be converted during the life of my said wife, or so long as she shall remain unmarried, but the income arising therefrom shall be paid to her as hereinbefore provided, and at her death or marriage. I give my leasehold house No. 20, Ferntower-road to my son Edward."

On the 1st of September, 1902, the vendor entered into an agreement to sell the leasehold house No. 20, Ferntower-road to the purchaser, but the agreement did not disclose the fact that the vendor was selling in a representative capacity. After examination of the abstract of title the purchaser took the objection that, having regard to the proviso in the will and the specific gift over in favour of the son, the vendor had no power to sell as trustee, and (it being admitted that there were no debts of the testator) that the vendor had no power to sell as executor. The vendor asserted her right to sell either as executor or trustee. This summons was accordingly taken out to determine the question in dispute.

*R. H. Roope Reeve*, for the purchaser.—The vendor cannot adduce such a title as can be forced upon a purchaser. The vendor cannot sell as executor, for, although it is well settled that the purchaser need not inquire as to the existence of any debts, yet in the present case the purchaser had direct notice that there were no debts. The vendor cannot sell as trustee, having regard to the proviso in the will and the specific gift over of the leasehold property to the son Edward.

*R. J. Woodfin*, for the vendor.—The vendor has power to sell either as trustee or executor. There is no limit of time after which an executor cannot sell: *In re Whistler*, 35 W. R. 662, 35 Ch. D. 561; *In re Venn and Furze's Contract*, 42 W. R. 440, [1894] 2 Ch. 101. The proviso in the will is only an expression of the testator's wishes, and does not prevent the trustee selling if she thinks fit.

*R. H. Roope Reeve*, in reply [not called upon to reply as to vendor selling as trustee].—*In re Whistler* and *In re Venn and Furze's Contract* cannot apply here, as the purchaser has had actual notice that there are no debts in existence.

KEKEWICH, J. (after stating the facts).—The trust for sale is mere machinery. Upon the wife's death the testator gives the property to his son Edward. This is a specific gift to him, and it shows that there is no absolute trust for sale. What the circumstances are that may require a sale it is not easy to guess, but at any rate it has not been shown that any circumstances at all require it, and unless they do so the son could, I apprehend, interfere to prevent the trustee selling, except in pursuance with the terms of the trust for sale. As trustee, therefore, the vendor can make no title. But the vendor is also executrix. Can she sell in that capacity? The testator died less than twenty years ago, but that is immaterial, as even if it were more than twenty years ago there would be nothing in that to prevent the vendor making a title as executrix, as it has been laid down in *In re Whistler*, and followed in *In re Venn and Furze's Contract*, that the twenty years' rule made with regard to freehold estates does not apply to the case of an executor selling leaseholds. In the present case, however, there is a peculiar fact which requires consideration. The vendor's solicitors have stated that there are no debts of the testator and that the vendor is not selling for the purpose of paying such debts. That fact does not exist in either of the cases I have referred to and it distinguishes the present case from them. The question then is, has the executrix power to sell the leasehold property which is not required for the purpose of paying debts of the testator. It is true that an executor has power to sell for other purposes besides that of paying debts, as is pointed out in the judgment of Kay, J., in *In re Whistler*, where he says: "The suggestion is made, with which I entirely agree, that it is not merely the debts of the testator which the executor has to pay; he may have incurred expenses of administration, and he may have to raise money by pledge or mortgage of the personal property of the testator,

(*a.*) Reported by C. B. CAMM, Esq., Barrister-at-Law.

and these are matters for which it is essential that he should retain the power of dealing with the assets of the testator." In the present case we know that the sale is not for the purpose of paying the debts of the testator; it is true it might be for the purpose of paying such other expenses as are mentioned by Kay, J., but nobody suggests that it is in fact made for any such purpose. I do not think, therefore, that I am bound by the two cases I have considered to hold that the executor can make a good title without making any explanation at all. It is enough for me to say that there is a sufficient doubt about the case for me to hold that this is not such a title as the vendor can force upon the purchaser. [His lordship accordingly held that a good title had not been made out by the vendor.]

Solicitors, *H. Mear; Hoddinott & Davis.*

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Chan. Div. } Nov. 4.
Byrne, J. }

*In re* HIRAM MAXIM LAMP CO. (*a*)

*Company—Winding up—Action for calls before winding up—Set-off pleaded in defence—Liquidation of plaintiff company before judgment in action—Summons in winding up for balance order.*

*Where an action for calls had been commenced prior to a voluntary winding up and set-off pleaded as a defence, but no judgment had been given,*

*Held, on a summons being taken out in the winding up for a balance order in respect of those calls, that no allowance could be made by way of set-off against the sums payable under that order.*

This was an originating summons issued by the liquidator of the above company in its voluntary winding up against the Sir Hiram Maxim Electrical and Engineering Co. (Limited) for a balance order in respect of calls.

The Hiram Maxim Lamp Co. was formed (*inter alia*) for the purpose of selling lamps manufactured by the Sir Hiram Maxim Electrical and Engineering Co. (Limited). The Engineering Co. held shares in the Lamp Co. upon which calls became payable on the 2nd of February, 1902.

An action was brought by the Lamp Co. against the Engineering Co. for these calls and interests, amounting in all to £1,260 19s. 2d. The Engineering Co. claimed that £1,136 4s. was due to them from the Lamp Co. for goods supplied, and on a summons under order 14, obtained unconditional leave to defend on bringing the difference between these two sums into court.

The Engineering Co., in their defence in the action, pleaded set-off as to the remaining £1,136 4s.

On the 11th of July, 1902, the Lamp Co. passed a resolution for voluntary winding up and appointed a liquidator.

On the 22nd of July, 1902, this summons was issued.

The action had not yet come on for trial.

*Rowden, K.C.*, and *Stutfield*, for the liquidator.

*H. Terrell, K.C.*, and *Hansell*, for the Engineering Co.

BYRNE, J., said that it was clear that without the action and the plea of set-off there could have been no set-off against the calls. He was unable to adopt the view that the original debts were gone as soon as the set-off was pleaded; the debts remained separate debts until judgment, and there had been no judgment in the action. On the commencement of the winding up new rights arose and the liquidator was entitled to a balance order for the costs without any allowance by way of set-off. A balance order was accordingly made on the liquidator undertaking to discontinue the action and to consent to the money paid into court being returned.

Solicitors, *Angove, Bromwich, & Yeo; George Terrell, Terrell, & Varley.*

(*a*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

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Chan. Div. } Nov. 11.
Swinfen Eady, J. }

MACGUARE v. MILLIGAN. (*a*)

*Practice—Costs—Notices after summons for directions—Rules of Supreme Court, 1883, Appendix N., 51—Ord. 65, r. 38.*

*The Rules of the Supreme Court, Appendix N., item 51, apply to notices taken out after a summons for directions has been issued.*

This was a summons to review the taxation of a bill of costs, and raised a question as to what was the proper charge to be allowed for notices of applications on further directions after an order for directions has been made in the action.

Before the practice arose of summonses for directions the charges for ordinary summonses were: Preparing and attending to issue, 3s.; paid, 3s.; copy for chambers, 2s.; copy and service on the other side, 3s. 6d. Since, it has been the practice to issue in every action a summons for directions and for all subsequent applications to be made by a notice, instead of a summons, and in place of the allowances formerly made for the summons the taxing-masters now allow: Preparing and attending to issue, 1s. 6d.; copy and service, 2s. 6d.; copy for chambers, 1s.; total, 5s.

In the present case the latter sums only had been allowed by the master for such notices.

*Borthwick*, for the plaintiff, contended that a notice following a summons for directions was not provided for by Appendix N. to the Rules of the Supreme Court, 1883, and that the former amounts ought to have been allowed as in the case of a summons.

*Rolt*, for the defendant.

SWINFEN EADY, J., in giving judgment, said: In substance the question raised by the summons was whether an allowance of 5s. each for notices after a summons for directions had been taken out was a reasonable and proper allowance. There was nothing special in the particular case, and the matter was one which must be determined on general principles. The present summons was taken out with a view of ascertaining what was the practice to be adopted in future cases. In accordance with the usual practice, a summons for directions was taken out, and then followed notices as to matters incidental—viz, for discovery of documents and a notice to stay the action on the terms of a compromise. The point taken by Mr. Borthwick was that a notice following a summons for directions was not provided for by Appendix N. to the Rules of the Supreme Court, 1883, and therefore, that the old practice ought to be applied. Item 51 in Appendix N. is, "For preparing any necessary or proper notice, not otherwise provided for, or any demand pursuant to ord. 7, rr. 1 and 2—

(*a*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

1s. 6d." The notice in question falls within that rule. It was true that notices under summonses for directions were not in force when the scale in Appendix N. was prepared, but the item applied to all notices not otherwise provided for. The 5s. fixed by the master was a fair and reasonable sum for the work in the present case. In some cases it might be high; in others it might be insufficient; but, if the notice were a special one, the master, under item 52, might make a special allowance. Under ord. 65, r. 38, the master in taxing costs had a very wide discretion. In the generality of cases the sum of 5s. was a fair and reasonable sum to allow for notices. The summons, therefore, failed, and would be dismissed with costs.

*His lordship refused leave to appeal.*

Solicitors, *King & Burrell; Flux, Thompson, & Co.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) June 23, 1902.

REX v. JUDGE OF BIRMINGHAM COUNTY COURT AND ANOTHER. (a)

*County court—Practice—Joint judgment—Order for committal against one defendant—Power to issue further summons—County Court Rules.* 1889, *r.* 25.

*The power of the county court judge to issue a committal order is a new jurisdiction in which he has to consider all the facts of the case, and is not analogous to the old writ of* fi. fa. *It is therefore within his jurisdiction to give leave to issue a judgment summons against a debtor, even though one has been already issued against a co-defendant to which no return has been made.*

This was the hearing of a rule *nisi* calling on the judge of the Birmingham County Court, or alternatively the registrar, to show cause why an application by the Birmingham Industrial Land and Deposit Co. for leave to issue a judgment summons against one Dryhurst should not be heard and determined.

The facts of the case are as follows: A judgment upon a joint and several promissory note for £7 had been obtained by the applicants against three persons named Dryhurst, Simcox, and Price, and the amount had been ordered to be paid by instalments of 10s. 6d. a month. The instalments fell into arrear, and on the 11th of December a single judgment summons for £2 12s. 6d. was issued against all the defendants. It was found impossible to serve Dryhurst and Simcox, and on the 24th of January, 1902, a committal order was made against Price for £2 12s. 6d. and costs, but it was suspended on payment of 4s. a month. Shortly afterwards Dryhurst's address was discovered, and on the 3rd of February, 1902, the registrar was applied to for leave to issue a judgment order against him. The registrar refused, and his refusal was affirmed by the judge on the ground that the proceedings by way of a committal order were in the nature of an unexecuted execution, and that a second execution could not issue till there had been a return to the first, and that therefore he had no jurisdiction to issue the summons.

*H. D. Bonsey* showed cause.—The plaintiffs having elected to take a joint judgment against three, cannot now obtain a further execution until a return has been made to the first execution. The execution must follow the judgment: *Clark* v. *Clement*, 6 T. R. 525.

*Bancroft*, in support of the rule.—The plaintiffs have made no election, and are entitled as of right to proceed against the other two. The arrest of a defendant under the old writ of *ca. sa.* did not operate as a discharge of a joint debtor: Chitty's Practice (1885 ed.), p. 901.

Lord ALVERSTONE, L.C.J.—I am of opinion that this rule should be made absolute, and that the plaintiff is entitled to have his application for leave to issue a summons against Dryhurst determined on its merits. No doubt if a committal order were analogous to the old writ of *fi. fa.* no further execution could issue till a return is made to the first writ. But the jurisdiction by means of a committal order is a new class of jurisdiction. The county court judge has to consider the means of the judgment debtor, knowing how much of the judgment debt has been received on behalf of the judgment creditor. I therefore think that the contention of the judgment creditor is right, that, unless there is a rule of law against it, he ought to have a remedy against the other defendants. But I think it is impossible for us to say that the judge must issue and hear a judgment summons. He has a right to satisfy himself as to position of defendant, and if a very large proportion of the judgment debt had been paid into court it would be wrong to say the judge had not a discretion as to whether the summons should issue. The rule must be made absolute for the judge to hear and determine the application for leave to issue this summons. Upon the hearing of the application the judge can require such information to be supplied to him as he thinks fit.

DARLING and CHANNELL, JJ., concurred.

*Rule absolute.*

Solicitors for the judgment creditor, *Arnould & Son*, for *Bickley & Lynex*, Birmingham.

Solicitor for county court judge, *Solicitor to the Treasury.*

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K. B. Div.
(Phillimore, J.) June 18, 19, 1902.

KODAK (LIMITED) v. CLARK. (a.)

*Inland revenue—Income tax—English company holding large majority of shares of foreign company—Whether controls or carries on business of foreign company—5 & 6 Vict. c.* 35, *s.* 100, *Schedule D., case* 1.

*An English company which holds an immense majority of the shares of a foreign company in which, however, there are independent shareholders, does not carry on the business of that company, nor is that company its agent, and consequently the English company is not assessable to income tax upon the full profits of the foreign company under 5 & 6 Vict. c* 35, *s.* 100, *Schedule D., case* 1.

Case stated by Commissioners of Income Tax.

This was an appeal by the Kodak Co. (Limited) against an assessment of £1,400,000 for the year ending the 5th of April, 1899, and £365,515 for the year ending the 5th of April, 1900, under 16 & 17 Vict. c. 34, Schedule D, and 5 & 6 Vict., c. 35, Schedule D., case 1.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The case set out the following facts:

In 1880 the business of George Eastman was established at Rochester, New York, to deal in photographic apparatus. In 1884 this business was transferred to the Eastman Dry Plate and Film Co., which had established an agency in London, from which business was carried on all over Europe.

In 1889 this company sold its business in the United Kingdom and in all other parts of the world except North and South America to the Eastman Photographic Materials Co., an English company registered under the Companies Act. The business of the company so sold was carried on wholly independently of the American company by the English company, and the ownership of the two companies was in separate hands.

In 1890 the American company (the Eastman Dry Plate and Film Co.) became merged in the Eastman Co. of New York, and in January, 1892, this company was consolidated under the laws of New York with another company called the New Process Film Co. as the Eastman Kodak Co. This company still carries on business in New York.

The Eastman Co. and its successor, the Eastman Kodak Co., were wholly independent of the Eastman Photographic Materials Co. (Limited), but the latter bought from the former a considerable quantity of the goods in which it dealt.

In 1898 it was determined to form a new company to acquire the business of the Eastman Photographic Materials Co. (Limited) and also the majority of the shares of the Eastman Kodak Co. (Limited).

It appeared there had been a difficulty in getting supplies from the Eastman Kodak Co., and that the object in acquiring the shares was to secure the consideration which would be due on business principles to the holders of a preponderating amount of the shares.

On the 30th of September, 1898, an agreement was entered into between the Eastman Photographic Materials Co. (Limited) and George Eastman for the sale to him of the former's business.

On the 15th of November, 1898, Kodak (Limited) was registered under English laws to acquire (according to the statements in the prospectus) the "property and business of the Eastman Photographic Materials (Limited), and not less than 95 per cent. of the shares of the Eastman Kodak Co. of America, thereby bringing under one control all the Eastman Kodak companies covering the world. "The services of Mr. George Eastman have been secured for a period of five years . . . on advantageous terms."

By an agreement of Kodak (Limited) with Mr. George Eastman it was provided that he should act as joint managing director of the company . . . and should use his best endeavours to promote the interests of the American company.

The bye-laws of the Eastman Kodak Co. provided that the trustees or directors of the company were to be seven, the majority of whom was to be citizens and residents of the State of New York. These were to be elected annually, and shareholders could vote either in person or by proxy.

Kodak (Limited) acquired the whole of the business of the Eastman Photographic Materials Co. (Limited), and carried it on without any change or interval.

They also acquired from Mr. George Eastman 98 per cent. of the shares of the Eastman Kodak Co., but there are, however, and always have been, 818 shares of the Eastmen Kodak Co., held by 30 independent shareholders, whose shares Mr. G. Eastman did not acquire. Some of these shares are held as qualifying shares by the trustees or directors of the company. By the laws of the New York State, Kodak (Limited) is unable to exercise any control over the Eastman Kodak Co. otherwise than as a shareholder at the annual general meetings. On the 27th of January, 1899, Kodak (Limited) granted to Mr. G. Eastman H. A. Strong, and B. H. Clark its proxy to vote at any meeting of the Eastman Kodak Co. Eastman and Strong are directors of both companies and Clark is a director of Eastman Kodak Co. Eastman voted once as proxy for Kodak (Limited) at a meeting of the Eastman Kodak Co. for the appointment of the directors, but otherwise it appeared that Kodak (Limited) had never controlled or interfered with the management of the Eastman Kodak Co. Kodak (Limited) has a number of American shareholders, and the bankers of Kodak (Limited), the Rochester Safe Deposit Co., receive from the Eastman Kodak Co. the dividends due to Kodak (Limited) and retain in America such dividends and utilize a certain proportion for the payment of the dividends due to American shareholders. The residue is left to the order of Kodak (Limited), and no moneys whatever attributable to the dividends coming to Kodak (Limited) from the American company have ever in fact been remitted to England.

It was contended on behalf of the company—

1. That the business carried on by the Eastman Kodak Co. was carried on in America, and neither wholly nor partly in the United Kingdom, and that there was no fact from which it could be found or held that the business was carried on in the United Kingdom, and that therefore no assessment could be made by or under the Income Tax Acts in respect of the profits of the business upon Kodak (Limited).

2. That the profits of the business of the American Eastman Kodak Co. were not the profits of Kodak (Limited).

3. That Kodak (Limited) had only such an interest in the business and profits of the Eastman Kodak Co. as holders of shares in the latter company would have, and no other; that they were entitled only to such profits as were converted into and distributed in the shape of dividends in respect of these shares, and to nothing else.

4. That the dividends to which Kodak (Limited) were entitled in respect of these shares in the Eastman Kodak Co. were taxable only (at most and if at all) under case 4 or case 5 of section 100, Schedule D, of the Income Tax Act, 1842, and not otherwise.

5. That the said dividends upon the said shares of Kodak (Limited) in Eastman Kodak Co. were taxable only (if at all) to the extent to which they were actually received in the United Kingdom, and that, as no part of any such dividends had been received in the United Kingdom in fact, Kodak (Limited) were not taxable in respect of any such dividends.

6. That as no part of the said dividends had been constructively received in the United Kingdom, Kodak (Limited) could not be assessed in respect of any part of any such dividends.

7. That the Eastman Kodak Co. and Kodak (Limited) were distinct and independent entities, and that the ownership by the latter of shares even to the extent of 98 per cent. of the total shares in the former did not make the business and profits of the former the business and profits of the latter, and that there was no evidence from which it could properly be found that the business or profits of the former were the business or profits of the latter, and that the holding of shares was not such evidence.

The surveyor maintained—

1. That Kodak (Limited), having their registered office in England, were liable to assessments upon their total profits, including those of the Eastman Kodak Co.

2. That if Kodak (Limited) were held to be chargeable under case 4 or 5 of the Income Tax Act,

1842, Schedule D, s. 100, then that the whole of the dividends of the Eastman Kodak Co. were constructively, if not specifically received in the United Kingdom.

Paragraph 15 of the special case is as follows: "After hearing the whole of the evidence . . . we found as a fact that the English company controlled the American company from England, and that the head and seat and directing power of the appellants' company are at their registered office in London."

Paragraph 16: "We therefore held . . . that the American company is carried on by and is the business of Kodak (Limited), and that the profits and business are technically the profits and business of Kodak (Limited). That if the business at Rochester is, and the profits made thereat are technically the profits of the American company, the American company for all purposes are the agents of the appellant company. That Kodak (Limited) is liable for its profits made in America, under Schedule D, case 1."

The question for the opinion of the court was whether on the facts there was any evidence to justify these holdings, and whether such holdings were correct in point of law or were erroneous.

*Danckwerts, K.C.* (*Kerly* with him), for the appellants.

*Sir R. B. Finlay, A.G.*, and *Sir E. Carson, S.G.* (*S. A. T. Rowlatt* with them), for the Crown.

The following cases were also cited in addition to those mentioned in the judgment: *Gresham Life Assurance Society* v. *Bishop*, [1901] 1 K. B. 153, 49 W. R. Dig. 77; *Rex* v. *General Commissioners of Taxes for Clerkenwell*, [1901] 2 K. B. 879, 50 W. R. Dig. 76.

PHILLIMORE, J.—This is a very important case evidently in point of amount. The facts in it are numerous and complicated, but I have been so much assisted by the learned counsel on both sides that they have been brought in my mind to a very small point, and I am prepared to give judgment at once.

The commissioners have found in an inferential form—upon the facts already found, that the American company—the Eastman Kodak Co.—"is carried on by, and is the business of the appellants, and that the profits and business are technically the profits and business of Kodak (Limited)." Secondly, "That if the business at Rochester and the profits made thereat are technically the business and profits of the American company, the American company for all purposes are the agents of the appellant company"; and having so found, they state this question for the court: "The question for the opinion of the the court is whether on the facts there was any evidence to justify our holdings, and whether such holdings are correct in point of law or are erroneous." They find, of course, a great number of other facts in the course of the case, and in paragraph 15 they find some of the facts—facts summing up the whole evidence—which have also to be considered; and I am bound to say at once that of the two findings in paragraph 15, I think the earlier is the only important point in conflict with the holdings of paragraph 16. They "found as a fact that the English company controlled the American company from England, and that the head and seat and directing power of the appellants' company are at the appellant's registered office in London." As to their second conclusion there is no doubt; but with regard to the first, if the English company controlled the American company from England, it would seem to me (for reasons which I will give more fully in the course of my judgment) that the proper thing to do would be able to apply the principle of the case of the *San Paulo Railway Co.*, 43 W. R. 339, 44 W. R. 336, [1895] 1 Q. B. 580, [1896] A. C. 31, and to say that the American company was carrying on the business in England, and that the American company could be taxed in England. The view of the commissioners is not that, but that the English company is to be taxed in England because the business which is carried on in America is substantially the business of the English company.

Now, in order to arrive at conclusions of law in this case I am guided by certain decisions. First of all, there is the case of *Colquhoun* v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493, which establishes shortly that a sleeping partner in England in a business carried on abroad is taxable in respect of the income which he receives in England from that business, but is not taxable on the profits of that business or bound to return them; and when I have said that about *Colquhoun* v. *Brooks* I have said all that is necessary for this case, except that I ought to quote that passage from Lord Herschell's judgment which was put before me in argument (38 W. R., at p. 291): "Indeed in this very case, if the business in which the respondent is a partner were disposed of to a joint stock company, and he retained his interest in the form of shares in that company, though the annual return to him might be precisely the same, he would, I take it, be clearly free from the taxation it is now sought to impose." Following on the case of *Colquhoun* v. *Brooks* comes the case of the *San Paulo Railway Co.* v. *Carter*, to which I have already referred. That case pointed out that in *Colquhoun* v. *Brooks* the successful appellant was merely a sleeping partner, and that where the partners resident in England are not sleeping partners, and do a portion of the partnership work in England, or where it being a company doing the main part of its work abroad, there is still a controlling power and brain power exercised in England by a body of directors in England, that company is held to be, or that partnership is held to be, a partnership or a company which carries on its business partially—not wholly—in England, and by reason of this partially carrying on of its business in England is liable to be taxed. Then, following on those cases, comes the case of the *Bartholomay Brewing Co.* v. *Wyatt*, 42 W. R. 173, [1893] 2 Q. B. 499, which, I cannot help saying, has, I think, been sometimes not sufficiently understood. My brother Wright's judgment in that case seems to me to rest, as he put it, upon two grounds. It was decided by him before the House of Lords had decided the case of the *San Paulo Railway Co.* v. *Carter*, and therefore on the first ground it was not strange that he did not see the limitation of *Colquhoun* v. *Brooks*, and that he took a point which the *San Paulo Railway Co.* v. *Carter* shows not to be a good point; but the second point which he took is, I think, well worthy of attention, and I do not think it has been interfered with by any subsequent decision or withdrawn by the learned judge himself (42 W. R., at p. 176): "I think that in point of law whatever control is exercised by the English company is exercised by it as the holder of practically all the shares in the American company; and if that is so, the English company cannot be properly said to carry on the business of the American company at all." I need not read the following words. That passage shows that one must not make the jump from "control" to "carrying on business." A company may control another company; but it does not necessarily follow that because an individual controls the company, or the company controls the company, or the company controls the individual, that the business carried on by the person or company controlled is necessarily a business carried on by the controller; and particularly is that the case when

the machinery of companies is used and the controller is a company; and I do not think my brother Wright's language in that case can be passed by, for it is, to my mind, very important. Then comes a group of cases, in all of which Mr. Apthorpe appeared as the surveyor of taxes and as the respondent, and I think that those cases require a little consideration; but when considered it will be seen that no one of them covers this case. In the first of them—the *Frank Jones Brewing Co.* v. *Apthorpe*, 15 Times L. R. 113—there was but one company in England carrying on the business in the United States, and for the purpose of the business there working through the American committee. All that the court had to decide was, did that come within the *San Paulo case* or did it not? Was so much of the brain power exercised out in America and so little in England that it did not come within the *San Paulo case*, and that the company was an English company carrying on business in America, though, no doubt, largely carrying it on through an American committee, and, therefore, was taxable? In *United States Brewing Co.* v. *Apthorpe*, [1898] 4 Tax Cas. 17, the facts were the same, except that the United States Brewing Co. was carrying on the business in several States in America, in some of which it was not possible for a corporation to hold land, and did in those States carry on its business through the machinery of its native company—a company formed in that State—and while having by far the largest part of the interest in shares in those subsidiary companies, still had allowed those shares to be owned, or apparently owned, by individuals. Whether those individuals held them in their own right, or whether they held them merely as trustees for the company, is not very clearly found by the case; but the learned counsel who argued the case for the United States Brewing Co. said this: "The only difference between this case and that of the *Frank Jones Brewing Co.* v. *Apthorpe* is that two of the five breweries belonging to the United States Brewing Co. are in the State of New York. In that State property cannot be held by an English company, and, therefore, an American company actually holds the breweries. But inasmuch as the committee of management is appointed from home by the English company, and for that reason the existence of the American company is only a question of title and machinery, I cannot distinguish this case from that of Frank Jones Brewing Co." I do not know that I quite follow his chain of argument in which he says: "and for that reason the existence of the American company is only a question of title and machinery." I think the gap in that argument should be filled in this way: "That inasmuch as I cannot rely on these three shareholders as having any substantial interest, and then it only becomes a question of where the actual work is done, I cannot distinguish this case." However, upon the case—which did not find that these three shareholders had any substantial interest—which did find that the company was formed merely in order to meet the rules of the State of New York—and upon the admission of counsel, the court, which had already decided the *Frank Jones case*, said they could see no distinction there; so upon that admission and on those definite findings, they gave the same decision. I do not regard that case as touching this. Then comes the somewhat difficult case of *St. Louis Breweries* v. *Apthorpe*, 47 W. R 334, 79 L. T. Rep. 551, where I cannot help thinking that the learned judges were allowed to suppose by some mistake that my brother Wright had withdrawn more of his judgment in *Bartholomay Brewery Co.* v. *Wyatt* than in fact he had done; but, at any rate, there are two or three reasons why that case does not decide this; and the first reason is that in that case—as in the next I am going to mention—the commissioners stated the parties out of court. They found the facts. They did not say that they had put all the evidence upon which they found those facts into the case; they did not ask the court whether the evidence in the case stated by them was sufficient to entitle them to find those facts; but they found the facts, and did not ask the court whether or not there was legal evidence to support them, and they found that the business which was carried on in the United States was in fact carried on by, and was the business of, the appellant company, and that the profits made were the profits of the appellant company; and then there was a subsidiary finding too. That is the first reason why that case does not govern this. The second reason is this. There were (as in this case) two companies, and (as in this case) the great majority of the shares in the American company belonged to the English company, which was the controlling company; and (as in this case) there were a small number of shares (fourteen in all) which did not belong to the controlling company, thirteen of which were held by the directors (thirteen in number) out in America, who held one each; but there was no finding there that those directors held those shares in their own right and as independent people. There were several points in that case which would lead any court to hold that substantially they were nominees, or trustees, or conduit pipes, and that the business of the American company was as much the business of the English company as if the English company had owned every share in the American company; and upon that the court held (as I should myself be quite prepared to hold, even unguided by that case) that in those circumstances the mere existence of the paper company out in America did not prevent the business carried on in America being the business of the English company, and that, therefore, the English company was taxable for that business. Last of all comes the case of *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (*Limited*), 80 L. T. Rep. 395, 47 W. R. Dig. 75, which is more important because it went to the Court of Appeal. There, as here, there were two companies. There, as here, the majority of the shares were in England. There, as here, there were a few shares left outstanding (in that case three); but there again the commissioners found as facts that the business carried on at Chicago, in the United States of America, was in fact carried on by, and was the business of, the respondent company; and the Court of Appeal largely went upon the question that they could not go behind those facts. Smith, L.J., though he does, no doubt, discuss the facts, says at the end and at the beginning of his judgment that he was really concluded by the decision of the commissioners in point of fact. He goes so far as to suggest that if the facts are incorrectly stated (and he evidently thinks it possible that they were) it would be possible to raise the matter upon a new assessment in another year. And Collins, L.J., says the commissioners had stated the brewery company out of court; and more than that, there were two very important considerations in that case. First of all, in that case the English company not only bought the shares of the foreign company, but they bought the business and assets and goodwill, and everything else of the foreign company, and took transfers of everything except the real estate, which they were obliged to leave outstanding in the foreign company, and I think that it is upon that and the finding of the commissioners that Collins, L.J.,

decided. He found as a fact that they were carrying on the business as brewers in Chicago; and he, I think, considered that the American company was not so much the instrument with which they carried it on as the screen behind which they carried it on, and taking the two matters—that they had actually bought the assets in the business, and that the commissioners found as a fact that it was their business—he had very little difficulty in deciding that they must be taxed upon it. The second point is this—that I do not find throughout that case any suggestion that the three outstanding shareholders had any real interest in their shares; and when I come to the judgment of Romer, L.J., I feel sure that he assumed that they had no interest, however small, in those shares at all. I read from his judgment (80 L. T. Rep., at p. 400): "I think that intention was carried out. The business was taken over by the English company, and has since been managed under the direction of the English company, which acted in Chicago by its agents there, although, no doubt, the American company was kept on foot for the purpose of holding real estate in Chicago for the English company, and otherwise preventing American law from interfering with the carrying on of the business by the English company in America." Now, those are the previous cases.

In this case the position is remarkable. No doubt Kodak (Limited) holds 98 per cent. (an enormous proportion) of the shares in the Eastman Kodak Co. in America, but it does not hold the remaining 2 per cent., and it is stated—and the facts before me show, as far as they stand—that the number of shareholders holding 2 per cent. of the whole shares are independent people, having their own interest in the Eastman Kodak (Limited), to which they adhere, and in respect to which they must be considered. Now, that being the case, I do not think it can possibly be said that Kodak (Limited), though controlling and managing the Eastman Kodak Co., is, when the Eastman Kodak Co. carry on business under its control, thereby itself carrying on the business. The Eastman Kodak Co. carries on business for its 100 per cent. of shareholders; 98 per cent. of those are the English company, and it has to carry on its business, as far as it lawfully can, under the control of, and in obedience to, the English company and its nominees; but it does not carry on the business for the English company, but for the English company plus the 2 per cent. in America; and when one comes to consider what the relations between the two companies are, one sees that it is very important to keep that provision in view. The American company are manufacturers and vendors, and the English company are buyers. Obviously, if the business of the American company was the business of the English company it would not matter, except as a matter of book-keeping and account, at what rates the goods transferred from the Eastman Kodak Co. to Kodak (Limited) were debited and credited. It matters exceedingly to the 2 per cent. of the American shareholders that those goods should be debited and credited at the highest possible value which could be obtained for them in the market. Therefore, I think, though the English company controls the American company, the business which the American company carries on is not the business of the English company; and it is impossible upon the documents so to hold; and the matter being—except in respect of some oral evidence which was given, not on behalf of the Crown, but on behalf of Kodak (Limited)—entirely a matter of documentary evidence and construction, I am bound to hold that there was no evidence on which the commissioners could lawfully hold that the American company is carried on by, and is the business of, the English company, so that the profits and business of the American company are technically the profits and business of Kodak (Limited); 98 per cent. it may be of the profits and business are technically the profits of their business, but the whole are not. The second finding there is even more difficulty in supporting, and it is more easy to dispose of: "That if the business at Rochester and the profits made thereat are technically the business and profits of the American company, the American company for all purposes are the agents of the appellants' company." They are not. They are a different entity with different constituents bound to carry on the business for the best advantage of those constituents; no doubt very largely the English company is the principal constituent of it; nevertheless, the American company carries on the business for its own company, and not for the appellant company. As I have already said, and I now repeat, the statement in paragraph 15 does not help, but to my mind rather interferes with the finding of the commissioners in paragraph 16. They seem to have mixed up, and throughout the argument in this case there seems to be a mixing up of, two very different questions. First of all, whose business is it that is being carried on abroad? That is one question. A company may be formed in England and there may be a sham company in America purporting to be carrying on business, and yet it may be the business of the English company carried on abroad. That is one question. Then the other question is, If the business is really carried on abroad, but the directorate—the company that carries it on—is in England, where is the control for the purpose of settling the question of taxation? One question is, Whose business is it? The other is, Who controls the one business? Now, the *San Paulo Railway case* and the *Frank Jones Brewery Co. case* (and some others) deal with the question of, Where is the control? There is one business carried on in America—one business carried on abroad: Where is the control? If it is in England, then the business is partially carried on in England, and is taxable here. The other class of cases do not deal with that. They deal with the question of whose is the business carried on abroad, Is it the business of the English company, or is it the business of someone else? If it is the business of someone else, it matters not that the English company control it, supervise it, administer it; it is the business of the foreign company, and the foreign company own it. Therefore I think that, upon this case and these questions, I must give judgment for the appellants and remit the case to the commissioners, directing them that there was no legal evidence upon which they could hold "that the American company is carried on by and is the business of the appellants, and that the profits and business are technically the profits and business of Kodak (Limited)," nor that they could hold "that if the business at Rochester and the profits made thereat are technically the business and profits of the American company, the American company for all purposes are the agents of the appellant company." But having done that, there remain at least two very serious questions, which may or may not have been pressed by the Crown, that have to be considered before this matter is settled. The first of those, which I confess I have only arrived at late in the course of this case, is the question whether the proper view is not that Kodak (Limited) ought to return as part of its profit, not merely the profits which it makes and the dividend which it receives from the Eastman Kodak Co., but, if for some reason or other it is more convenient to the Crown to try it in another way, the actual profits

made by the Eastman Kodak Co. I am not at all certain that the true view is not that 98 per cent. of the profits of the Eastman Kodak Co. ought not to be returned by Kodak (Limited), as part of its profits; but that point has not been argued before me, nor does the case probably state every fact necessary in order to determine that; and, of course, one must remember that no shareholder has a right to any profits until the dividends are declared. At the same time, remembering here what an enormous preponderance Kodak (Limited) holds of the shares, it may be that the true view here is that Kodak (Limited) ought to be taxed upon 98 per cent. of the profits of the Eastman Kodak Co. The other question is, which is not, of course, raised in this case, whether they ought not to include, at any rate in their return, the dividends declared—I do not say received, but the dividends declared—by the Eastman Kodak Co., and paid over, at any rate to the agent of Kodak (Limited) in America, even if they never reach, in meal or in malt, this country.

There remains again another question, which might or might not affect this case, as I have said earlier, upon the finding in paragraph 15; if that be correct (of course it does not bind the Eastman Kodak Co.), that is whether the Eastman Kodak Co. must not return its profits as a company carrying on its business partially in England, because the control and brain is in England, and whether under one of those clauses of the Act (which I have not carefully looked into) under which factors, agents, and stewards, and so on must make a return, so perhaps the Crown may compel Kodak (Limited) to make a return on behalf of the Eastman Kodak Co. Those are all matters which I am not determining to-day. I suppose that all I can do is to pronounce my opinion upon these two questions and remit the case to the commissioners; and there will be the costs of the appeal.

*Appeal allowed.*

Solicitors for appellants, *Kerly, Son, & Verden.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

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## IN BANKRUPTCY.

K. B. Div.
(Wright and Darling, JJ.) } Aug. 4, 1902.

*In re* ILIFF. (*a.*)

*Bankruptcy—Practice—Proof—Substitution of proof by assignee of proving creditor—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 63.

*The assignee of a proof who desires to take the benefit thereof, after satisfying the official receiver or trustee of the validity of the assignment, should apply to the court to give leave to the official receiver to place a proof by him (the assignee) on the file in place of the proof of the assignor.*

Application by way of appeal from a decision of his Honour Judge O'Connor, in the county court at Sunderland, for directions as to the procedure to be adopted by the assignee of a proof in order to obtain the dividends due under the proof.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

The applicant, who was the assignee of a proof in the bankruptcy, had asked the official receiver, as trustee in the bankruptcy, to examine into the proof and the assignment, and if satisfied therewith to put a proof on the file in the name of the assignee in substitution for the proof of the assignor, that being the procedure suggested by the court in the case of *In re Frost & Frost,* 47 W. R. 512, [1899] 2 Q. B. 50.

The official receiver, having examined into the matter, expressed his willingness to place the assignee's proof on the file if ordered to do so by the court.

The assignee thereupon applied to the county court at Sunderland for an order directing the official receiver to place his proof on the file in place of the proof of the assignor.

The county court judge refused to make any order on the grounds that it was no part of the business of the court, and that the official receiver ought to deal with the proof on his own responsibility.

The assignee appealed.

*A. Read,* for the appellant, placed the facts before the court and asked for their directions in the matter.

*H. Sutton,* for the official receiver, did not oppose the application.

WRIGHT, J.—In future cases of this kind after the official receiver or trustee has examined into the assignment, and satisfied himself as to its genuineness, the assignee should apply to the court to give leave to the official receiver to place a proof by him (the assignee) on the file in place of the proof of the assignor. In the present case we grant that leave without further application.

DARLING, J., concurred.

Solicitors for the appellant, *Coote & Ball.*

Solicitors for the official receiver, *The Solicitor to the Board of Trade.*

## Court of Appeal.

From K. B. Div. (Collins, M.R., Jeune, P., and Cozens-Hardy, L.J.) — Aug. 12, 1902.

TOLHURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS (LIMITED).

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (LIMITED) AND IMPERIAL PORTLAND CEMENT CO. (LIMITED) v. TOLHURST. (a.)

*Contract — Assignability — Obligation performable by deputy—Action by assignor and assignee.*

*By a contract between T., the owner of a chalk quarry, and a cement manufacturing company, who were the owners and occupiers of neighbouring land, it was agreed that T. would supply and the company would take and buy at a specified price 750 tons of chalk a week, and so much more as the company should require for the manufacture of cement on their said land. The contract was to last for fifty years. Subsequently the company went into liquidation for the purpose of being amalgamated in a new company with a very much larger capital, and all the property and the business of the old company, and the benefit of its trade contracts, were assigned to the new company. The deed of assignment contained a covenant by the new company to indemnify the old company against all liabilities on trade contracts. In an action by the old company and the new company against T.,*

*Held, that, as there was nothing personal to the old company in the receiving or paying for chalk, or in the requirements for the manufacture of cement on the said land, the contract remained enforceable against T., and he was bound to supply chalk to the new company at the price specified in the contract.*

*Decision of* Mathew, J. ([1901] 2 *K. B.* 811, 50 *W. R. Dig.* 38), *reversed.*

Appeals from the judgment of Mathew, J., at the trial of two actions without a jury: [1901] 2 K. B. 811, 50 W. R. Dig. 38.

By a contract dated the 5th of January, 1898, between Alfred Tolhurst and the Imperial Portland Cement Co. (Limited), after reciting that the company were the owners of a piece of land at Northfleet, and that Tolhurst was the owner of chalk quarries in the vicinity, it was agreed that the company would construct a tramway on their said land as therein specified, and that when the tramway should be completed Tolhurst would, for a term of fifty years, to be computed from the 25th of December, 1897, or for such shorter period (not being less than thirty-five years) as he should be possessed of chalk available and suitable for the manufacture of Portland cement and capable of being quarried, supply to the company, and the company would take and buy of Tolhurst at least 750 tons per week, and so much more (if any) as the company should require for the whole of their manufacture of Portland cement upon their said land. The price to be paid by the company was 1s. 3d. per ton.

In November, 1900, the Imperial Portland Cement Co. (Limited) went into liquidation for the purpose of being amalgamated with other cement works, and a new company, the Associated Portland Cement Manufacturers (1900) (Limited), was formed for the purpose of acquiring the property and business of the Imperial Co. and of other cement manufacturers. The capital of the Associated Co. was £5,000,000, being very much larger than that of the Imperial Co. By a deed dated the 30th of November, 1900, all the property and business of the Imperial Co. and the benefit of their trade contracts, including the contract with Tolhurst, were assigned to the Associated Co.

Notice of the liquidation and of the sale of the business of the Imperial Co. to the Associated Co. was given to Tolhurst on the 12th of December, 1900.

On the 20th of December Tolhurst wrote to the Associated Co. that he was willing to supply them with chalk at 2s. a ton. On the next day the company wrote in reply that they were entitled to the benefit of the contract of the 5th of January, 1898. Tolhurst wrote in answer that the contract was not one which the Imperial Co. could transfer, that the contract had been terminated by the liquidation of the Imperial Co., and that he was not bound to supply chalk to the Associated Co. under the contract.

The Associated Co. took possession of the works and business of the Imperial Co., and Tolhurst supplied the Associated Co. with a large quantity of chalk.

The first of the two actions was brought by Tolhurst against the Associated Co. The second was brought by the two companies against Tolhurst.

In the first action Tolhurst claimed payment at the rate of 2s. a ton for chalk supplied by him since the formation of the Associated Co., and a declaration that he was not bound to supply the Associated Co. upon the terms of the contract. In the second action the plaintiff companies claimed a declaration that the contract was still subsisting and was a valid and binding contract, and that they were or one or other of them was entitled to be supplied with chalk by the defendant on the terms of the contract.

It was agreed that Tolhurst should go on supplying chalk to the Associated Co. without prejudice to the question whether the price should be 2s. or 1s. 3d.

Mathew, J., held that, as the Associated Co., being an amalgamation of several companies, would have a larger trade than the Imperial Co., and would probably require a larger quantity of chalk, the effect of the assignment might be to place upon Tolhurst a greater burden than he had originally agreed to, and that, therefore, he was not bound to supply chalk to the Associated Co. on the terms of the contract. He accordingly gave judgment for Tolhurst in both actions.

The two companies appealed.

*J. Alderson Foote, K.C., Younger, K.C., A. M. Bremner,* and *H. E. Wright,* for the companies.

*Pickford, K.C.,* and *George Wallace,* for Tolhurst.

*Cur. adv. vult.*

Aug. 12.—COLLINS, M.R., read the following judgment: The question raised in these appeals is whether a contract made between one Tolhurst and the Imperial Cement Co. (Limited) for the supply of chalk by Tolhurst to the company for their manufacture of Portland cement upon a certain piece of land can be enforced against Tolhurst, the company having assigned to another company called the Associated Portland Cement Manufacturers (Limited) its property and undertaking, including the contract in question, without the consent of Tolhurst. The Imperial Co. went into liquidation immediately upon the assignment, and during the pendency of this litigation all its assets have been fully distributed, but it has been kept alive so far as to admit of actions being brought in its name to recover book debts. The deed of assignment also contains a covenant by the new company to indemnify the old against all claims and liabilities in respect of trade contracts, and we were told that this right to indemnity is its sole remaining asset. On the 12th of December, 1900, the old company wrote to Tolhurst

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

as follows: "Dear Sir,—I have been instructed to advise you that the sale of our business to the Associated Portland Cement Manufacturers (1900) (Limited) was completed yesterday, to take effect as from the 30th ult.—Yours faithfully, Imperial Portland Cement Co. (Limited), in liquidation, Ernest W. Elliott for the liquidators." Tolhurst, on the 20th of December, wrote to the secretary of the new company as follows: "Dear Sir,—I have received a communication from the Imperial Portland Cement Co. (Limited), in liquidation, informing me that they had sold their business to the Associated Portland Cement Manufacturers (1900) (Limited), and that such sale took effect as from the 30th ult.; but, as I have received no similar communication from your company as the purchasers, I should be glad to know whether we are to continue to supply these works with chalk, which I am quite willing to do at 2s. per ton delivered alongside your chalk store, your men tipping the trucks on their arrival so that the engine takes back empty trucks without being detained. Pending hearing from you I will continue to supply what may be required at the above rate." Some further letters followed, in which both parties adhered to their original positions, and it was ultimately arranged that Tolhurst should continue to deliver chalk to the new company pending the decision of the court as to whether he was bound to supply it at the price agreed in the contract with the old company. The material parts of that contract was as follows: After reciting that the company had recently bought a piece of land from him, and that he was the owner of chalk quarries, and had constructed a tramway up to a point on land of the company, the latter undertook to connect with it and carry forward another tramway for the purpose of receiving and delivering chalk from Tolhurst's quarries at their works. By clause 2 it was provided as follows: "When the tramway to be constructed by the company as aforesaid shall be completed the said Alfred Tolhurst will for a term of fifty years to be computed from the 25th of December, 1897, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable for the manufacture of Portland cement and capable of being quarried and got in the usual manner above water level, supply to the company, and the company will take and buy of the said Alfred Tolhurst at least 750 tons per week and so much more, if any, as the company shall require for the whole of their manufacture of Portland Cement upon their said land. And the said Alfred Tolhurst will provide all rolling stock and traction power, and will deliver such chalk by conveying it in wagons, such wagons to be side or end tip as required by the company over the tramways aforesaid, to alongside the wash mills or stores of the company or other convenient places to be provided by them as the company shall direct, but this agreement shall not preclude the said Alfred Tolhurst from supplying chalk from his said quarries to other persons than the company for ballasting or manufacturing purposes or otherwise." By clause 4 the price to be paid for the chalk is 1s. 3d. per ton, and the company are to pay in cash monthly on the 10th of the month following delivery, subject to neither party being prevented from delivering or taking by strikes, &c., as stated in clause 6, which further provides that if Tolhurst is so prevented from delivering, the company may obtain chalk elsewhere. It will thus be seen that the goods were deliverable on credit, and—beyond a *minimum* amount—to the extent of so much more as the company should require for the whole of their manufacture of Portland cement upon their said land. The litigation was initiated by Tolhurst suing the new company for the price of chalk delivered by him to them at 2s. a ton, and for a declaration that he was not bound to deliver at the contract rate as between him and the old company. The defendants relied upon the defence that they were entitled to the benefit of the contract to have the chalk delivered at 1s. 3d. a ton. The old company was not, in fact, a party to these proceedings, but, I think that, having regard to the correspondence, no point can be made of this. A cross-action was then brought by the new company joining the old to establish that the contract was subsisting and binding upon Tolhurst, and to have it performed. Mathew, J., has held that the contract cannot be enforced against Tolhurst.

It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor: see *Liversidge* v. *Broadbent*, 7 W. R. 615, 4 H. & N. 603, and cases collected in the notes to *Lampleigh* v. *Brathwait*, 1 Smith's Leading Cases (10th ed.), p. 136. On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice. Whether the right so created involves privity between the debtor and the assignee is, I think, doubtful; and the rule of the common law that the action must be brought in the name of the assignor shows that it did not regard such a transaction as equivalent to a *novatio*. The right seems rather to be based on the equitable principle that it would be against conscience on the part of the person on whom the obligation lay to discharge it to the original contractee after he had notice that the latter had assigned the benefit of it to another person. The special right of ignoring altogether the consent of the person upon whom the obligation lies to the substitution of one person for another as the recipient of the benefit would seem in principle and in common justice to be confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it, and I think the right of dropping the original contractee out of the discussion must be limited to those cases only in which the contract—that is, the benefit of all that remains to be done under it—has been assigned; and it is in this sense only, as it seems to me, that contracts can be said in strictness to be assignable. There is, however, another class of contracts where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or *quasi*-privity with a substituted person. "You have a right," says Lord Denman, C.J., in a passage cited by Gray, J., in delivering the judgment of the Supreme Court in the case of *Arkansas Smelting Co.* v. *Belden Mining Co*, 127 Davis's U. S. Sup. Ct. Rep. 379, at p. 387, "to the benefit you contemplate from the character, credit, and substance of the party with whom you contract": *Humble* v. *Hunter*, 12 Q. B. 310, at p. 317. To suits on these contracts, therefore, the original contractee must be a party, whatever his rights as between him and his assignee. He cannot enforce the contract without showing

ability on his part to perform the conditions performable by him under the contract. This is the reason why contracts involving special personal qualifications in the contractee are said, perhaps somewhat loosely, not to be assignable. What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of the obligation on to a substituted contractor any more than where it is special and personal, but that in the first case the assignor may rely upon the act of another as performance by himself, whereas in the second case he cannot. He cannot vouch the capacity of another to perform that which the other party to the contract might, however unreasonably, insist was what alone he undertook to pay for—viz., work to be executed by the party himself. If, for instance, he had ordered a painting from some unknown artist of his own choice, he could not be compelled to accept instead of it the work of another artist, however eminent.

These considerations seem to me to establish beyond all question that the present case is not one where it would be possible to assert that on any rule of law or equity the new company could be deemed to be substituted into the place of the old one at the mere will of the assignor without the consent of Mr. Tolhurst. The latter may be wrong, but he is entitled, it seems to me, to have a choice in the matter of the person or company to whom he is asked to give credit, and he may prefer, and I think he is entitled to prefer, to deal with a particular company doing business in one place on a comparatively small scale, rather than with one which is about to embark on a large combination of competing businesses requiring a very large capital and involving commensurate risks. No instance of such a contract being sued on in the name of the assignee has been adduced, and the judgment of the Supreme Court of the United States in the case cited is clear against it; while for the reasons I have above given it seems to me to fall outside that limited class of cases in which privity or *quasi*-privity can be said to be established without novation. To support this ground of claim counsel for the appellants relied upon section 157 of the Companies Act 1862, and section 25, sub-section 6, of the Judicature Act, 1873. But these sections must, I think, be read with some limitation. They have never been construed as rendering assignable contracts which were before incapable of assignment, such as those involving special personal qualifications on the part of the person claiming performance, and they do not override the common principles of law and equity so as to compel a man against his will to accept something essentially different from that which he stipulated for: see the judgment of the court delivered by Channell, J., in *Torkington* v. *Magee*, 18 Times L. R. 703. It would seem, then, that the appellants' case can be supported only, if at all, on the ground that the old company is a party to the proceedings, as it certainly is in the action brought by it.

The case, therefore, must be considered now solely on the footing that the action is brought by the original contractees, the old company. In this view the assignment is only material as negativing capacity on the part of the plaintiffs to perform their obligations under the contract. The privity between them and Tolhurst still subsists notwithstanding the assignment, and they are entitled to insist on performance on his part unless he can show a valid defence. Such a defence he might establish if he could show that the plaintiffs had by their conduct repudiated the contract, and that he accepted such repudiation. Or he might show that the plaintiffs had disabled themselves from performing their part of the contract, and therefore could not insist upon performance by him. Both these defences are in fact put forward by Tolhurst, and both are based on the circumstances of the voluntary liquidation and the assignment. It is necessary therefore to consider carefully what is the effect upon the contract of these two facts together or separately. Liquidation of itself clearly does not involve inability to carry out the contract, though it certainly may, coupled with other circumstances, such as those mentioned in *Ex parte Chalmers*, *In re Edwards*, 21 W. R. 349, L. R. 8 Ch. App. 289, and *Morgan* v. *Bain*, 23 W. R. 239, L. R. 10 C. P. 15, ground an inference that the liquidating company has renounced the contract. Here there does not seem to me to be sufficient evidence to justify any such inference. At the time when these actions were brought and tried the company was in possession of assets undistributed amounting to a very large sum, and could in no sense be described as insolvent, even if insolvency without more could be treated as equivalent to a repudiation of the contract, as it clearly could not: see *Ex parte Chalmers*. Insolvency alone could at most entitle the person called on to deliver to refuse to do so except on cash terms (see *Morgan* v. *Bain*, and *Ex parte Stapleton*, *In re Nathan*, 27 W. R. 327, 10 Ch. D. 586); and no point could be made by the defendant here that cash was not offered, since by refusing to deliver at all on the ground that the contract was at an end he clearly absolved the plaintiffs from tendering cash, had such tender been a condition precedent to their right to demand delivery. But, as I have said, at the time of the trial there was no evidence of insolvency. It is true that since the trial and before the hearing of the appeal the assets of the company have been completely distributed, and nothing is left to it but its name and its right to claim indemnity from the new company. But even if we could decide the case by reference to facts as they exist now, insolvency, for the reason I have given, would not be an answer to the claim. How far, then, does the assignment alter the case? It is relied upon for two contentions: first, that coupled with insolvency it proves repudiation; secondly, that the obligations of the contract are such that they cannot be discharged by deputy, and that the company having assigned has disabled itself from performing them. But with reference to the first contention, it is clear from the terms of the assignment that there was no intention to renounce the contract, but that, on the contrary, it was part of the bargain that it should be kept in force, the assignees taking the benefit of it and indemnifying the assignors against the burden, while provision is made for the use of the old company's name. There is, therefore, nothing to ground an inference of repudiation, and the question must be determined by reference to the second point only. That depends on whether the two obligations resting on the old company were capable of performance by them according to the contract, notwithstanding the assignments. The two are, payment for the chalk and "requirement by them for the whole of their manufacture of Portland cement upon their said land" as a condition of receiving the extra quantity. I think there is clearly no personal element in the payment of the price. It could make no difference to Tolhurst from what source it came; and the old company can therefore discharge this obligation by the hand of the new company. As to the other there is undoubtedly more difficulty. The measure of an original contractee's requirements may be very different in a given case from those of a substituted person. In such case clearly the original contractee could not insist on his contractor furnishing a supply equal to the requirements of the substitute, and could not prove that he

required it himself. This part of the contract would be personal, and could only be fulfilled by the contractee himself. I confess that I have felt very considerable difficulty on this part of the case, for though the contract provides a *minimum* quantity I am by no means satisfied that it could be split up, as contended by the appellants, without the assent of the vendor so as to limit it to the *minimum* quantity only. The price may have been fixed by reference to the possible *maximum* as well as to the *minimum* clause. I have come to the conclusion, however, though with some hesitation, that the provision as to requirement is not personal in its nature in this case so as to involve manufacture by the old company itself as the condition of requirement. It is a stipulation regulating the amount of supply only, and the limit is "so much more, if any, as the company shall require for the whole of their manufacture of Portland cement upon their said land." The capacity of the land and the machinery thereon rather than anything personal to the company is here made the standard, and I think the vendor must be taken to have contemplated all such changes as the company might make according to law in increase or reduction of its capital and the possible expansion or contraction of its requirements above the *minimum* quantity. The *minimum* and the *maximum* quantities of chalk to be taken are thus regulated by limits quite outside anything personal or peculiar to the old company. The general rule, *Qui facit per alium facit per se*, applies to contracts of this class unless there is something in the terms of the bargain or the nature of the obligation imposed to require personal performance. The case of *British Wagon Co.* v. *Lea*, 28 W. R. 349, 5 Q. B. D. 149, is a clear authority both that liquidation coupled with assignment does not determine a contract, and that the assignors, a company who by their contract had undertaken to keep in repair wagons which they had let to the defendant, were not prevented from proving readiness and willingness to perform the contract on their part by the fact that they had assigned their business and all their repairing plant to another company. While, therefore, I have had grave misgivings whether the new state of facts brought about by the liquidation and the assignment, involving the practical extinction of the original company party to the contract, and the virtual substitution of another and a very different one, has not so radically altered the vendor's position that he ought to be held absolved from his bargain, I am unable on the whole to find a sound legal basis for his defence. There is certainly an apparent hardship, unless he accepts the new company instead of the old, that whereas before the assignment he had a solvent company to deal with against whom he had an effectual remedy if they refused to perform the contract, now, if the price of chalk was to fall below 1s. 3d., and the new company no longer cared to take it at that price, his only remedy would be against the company wholly denuded of assets. But a vendor has no right to the continuous solvency of his purchaser, and cannot cease to deliver as long as he is paid, although he knows that if the purchaser should decline to take any more in a falling market he would be without remedy. It is further very undesirable that, except so far as we are constrained by law to do so, we should put any barrier in the way of traders disposing freely of the goodwill of their businesses which generally consist largely of trade contracts.

I have attempted to consider the question of the change of position brought about by the assignment on purely legal principles, but it seems to me on the facts, so far as we know them from the correspondence, that these considerations had really nothing to do with Mr. Tolhurst's attitude. He seems to have seized a convenient opportunity of getting rid of a burdensome contract, not because of any real or supposed change of position by reason of the assignment, but because the market price of chalk had risen considerably above the contract price, and he was very willing if he could to reap the advantage of the rise. He must have been cognizant of all that had taken place in the antecedent negotiations involving assignments of the benefit of his contract to nominees and ultimately to the new company before final and formal execution, and he continued to deliver throughout this period and for a week after formal notice without objection. His objection when made is put on technical grounds only. Having regard also to the length of time contemplated by the contract for the continuance of the arrangement, he must, I think, have contemplated possible changes by devolution or assignment on both sides. For the reasons I have given, therefore, I feel compelled to differ from the conclusion arrived at by Mathew, J. But, as far as I can see, we differ only upon an inference of fact as to what under all the circumstances was the real meaning of the bargain. Was it intended to exclude performance by any person other than the old company itself of their part of the obligation? I have come to the conclusion that it was not. I think, therefore, that the appeals must be allowed. The President of the Probate Division agrees with this judgment.

COZENS-HARDY, L.J., read the following judgment: This appeal raises the question whether by reason of a transaction between the two companies which are co-plaintiffs—viz., the Associated Co. and the Imperial Co., a contract entered into between the Imperial Co. and the defendant Tolhurst has ceased to be operative, or whether the plaintiffs or either of them can now recover damages against the defendant for breach of the contract. The terms of the contract of the 5th of January, 1898, have been fully stated by the Master of the Rolls. It is sufficient for me to say that it provided for the delivery of chalk from the defendant's quarries, by means of an existing tramway constructed on the defendant's land and of a new tramway to be constructed on the adjoining land, at cement works in course of erection on the company's land. The price was 1s. 3d. per ton, and payments were to be made monthly. The tramway and other works contemplated by the contract have been completed.

The Associated Co. was formed for the purpose of acquiring the business of the Imperial Co. and also the business of other cement manufacturers. The price arranged for the purchase from the Imperial Co. was £18,000, payable partly in debenture stock and partly in shares of the Associated Co. The sale was carried through by means of a preliminary agreement and a voluntary winding up of the Imperial Co., followed by a conveyance and assignment dated the 30th of November, 1900. By this deed the Imperial Co. and its liquidator conveyed to the Associated Co. the land and buildings mentioned in the contract and all other the land of the Imperial Co., and assigned to the Associated Co. all the goodwill and connection of the business of the Imperial Co., and the sole use of the trade name of the old company, and the sole right to represent the new company as carrying on the business of the old company, and the full benefit of all pending trade contracts and engagements in connection with the old business, including expressly the contract of the 5th of January, 1898, and all book debts. The deed contained a power of attorney in the usual form and a covenant by the new company to indemnify the old company against all

proceedings, costs, damages, claims, demands and liabilities in respect of trade contracts and engagements the benefit whereof was thereby assigned. On the 12th of December, 1900, notice of this was given to the defendant, and the correspondence took place which has been referred to by the Master of the Rolls. Under these circumstances the plaintiffs contend (1) that the Associated Co., as the assignees of the contract, can sue the defendant for the breach thereof, or alternatively (2) that the Imperial Co. can sue the defendant, there having no breach on their part and no abandonment of the contract.

As to the first point, it is clear at common law no action could be maintained by an assignee for breach of a contract of this nature. There is no privity between the Associated Co. and the defendant. But it is said that all this has been altered by section 25, sub-section 6, of the Judicature Act, 1873—that there is here an "absolute assignment" of a "legal *chose in action*," which is effectual to transfer the legal right to such *chose in action* Now this section relates to procedure only. It does not enlarge the class of *choses in action* the assignability of which was previously recognized either at law or equity. It is designed to avoid the necessity of going first to a court of equity and then to a court of law. Some limit must be put upon the words used. It is plain that there are many contracts of such a personal nature that they do not admit of being assigned—*e.g.*, a contract to paint a picture. And even where the personal element did not come in, the old Court of Chancery did not, any more than the courts of common law, regard the burthen of a contract as assignable. There was an exception in the case of contracts of which specific performance could be granted. But the contract of the 5th of January, 1898, is not in its nature capable of specific performance. In old days the Associated Co. could not have maintained a bill in Chancery to enforce it, and I think the Judicature Act in no way alters the position. It was further contended that a special and larger right was conferred upon the Associated Co. by virtue of sections 95, 133 (7), and 157 of the Companies Act, 1862. But the same considerations which lead to the conclusion that some limitation must be put upon the word "*chose in action*" in the Judicature Act apply to the use of the word in the Companies Act. It follows that, in my opinion, the Associated Co. cannot maintain this action in their own right as assigns of the Imperial Co. I may add that where there has been an attempted assignment it takes very little to establish a tripartite agreement resulting in a novation, and it may well be that, if evidence had been addressed to the point, novation might have been established in the present case.

The second point presents more difficulty. The Imperial Co. are plaintiffs. Unless something has happened to destroy it, there is now an existing contract between the Imperial Co. and the defendant. The obligations imposed upon the Imperial Co. do not involve any personal skill. To receive chalk when delivered on the premises and to pay for the chalk once a month are things which may well be done by a third person by the direction of the Imperial Co. A power of attorney conferred upon the Associated Co. would enable the latter to do all this in the name of the Imperial Co. Nor would it be material, for the present purpose, to consider the pecuniary position of the Imperial Co., so long as no default is made in payment. If a receiver and manager of the undertaking of the Imperial Co. were appointed by the court in a debenture-holder's action, the defendant could not for that reason treat the contract as at an end. The chalk would be ordered, received, and paid for by the receiver in the name of the company, although the business was being carried on for the benefit of the debenture-holders, and although the company had not a penny of assets not covered by the debentures. Having regard to the number of cases in which receivers and managers are carrying on large businesses, the prosperity, or indeed the continuance, of which depends upon trade contracts or contracts for forward delivery of coal or other materials, I think it important that there should be no doubt on this point. Would the voluntary winding up of the company, after the appointment of a receiver and manager, make any difference? I think not. But suppose the voluntary winding up takes place without the previous appointment of a receiver and manager. Whether the company is insolvent or, as in the present case, not insolvent, I see no reason for holding that the winding up would of itself terminate the contract or authorize the defendant to terminate it. The chalk would be ordered, received, and paid for by the liquidator in the name of the company. Does it make any difference that in the course of the winding up the liquidator transfers the business to a purchaser with a power of attorney, who orders, receives, and pays for the chalk. The liquidator in the present case received a large consideration from the purchaser. If, which I doubt, it be relevant to consider the pecuniary position, the liquidator had, when this action was commenced, ample assets in his hands to discharge all liabilities for chalk, apart from the purchaser's covenant to indemnify. It has been stated that since the assignment and pending this action the liquidator has advertised for claims and has discharged all that have been sent in, and that he has distributed all or the greater part of the residue of the assets between the shareholders. But the company has not yet been dissolved, and I am not satisfied that it can properly be dissolved, under sections 142 and 143, so long as its continued existence is necessary to give effect to the contractual obligations of the company towards the purchaser. Unless, therefore, there is something peculiar in the contract itself, I think the defendant cannot treat it as abandoned. This view seems to be consistent with, and indeed to follow, the decision of the Queen's Bench Division in *British Wagon Co.* v. *Lea*. That case decided two points—(1) That voluntary liquidation did not in itself incapacitate the company from performing its contract—the court left open the question as to the position of the parties if and when the company was dissolved; (2) that the company fulfilled its obligations under the contract by finding a new company (assignee of the contract) able and willing to execute the repairs which the old company contracted to perform. That decision in the year 1880 has never, so far as I am aware, been questioned in a court of law. And, unless we are prepared to overrule it, I think the principles there laid down must govern the present case. So long as the Imperial Co. continues to exist, it is capable of suing and liable to be sued. The defendant has no right to insist upon the company retaining free assets to meet future liabilities. The company, before and apart from winding up, might have charged all its assets present and future with a sum far in excess of their value. Such facts, which might reasonably induce the defendant not to enter into a fresh contract with the company, would not justify him in treating an existing contract for forward delivery to the company as at an end. In the present case the Imperial Co. is willing to fulfil, and able to fulfil, all its obligations towards the defendant through the Associated Co. In truth there is no doubt or difficulty as to the money for the chalk being forthcoming.

I have hitherto assumed that there is nothing in

the contract which renders it unreasonable to allow the Imperial Co. to perform its obligations by deputy. Whether this assumption is well founded is the real and serious difficulty which this case has presented to my mind.

It is contended that the contract itself binds the defendant to supply not only a fixed quantity of 750 tons of chalk per week, but also so much more chalk as the Imperial Co. may require for the whole of their manufacture of cement upon the land, and that, as the requirements of the Imperial Co. have necessarily ceased, it is unreasonable to substitute the requirements of a new and larger company which may impose a greater burthen on the defendant. Now it is important to observe that no words of succession are found in the contract, although it was to be in force for fifty years. It seems to me that such words must be implied, at least to some extent. The death of the defendant would not terminate it. His executors would be liable to damages unless they fulfilled the obligations to deliver chalk through the agency of his heir or devisee or other person for the time being owning what are called "his said quarries." The stipulation that the agreement is not to "preclude the said Alfred Tolhurst from supplying chalk from his said quarries to other persons than the company for ballasting or manufacturing purposes or otherwise," which is a qualification of what might otherwise have been held to be an absolute obligation to deliver chalk to the company, would, I think, be available after Tolhurst's death. In other words, Tolhurst agrees that, so long as there is chalk in his quarries available and suitable, the owner of the quarries will supply it for manufacture of Portland cement on the particular site which was connected with the quarries by a tramway. That was the real and substantial limitation. The personal element did not come into consideration on either side. No limit is imposed upon the size of the works to be erected on this site, or upon the capital to be embarked in the trade. If the Imperial Co. had increased its capital to £5,000,000 and covered every inch of the site with buildings, the defendant could not have complained. And I cannot accept the suggestion that a burthen is thrown upon the defendant greater than he contracted to bear by reason of the large capital of the Associated Co.

I agree with the Master of the Rolls in holding that the plaintiffs are entitled to a declaration that the agreement of the 5th of January, 1898, is a subsisting and valid and binding agreement between the Imperial Co. and the defendant, and for consequential relief on that footing.

I have treated the action in which the two companies are co-plaintiffs as the substantial action. But the question raised in the other action is really identical, and both appeals must be allowed.

*Appeals allowed.*

Solicitors for Tolhurst, *Sismey & Cooke*, for *Tolhurst, Lovell, & Clinch*, Gravesend.

Solicitors for the companies, *Ashurst, Morris, Crisp, & Co.*

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From Chan. Div. (Vaughan Williams, Romer, and Mathew, L.JJ.) } July 25, 26, 28, 29, 1902.

*In re* THE REGISTERED TRADE-MARKS OF BASS, RATCLIFF, & GRETTON (LIMITED). (*a.*)

*Trade-mark—Label—Words "trade-mark" printed on part only of label—Misleading label—Removal from register—Innocent deception.*

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

*There is no general rule that whenever the words "trade-mark" appear on a label they must be intended to refer solely to the particular part of the label on which they are placed.*

*To justify the removal of a trade-mark from the register, on the ground that it is calculated to deceive, it must be shown that it is reasonably calculated to injure some person, and is not a mere innocent deception which would injure no one.*

In re Apollinaris Co.'s Trade-Marks, [1891] 2 *Ch.* 186, 39 *W. R. Dig.* 237, *distinguished.*

*Decision of* Kekewich, J. (86 *L. T.* 186, 50 W. R. Dig. 170), *reversed.*

This was an appeal from the decision of Kekewich, J. (reported 86 L. T. 186), on two motions to remove from the register of trade-marks certain trade-marks registered by Bass, Ratcliff, & Gretton (Limited). The first motion related to marks Nos. 915 and 31,837, which were registered as old marks respectively in January, 1876, and March, 1883—915 for Burton ales, brown beers, and stouts, and 31,837 for beers generally. They both consisted of the device of a plain diamond or triangle, and Bass, Ratcliff, & Gretton used them coloured red, with the words "trade-mark" on them coloured brown. The second motion related to marks Nos. 2, 27,781, 31,839, 31,840, 43,808, 43,809, and 53,995. These had all been registered as old marks with one exception, and at various dates commencing in 1876, and consisted of oval labels containing a device of a diamond in the centre, across which were printed the words "trade-mark." The diamonds in the labels were of different colours. The labels bore Bass & Co.'s signature, with a description of the kind of beer to which they severally related, and also a printed statement that they were issued only by Bass & Co. The objection taken to the marks was based on the allegation that the diamond was a device common to the trade at the time of registration, and it was further alleged that the labels were calculated to mislead on the ground that the words "trade-mark," being printed on the diamond, would induce a belief that the rest of the label was not protected. The proceedings originated in an action by Bass, Ratcliff, & Gretton for an injunction to restrain John Davenport & Son's Brewery (Limited) from infringing their trade-marks and passing off beers as theirs by the use of devices similar to their registered trade-marks. The defendants denied the infringement and the use of similar devices, and brought the two motions to remove the plaintiffs' trade-marks from the register; and Kekewich, J., gave judgment in the defendants' favour both in the action and on the motions. His lordship held that there had been no infringement, that the device of a diamond was common to the trade, and that the printing of "trade-mark" on the diamond alone made the labels misleading within *In re Apollinaris Co.'s Trade-Marks*, [1891] 2 Ch. 186, 39 W. R. Dig. 237.

Bass, Ratcliff, & Gretton appealed from the order to remove their trade-marks from the register.

There was no appeal from the judgment in the action.

*Moulton, K.C., Cutler, K.C.*, and *Schiller*, for the appellants.

*Warmington, K.C., Neville, K.C.*, and *Sebastian*, for the respondents.

*R. J. Parker*, for the Comptroller of Patents.

On the first motion, raising the question whether the device of a diamond was common to the trade at the date of registration, a number of trade-marks were produced in support of this contention, but the court held on the evidence that at the date of regis-

tration the diamond had not become common to the trade, and that the other marks could not be confused with that of the appellants. The appeal on this motion was therefore allowed.

On the question arising, on the second motion, whether the placing of the words "trade-mark" on the diamond alone rendered the labels misleading, *In re Phillips' Trade-Mark*, [1891] 3 Ch. 139, 40 W. R. Dig. 264, and *In re Apollinaris Co.'s Trade-Marks* were referred to.

VAUGHAN WILLIAMS, L J.—The position of the words "trade mark" on this diamond cannot mislead anyone or do any harm, and that is all that it is necessary to say.

ROMER, L.J.—I should like to say a few words about this case, because our decision may and probably will have an effect hereafter on other cases. I am bound to say, speaking for myself, I do not like the decision, on the point we are now considering, of the Court of Appeal in the *Apollinaris case*. Of course I should be bound by that decision if it was a decision on a question of law, but I do not consider it was a decision on a question of law. I think it was a decision on a question of fact, and we are therefore not bound by it where the facts of the particular case before us are not precisely the same, and they are not the same here. Personally, I am bound to say that I should not have come to the same conclusion as a question of fact as the Court of Appeal did in the *Apollinaris case*, but that is immaterial. I should like, however, to say a few words on the principle of a case like this. I think it cannot be that in every case the printing of the words "trade-mark" on a trade-mark label, without more, would be something calculated to deceive. It cannot be wrong, on a label intended to be used as a trade-mark, to state that it is a trade-mark; and you may put the words "trade-mark" on a label so as to denote that the whole is intended to be included by those words. You must put it somewhere on the label; and why, because it is on some particular portion, you are to assume of necessity in every case that that particular portion alone is intended to be designated by the words, I cannot see. You may, no doubt, assume it in some particular circumstances; but I can only say that it ought not to be assumed in every case, whenever you see the word "trade-mark" on a label, that it must be intended solely to refer to the particular part of the label on which it is placed. Take the particular case before us, that of this Bass label. Suppose the words "trade-mark" had been on the ornamental rim that you have round it, would anybody suppose, or would it be a natural inference, that Bass & Co. really meant that the rim was the trade-mark? No. Therefore I think it is clear that you cannot lay down as a general rule that whenever the words "trade-mark" appear on a label they must be intended to denote the particular part on which they are individually placed. In the present case I do not know that I need really say more than this. The words "trade-mark" are here in the centre of the label, and I do not know why I should be bound to assume that they are intended to apply to the diamond; but I will assume that they do. What then? In every case of a label where the words "trade-mark" are put upon a particular portion of it to denote that that portion is a trade-mark, is the court bound to hold that the label is one calculated to deceive? In my opinion, no; it may be so if, for example, the part which it is alone intended to refer to is not in fact the subject of a separate trade-mark. That, I think, would be calculated to deceive, because it would lead any ordinary person reading it to suppose that the owner of the label, as a whole, had a specially greater right than he really had as against the public. But if there were a separate trade-mark for the part of the label which is designated by the words "trade-mark," why is it to be assumed in every case that the words are to be treated as calculated to deceive. It is not sufficient to say "calculated to deceive." You must show that it is reasonably calculated to injure someone—to lead them to do some act, or abstain from doing some act, which may possibly injure them. Now, there may be a perfectly innocent deception which would injure nobody, and that ought not to be a ground for removing a trade-mark. The fact is, you ought to see in each case whether, assuming the words "trade-mark" to refer to a particular portion of the label, there would be in the first place a natural inference that the rest of the label, or the label as a whole, was not a trade-mark. Speaking for myself I refuse to take it as a natural or necessary inference in every case, from the fact that a particular portion of a general label is in itself designated as "trade-mark," that the whole of the label is not a trade-mark. Such a conclusion ought not to be drawn in every case; and one ought to go further and ask in each case whether anyone could suppose, from the facts of the particular case, that there was any substantial likelihood of injury. The matter could not be better illustrated than by the case we have before us. If anyone were led to suppose that "trade-mark" here referred to the diamond alone, would it be a natural inference for him to suppose that he might with impunity imitate or disregard the rest of the label? I should say, certainly not. He could not possibly be injured. There could be no such deception as would injure any ordinary reasonable human being, and on that ground alone I should have thought you could not say that there was such an intention to deceive or that the label itself was so calculated to deceive as to justify you in saying that the label was an improper subject of a trade-mark on that ground. I should like again to say that where the words "trade-mark," which do not of necessity mean the only trade-mark, are capable of being used innocently, I should have thought that there would be a natural presumption in favour of innocence, and that you ought not to assume that deception is intended, or is likely to result, unless it is a very necessary inference. As I have said, I cannot see that in every case the description of a particular portion of a trade-mark with the words "trade-mark" would justify you in holding that there is deception because it implies that the rest is open to the trade, or is not the subject of a trade-mark at all. There ought to be a presumption in favour of fairness and honesty, and that applies especially to the present case, seeing that here this trade-mark has been in use and has been registered for so many years, and no one has ventured to come forward to say that anyone has been injured or could possibly be injured. I am perfectly certain that no one could be injured, and therefore think the appeal ought to be allowed.

MATHEW, L J., concurred.

*Appeal allowed.*

Solicitors, *McKenna & Co.; J. Westcott*, for *Wright & Marshall*, Birmingham; *Solicitor to the Board of Trade.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 20, 1902.

"THE DOWLAIS." (a.)

*Ship—Charter-party—Freight—Option to pay freight on weight delivered or intake weight—Time to exercise option.*

*By the terms of a charter-party cargo was to be delivered "on payment of freight at the rate of 6s. 3d. per ton delivered or intake weight less 2 per cent. at charterers' option." The shipowners not having required the charterers to declare their option as soon as the cargo was delivered, the latter elected to pay on the intake weight, less 2 per cent.*

*Held, that the charterers could elect to pay the lesser—i.e., the intake freight, as they were not bound to exercise their option until the time for payment of the freight had arrived, the shipowners having waived their right to require the charterers to declare their option as soon as the cargo had been delivered.*

Appeal by the plaintiffs, the Dowlais Steamship Co. (Limited), from the judgment of a Divisional Court sitting in Admiralty, affirming the decision of the county court judge of Cardiff.

The action was brought by the owners of the steamship *Dowlais* against Messrs. Budd & Co., the charterers, to recover £9 6s. 5d., being the balance of freight alleged to be due on a cargo of pitwood carried in *The Dowlais* from Bordeaux to Newport under a charter-party dated the 12th of January, 1900.

By the charter-party it was agreed that the cargo should be delivered on being paid freight at the rate of 6s. 3d. per ton delivered "or intake weight less 2 per cent. at charterers' option." It was provided that freight was to be paid after unloading and right delivery of the whole cargo, in cash. There was no dispute that the intake weight of the cargo was 1,272 tons and the weight delivered 1,277 tons, or that when freight was paid, and not before then, the charterers claimed to pay freight upon the intake weight less 2 per cent. Further, it was not suggested that the plaintiffs called upon the defendants to exercise their option before that time.

It was contended by the plaintiff shipowners, however, that the option had to be declared before bulk was broken, and that as the defendants had not done so freight had to be paid on the delivery weight.

The sole question, therefore, was when the option given had to be exercised by the charterers.

The county court judge thought that if the plaintiffs had required the defendants to declare their option as soon as the cargo had been delivered, the defendants would have been bound to have done so, but the plaintiffs did not require this to be done, and therefore waived their right to have it done. He held that in the circumstances the defendants were not bound to exercise their option until the necessity for doing so arose, and that necessity did not arise until the freight was paid. He accordingly gave judgment for the defendants.

On appeal to the Divisional Court (Sir F. Jeune and Barnes, J.) the decision of the county court judge was affirmed.

The plaintiffs now further appealed.

*J. A. Hamilton, K.C., Montague Lush,* and *Bailhache,* for the appellants.

*Ernest Todd* (*H. H. Gregory* with him), for the respondents.

THE COURT dismissed the appeal.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

COLLINS, M.R.—The question here is whether the particular option given to the charterers must, on the true construction of the charter-party, be exercised before delivery. The option is with respect to a timber cargo, and is contained in a few words in the early beginning of the charter-party—to deliver, and so on, at the usual time and place as directed, on being paid freight "at the rate of 6s. 3d. per ton of 20 cwt. delivered, or intake weight, less 2 per cent., at charterers' option." Then follows "freight to be paid, after unloading and right delivery of the whole cargo, in cash." Now it was contended on behalf of the plaintiffs that on the true construction of the charter-party the option which is expressly given to the charterer must be exercised before he knows all the facts, and must be exercised before delivery, and certainly before the cargo has been weighed. A very great point was made by the plaintiffs' counsel upon the inconvenience which he suggested would arise if it became practically necessary in all cases for the shipowner to incur the expense of weighing the cargo so as to ascertain the precise amount of the freight for which he had his lien, and it was suggested, therefore, that the true meaning was that the charterer must act reasonably, and determine the option, so that if he did elect to pay at the intake price the shipowner would not have to incur the superfluous expense of weighing the cargo at the port of delivery. The case has been left singularly disembarrassed of any facts that might have thrown light on that part of the discussion. We know nothing as to the process of weighing or unloading cargoes which is carried out at the port of Newport. We have no evidence upon it all, nor, indeed is there any evidence that it is in accordance with custom at that port that the shipowner has to weigh under any circumstances the cargo, or whether the cargo as a matter of fact, whatever the provisions of the charter-party, does undergo the process of weighing at somebody's instance and somebody's expense. We know nothing of the actual facts as governing the customs of the port at which the cargo was delivered. We have this also, that there was nothing on the face of the contract itself providing for the exercise of the option by the charterer at any particular time, and that really seems to me to be the governing factor in this dispute. I was a good deal impressed by some of the inconveniences which the plaintiffs' counsel pointed out in the construction which has been adopted by the court below, but the learned county court judge has given a well-reasoned judgment upon it. That judgment has been confirmed by the judgment of Barnes, J., and though I agree there is a good deal to be said from the plaintiffs' standpoint as to the convenience and desirability of the option being exercised at some earlier period, it seems to me that ought to have been a matter of express stipulation, and we have not got before us materials which would enable us to read it into the charter-party when the parties themselves have not put it in. On these grounds, though I have had some misgivings about it during the arguments, I should not be justified when the case is left in such a jejune condition as to evidence, in differing from the judgment both of the learned county court judge and the Divisional Court. I am of opinion, therefore, that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. The word "option" is used in this charter-party evidently to suggest it should not be an election in the dark, which is what Mr. Lush has contended it should be. What is the position of the shipowner? It did not

matter to him where this election was made—if it be made before the cargo left Bordeaux or during the course of the voyage, or on its arrival at its port of destination—Cardiff. Why is it said, then, that the owner here is placed in a better position than if the option had been exercised, and notice given him when the cargo left on the voyage? Mr. Lush argues that the position of the shipowner has been altered by what has occurred at Cardiff—in other words the charter has been estopped, if the option can be exercised after the cargo had been delivered. Of course, Mr. Lush says, if an intimation had been given before a cargo had begun to be discharged the shipowner would be saved the expense he had incurred. It is singular that before the learned county court judge, surrounded by people familiar with this trade, this point was never made, nor was it suggested in the argument before the Divisional Court. We are not in a position to say under these circumstances whether or not any additional expense is cast upon the shipowner by reason of having to weigh the cargo. I should infer there would be a very rough way of ascertaining the tonnage of such a cargo as this, consisting of 1,277 tons of pit-props, but however that may be, I cannot conceive that it was intended that there should be a constructive exercise of a lien and a demand for payment of the freight as each portion of each ton of this cargo was delivered. At any rate, according to the ordinary reasonable construction of the words of the contract, following, as they do, on the conditions of the payment of freight, it was meant—unless some other arrangement was come to between the parties—that the charterer was to be free to exercise the option when he knew what he was doing, and I therefore think the appeal must be dismissed.

COZENS-HARDY, L.J.—I agree. It is a mere question of the construction of these different documents in the absence of all evidence as to circumstances.

Solicitors for the plaintiffs, *Botterell & Roche*, for *Vaughan & Roche*, Cardiff.

Solicitors for the defendants, *Williamson, Hill, & Co.*, for *Ingledew & Sons*, Cardiff.

## High Court of Justice.

Chan. Div. } Oct. 31.
Kekewich, J. }

*In re* ROBERTS.
ROBERTS *v.* ROBERTS. (*a.*)

*Administration—Debts—Marshalling assets—Real estate charged with debts—Pecuniary legatees and specific devisees.*

*Where a testator directs his debts to be paid and so charges them on his real estate, and also gives pecuniary legacies, the pecuniary legatees are entitled to have the assets marshalled as against the specific devisees of the realty.*

In re Bate, Bate *v.* Bate, 43 *Ch. D.* 600, 38 *W. R. Dig.* 6, *disapproved.*

In re Stokes, 67 *L. T. Rep.* 223, 41 *W. R. Dig* 3, *and* In re Salt, 43 *W. R.* 500, [1895] 2 *Ch.* 203 *followed.*

Adjourned summons.

Edmund Roberts, deceased, by his will dated the 26th of May, 1902, directed that all his just debts and funeral and testamentary expenses should be paid as soon as possible after his decease, and after a bequest of chattels the testator gave two pecuniary legacies of £500 and £200 respectively. He then devised certain real estate specifically to his brother and certain other real estate to his cousin. The will contained a good residuary gift of personalty, but there was no residuary devise of real estate, which, except for the specific devises above-mentioned, descended to the heir-at-law.

The general personal estate and the descended realty proved insufficient for the payment of the testator's debts, and this summons, which was taken out by the executrix of the will, raised (among others) the question whether the pecuniary legatees were entitled to have the assets marshalled so as to stand in the place of creditors as against the specifically devised real estate to the extent to which the personal estate should be applied in payment of debts.

*T. T. Methold*, for the executrix.

*Mark Romer*, for the specific devisees, relied on *In re Bate, Bate* v. *Bate*, 43 Ch. D. 600, 38 W. R. Dig. 6.

*Hon. Frank Russell*, for pecuniary legatees, cited *In re Stokes, Parsons* v. *Miller*. 67 L. T. Rep. 223, 41 W. R. Dig. 3, and *In re Salt, Brothwood* v. *Keeling*, 43 W. R. 500, [1895] 2 Ch. 203, to show that the decision in *In re Bate* was no longer good law.

KEKEWICH, J. (after stating the facts).—Under these circumstances the pecuniary legatees claim that since the testator has, by directing payment of his just debts, charged them upon his real estate they can insist that in so far as the personalty has been applied in payment of debts it should be made good to them by the specific devisees of the real estate. It is a question of great importance, and there is some difficulty owing to the decision in *In re Bate*. That case was carefully examined by Stirling, J., in *In re Stokes*, and was not followed by him. Again, in *In re Salt* Chitty, J., felt himself unable to follow *In re Bate* having regard to the view which Stirling, J., had expressed in *In re Stokes*. In Seton on Judgments (6th ed., vol. 2), p. 1673, it is stated that upon this point *In re Bate* must be taken to be overruled. That, I think, is a correct statement of the law, and I shall adopt it. I therefore hold that the doctrine of marshalling in favour of the pecuniary legatees must be here applied.

Solicitors, *Rowcliffes, Rawle, & Co.*

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

Chan. Div. } July 19, 1902.
Swinfen Eady, J. }

*In re* BARONESS LLANOVER.
HERBERT *v.* FRESHFIELD. (*a.*)

*Settled land—Tenant for life—Dwelling-house—Right of occupation—Trustees' power to manage and to appoint and pay servants—Settled Land Act*, 1882, *s.* 2, *sub-section* 5; *s.* 58, *sub-section* 1 (vi.).

*A testatrix devised certain hereditaments to trustees with powers of management, and as to part of the said hereditaments, but not as to certain mansion-houses, part thereof, powers of sale and leasing, and as to the mansion-houses she directed the trustees to keep them up, and for this purpose to appoint and pay servants, who were to be Protestants and Welsh-speaking, and she directed that the trustees should permit H. at any time and from time to time to reside in the said mansion-houses.*

(*a.*) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

*Held, that H. had the powers of a tenant for life under the Settled Land Acts.*

Adjourned summons.

This was a summons asking for the determination of the question whether the plaintiff, the Hon. Mrs. Herbert, was tenant for life under the Settled Land Acts, or entitled to exercise the powers under the said Acts of a tenant for life in respect of certain mansions devised to trustees by the will of her mother, Lady Llanover.

By her will, Lady Llanover devised certain hereditaments, including the mansion-houses in question, to trustees upon trust to enter into possession or receipt of the rents and profits of, or to manage or superintend the management of the same, with powers in respect to all the hereditaments to cut non-ornamental timber, and to repair and erect farmhouses and cottages, and with powers to let, sell, or exchange the said hereditaments or any part thereof, except the two mansion-houses and grounds at Llanover, a mansion-house and grounds called Abercarn Uchaf, and a mansion-house and premises in Great Stanhope-street, Mayfair, and with power for all or any of the purposes aforesaid to employ such agent or agents or other persons as might be deemed expedient, and who upon personal inquiry might be proved to be not only of high standing in regard to moral character but also well qualified for the situation, provided that no land or mineral agent should be appointed who should not be fully able to speak, read, and understand the Welsh language. And after divers provisions in regard to charges upon the hereditaments and the gift of certain annuities the testatrix directed that subject thereto her trustees or trustee should apply such annual sum as might be necessary for keeping up the four mansion-houses and the grounds above mentioned in a fit state for residence in accordance with such scale and rules, if any, as she might before death have expressed orally or in writing, or otherwise in accordance with such scale and rules as they or he might think fit, including in such keeping up the wages of all servants and other persons employed by her trustees or trustee in or about such mansion-houses and grounds, which servants and other persons should be Welsh and speak the Welsh language and should not be of the Roman Catholic religion. And the testatrix directed that her trustees or trustee should permit Mrs. Herbert at any time and from time to time during her life to reside at the said mansion-houses, and that during any and every such residence at any of the said mansion-houses under such permission as aforesaid her trustees or trustee should out of the rents and profits of the devised hereditaments (subject to the prior payments before mentioned) pay to her said daughter an allowance of £80 per week during such residence if the surplus rents and profits should be sufficient for that purpose, and if not then an allowance at the rate of so much per week as her trustees or trustee might in their or his uncontrolled discretion think that such surplus rents and profits could fairly bear; and the testatrix provided for the disposal of the ultimate surplus, if any, of the rents and profits of the hereditaments. After the death of the testatrix, Mrs. Herbert entered into and continued in the occupation of the mansion-houses.

It was contended for Mrs. Herbert that the provisions of the will that the trustees should permit her at any time and from time to time during her life to reside in the mansion-houses gave her the rights of a tenant for life under the Settled Land Acts.

*Warmington, K.C.*, and *Fellows*, for the plaintiff.—The plaintiff is either within the definition of a tenant for life in section 2, sub-section 5, of the Settled Land Act, 1882, or within section 58, sub-section 1 (vi.), of the same Act. In *In re Eastman's Settled Estates*, 68 L. J. Ch. 122, a house was devised to trustees upon trust to permit the testator's widow to live there during her life or widowhood, and an annuity was given her with a provision cutting the annuity down in case she should not live in the house. Romer, J., held that she was tenant for life, and that the provision for cutting down the annuity was void, as being calculated to deter her from exercising the powers of the Settled Land Acts. In *In re Carne's Settled Estates*, 47 W. R. 352, [1899] 1 Ch. 324, where there was a trust to permit the plaintiff to reside in a house rent free so long as she should choose to do so, North, J., followed *In re Eastman's Settled Estates*.

They also referred to Co. Litt. 42*a*, and to Burton, R. P. (7th ed.), p. 239.

*Haldane, K.C.*, and *Howard Wright*, for the trustees.—The testatrix intended to give Mrs. Herbert no estate, but only a personal license; for the trustees are to enter into possession of the mansions, as well as of the other hereditaments, and to manage them; and they alone are to have possession, for Mrs. Herbert's license to live there is not exclusive, since the trustees are to put in servants and manage and pay them; and all power for the management of the mansions is in the trustees. In *In re Eastman* and *In re Carne* there were no provisions for management.

SWINFEN EADY, J.—I think the lady is tenant for life and has really the powers of a tenant for life within the meaning of the Settled Land Act, and I am quite unable to distinguish this case from *In re Eastman's* or *In re Carne's Settled Estates* which have been cited. True it is that in this case the trustees have the obligation imposed upon them by the will of keeping up the mansion-houses, grounds, and premises in a fit state for residence, with the obligation of paying the servants indoors and outdoors for that purpose, but the plaintiff has the absolute right to occupy all or any of the premises in question. The trustees "shall permit" her. So, although in one sense she resides there by their permission, it is a permission which the will compels them to grant. She has the absolute right to reside there, and nobody else has the right to reside there. The trustees are not empowered to let the property, they do not claim or desire to use it for their own residence. The plaintiff is the sole person entitled to reside there; she is entitled to reside there in the ordinary way of a person in her station of life (that is, with personal servants of her own), with such conditions as the trustees may consider necessary for keeping the premises inside and out in a proper state.

It is said that she has not the exclusive possession, but it is quite obvious that the Settled Land Acts include the case of a tenant for life who has no right actually to enter the house at all. The house may be let to a family and the tenant for life may be only entitled to the rents and profits. The mere fact that the obligation is imposed upon the trustees to keep up the house and grounds and to pay for the necessary service does not, in my opinion, serve to distinguish this case from the two to which reference has been made.

It may be that the decision would have surprised the testatrix, and is not in accordance with her intention, but the Settled Land Act overrides her intention, and I determine, therefore, that the lady has the powers of a tenant for life within the meaning of the Settled Land Acts.

Solicitors for the plaintiff, *Hunter & Haynes*.

Solicitors for the defendant, *Freshfields*.

K. B. Div. (Kennedy, J.) Nov. 3.

JACKSON v. MUMFORD. (a.)

*Insurance—Marine—Policy on hull and machinery of torpedo-boat destroyer—"Latent defect"—"Breakage of shafts"—"Trials."*

*A policy of marine insurance upon the hull and machinery of a torpedo-boat destroyer covered the following perils: "Fire in shops and on board, on stocks, trials, and all marine risks to completion and acceptance by the Admiralty . . . and all other perils, losses, or misfortunes." Attached to the policy was this clause: "This insurance is also specially to cover loss of or damage to hull or machinery through the negligence of mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect . . . with leave to go on trial trips." During a trial the connecting rod of the starboard engine broke, causing great damage.*

*Held, that "latent defect in machinery" did not cover a weakness in design; that the breakage of the connecting rod was not a "breakage of shafts"; and that "trials" did not denote a period during which the assured were to be insured against fire, but specified a particular peril insured against—viz., peril of trials.*

Action tried in the Commercial Court.

This was an action on a policy of marine insurance upon the hull and machinery of the torpedo-boat destroyer *Bullfinch*.

The plaintiff was the receiver and manager of Earle's Shipbuilding Co. (Limited), who had built *The Bullfinch* for the Admiralty, and the defendant was an underwriter at Lloyds.

The following perils were insured against by the policy: "Fire in shops and on board, on stocks, trials, and all marine risks to completion and acceptance by the Admiralty . . . (£1,660 on machinery) . . . and all other perils, losses, or misfortunes."

Attached to the policy was the following clause: "This insurance is also specially to cover loss of or damage to hull or machinery through the negligence of mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect . . . with leave to go on trial trips."

During the currency of the policy, which was a time policy, while *The Bullfinch* was on a trial, the connecting rod of the starboard high-pressure engine broke, causing great damage and loss of life.

The plaintiff contended that he was entitled to recover under the three following heads of the perils insured against—(1) trials, (2) breakage of shafts, (3) latent defect in the machinery; that the fracture in the connecting rod was caused by the structure of the steel; and that, if it was caused by faulty design, such would be a "latent defect in the machinery" within the meaning of the policy.

For the defendant it was contended that, according to the true meaning of the policy, the word "trials" denotes a period during which the assured was insured against fire; that weakness in design was not a latent defect; and that the loss was not a loss by the perils insured against within the meaning of the policy.

*Scrutton, K.C.*, and *E. M. Pollock*, for the plaintiff.

*J. A. Hamilton, K.C.*, and *F. W. Hollams*, for the defendant.

The following cases were cited: *Readhead* v. *Midland Railway Co.*, 17 W. R. 737; *Vaughan* v. *Taff Vale Railway Co.*, 8 W. R. 549; *Cullen* v. *Butler*, 5 M. & Sel. 461; *The Knight of St. Michael*, 46 W. R. 396; *The Thames and Mersey Marine Insurance Co. (Limited)* v. *Hamilton, Fraser, & Co.*, 36 W. R. 337; *Merchants Trading* v. *The Universal Marine Insurance Co.*, 2 Asp. N. S. 431; and *The Xantho*, 36 W. R. 353.

*Cur. adv. vult.*

Nov. 3.—KENNEDY, J., delivered the following judgment: The question I have to decide is whether there has been a loss within the policy, and the case involves both legal and technical questions. I shall first deal with the question whether there was a latent defect within the meaning of the policy. The plaintiff contends that the fracture was due to the structure of the steel; the defendant, on the other hand, says that it was due to the weakness of the design. I cannot find that the fracture was due to the structure of the steel, but upon the evidence I have come to the conclusion that the real cause of the fracture was the weakness of the design. But the plaintiff contends that a faulty design is a "latent defect in the machinery" within the meaning of the clause in the policy. I am certainly not prepared to impute negligence to the designers because it is now shown that the design was wrong. But granting so much, I am still quite unable to regard "latent defect in the machinery" as covering a weakness of design. It is not a natural interpretation of the words, or a meaning which any man of business reading the expression in a commercial document would attach to it. The phrase "defect in machinery" in a business document means a defect of material, in respect either of its original composition or in respect of its original or its after-acquired condition. But for the purposes of to-day it is sufficient for me, without attempting to define its boundaries, to say that the phrase at all events does not in my view cover the erroneous judgment of the designer as to the effect of the strain which his machinery would have to resist—the machinery itself being faultless, the workmanship faultless, and the construction precisely that which the designer intended it to be.

As to the second contention of the plaintiff, it has been argued that the breakage of a connecting rod is so closely akin to the breakage of a shaft that, applying the *ejusdem generis* principle and reading the special clause with the ordinary Lloyds' perils clause, so as to incorporate with the former the general or sweeping words "all other perils, losses, and misfortunes," the breakage of a connecting rod ought to be treated as a risk which, like "breakage of shafts," is covered by the policy. On the other hand, however, a connecting rod and a shaft are always distinguished in the language of engineers. And the expert evidence, which was uncontradicted, showed that the functions really had a difference, and that, while both rod and shaft alike transmit power, the connecting rod and the crank shaft transmit it by strains which are of an essentially different character. In this state of facts I should hesitate, at any rate, to apply the *ejusdem generis* principle even if I could incorporate the special in the general clause. I do not think I should be justified either in treating this special clause simply as a part of the ordinary Lloyds' perils clause, which precedes it, or in adding to it from that clause the general and sweeping words. It does not appear to me to affect the question of construction that there is, in the policy, just before the ordinary Lloyds' peril clause, a reference to this special clause in the words "clauses as attached.' The one issue which remains for decision is whether the loss is a loss covered by the word "trials." Is the effect of the clause "against fire in shops and on

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

board, on stocks, trials, and all marine risks to completion and acceptance by the Admiralty," to protect the assured in respect of the machinery—(1) against the peril of fire until *The Bullfinch* was afloat, (2) against the peril of trials, (3) against all marine risks until completion and acceptance by the Admiralty; or is the clause to be read as if "trials," like the preceding expressions — "in shops" and "on board on stocks" — simply denotes a period or state of things during which the assured are to be insured against fire? The latter is the construction for which the defendant contends. He also contends that, even if "trials" denote a peril insured against, the loss claimed for is not a loss by that peril, inasmuch as the machinery was running only at the contract speed, and the damage resulting inevitably from the faulty design was a consequence that must happen and not a casualty that might happen. I have come to the conclusion that upon the issue the plaintiff is entitled to succeed. The construction of the clause for which the defendant contends certainly is one which makes the clause ungrammatical; but leaving the punctuation out of sight as a possible oversight, it seems a strong thing, unless no good sense can otherwise be given to the clause, to insert, as the defendant's construction requires, some such words as "and during" before the word "trials." In the next place, the word "trials" is superfluous as a declaration of a time or state of things during which fire peril was to be insured against. By the express provisions of the policy there is leave "to go on trial trips in ballast or otherwise," and the ordinary Lloyds' perils clause covers damage or loss by fire. It was therefore quite useless to put in this clause a protection against fire during trials. On the other hand, not only is the construction of the clause in question which makes "trials" a risk insured against grammatically unobjectionable, but there would otherwise not be in this policy any protection against a risk which, in the light of the scientific evidence in this case, I should suppose that no reasonably prudent contractor for the machinery of a vessel of this sort would allow himself to be unprotected by insurance. There must, therefore, be judgment for the plaintiff for the total amount (as against all the underwriters) for £3,692 6s. 2d., the plaintiff to have the general costs of the action, the defendant to have the costs of the issues with regard to the quality of the steel and the sufficiency of the design of the connecting rod, execution to be stayed for ten days, and, if notice of appeal be given within that time, then until the hearing of the appeal.

Solicitors for the plaintiff, *Cattarns & Co.*

Solicitors for the defendant, *Waltons, Johnson, Bubb, & Whatton.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) June 25, 1902.

PASQUIER *v.* NEALE. (*a.*)

*Licensing law—Offence—Sale at place not authorized by licence—Unlicensed restaurant—Wine sent out for—Proprietor of restaurant part proprietor of licensed wine shop from which waiter fetched the wine—Appropriation of goods—Refreshment Houses and Wine Licenses Act,* 1860 (23 & 24 *Vict. c.* 27), *s.* 19.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*The appellant was proprietor of a restaurant which was not licensed for the sale of wine, and part proprietor of a duly licensed wine shop a few doors off.*

*Held, that, although the waiter received money from the customer before he fetched a bottle of wine from the wine shop, yet, that there was some evidence upon which the magistrate was justified in finding as a fact that there was a sale by the appellant of the wine to the customer at the restaurant, and therefore the conviction of the appellant for having sold wine on unlicensed premises must stand.*

Special case.

Appeal from a decision of Mr. Denman, a police magistrate sitting at Marlborough-street, who had convicted and fined the appellant, a restaurant keeper in Soho, for selling intoxicating liquors without a licence,

An information was preferred by the respondent Neale, an officer of the Inland Revenue, against the appellant, Alphonse Pasquier, for having sold a pint of wine by retail without having a proper licence in force authorizing him to do so. The magistrate convicted the appellant and fined him £3 10s., and 2s. costs.

The case found that the appellant was the proprietor of a restaurant business at 16, Gerrard-street, Soho, not licensed for the sale of wine, and that he also carried on the business of a wine dealer in partnership with one Paul Durand at 2, Dansey-yard, Soho, in respect of which premises Durand held a licence as a dealer in foreign wines under section 2 of 6 Geo. 4, c. 81. On the 10th of December, Finnigan, an officer of the Inland Revenue, entered the restaurant in Gerrard-street and ordered a meal. A waiter showed him a list of wines with the prices marked against them, and from the list Finnigan selected a bottle of claret at 1s. 6d. The waiter asked Finnigan to pay for the wine, and Finnigan accordingly gave him 1s. 6d. The waiter then left the Gerrard-street premises and proceeded to 2, Dansey-yard and there purchased a bottle of claret, for which he paid, though there was no evidence of the price he paid. He then returned with the bottle of claret, which he served to Finnigan, who consumed it.

On the above facts the magistrate held that there had been a sale of the wine to Finnigan by the appellant's servant at 16, Gerrard-street, and he accordingly convicted the appellant.

The question for the opinion of the High Court was whether there was evidence upon which the magistrate was justified in finding that there was a sale of wine to Finnigan at 16, Gerrard-street, or whether, as was contended by the appellant, he was bound as a matter of law to hold that the sale took place at Dansey-yard.

*Horace Avory, K.C.* (*H. B. D. Woodcock* with him), for the appellant.—It is an every-day practice that has been going on for years for restaurant keepers who have no licence to send out for wine for their customers. In such cases the money is first paid by the customer to the man who is sent out to fetch the beer or wine, and the practice is based on the theory that the waiter who receives the money in advance gets the wine as agent for the customer. The moment Finnigan was asked by the waiter for the money he knew that the wine could not be supplied on the premises but was to be sent out for. The fact that the appellant was in partnership with the keeper of the wine shop from which the wine was obtained caused the magistrate to convict, but the real question upon which the conviction must stand or fall is whether in law the sale took place on the licensed or on the unlicensed premises. The appropriation of the wine was at Dansey-yard.

Therefore the sale was effected there: *Pletts* v. *Beattie*, [1896] 1 Q. B. 519, 44 W. R. Dig. 90; *Pletts* v. *Campbell*, [1895] 2 Q B. 229, 44 W. R. Dig. 90; and *Stephenson* v. *Rogers*, 63 J. P. 230, 47 W. R. Dig 101.

*Sir Edward Carson, S.G.* (*Rowlatt* with him), for the commissioners.—The facts in this case are not in dispute, and there is ample evidence upon which the magistrate could find that there was a sale at Gerrard-street and this court cannot, therefore set the conviction aside.

Lord ALVERSTONE, L.C.J.—We do not think it necessary to hear counsel for the Crown argue the case further, because, we accept his submission that here the magistrate having drawn an inference of fact the only question that we have to consider is whether there is any evidence to justify him in finding that fact and drawing that inference. He has drawn the inference that the sale to the customer of the wine took place, not at Dansey-yard, but at the unlicensed premises in Gerrard-street. It seems to me that there is ample evidence to warrant such an inference being drawn. Where a restaurant proprietor informs his customers that he sells no wines, but that a waiter will be sent out to obtain wines or beer as agent on behalf of the customer, as is daily done in respectable restaurants, that is one thing. But this is the case of a man who is in partnership with a person who holds a licence at another place. By keeping a restaurant near at hand he promotes the sale of their wines by having agents to ask customers if they would require wine, and it appears to me nothing but a sale by the restaurant keeper of wine to his customers. If the waiter had been called, his evidence might have thrown a different light upon the evidence we have to consider, but as it stands it is impossible on the facts as stated in the case for us to say that there is no evidence that the sale was on unlicensed premises, and therefore we cannot interfere with the finding of fact of the learned magistrate.

DARLING and CHANNELL, JJ., concurred.

Solicitors, *Watkins, Baylis, & Chidson; The Solicitor of Inland Revenue.*

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Prob. Div. & Adm. Div. Admiralty. } July 8, 9, 1902.

"THE USKMOOR." (*a.*)

*Ship—Collision—Article* 28 *of the Regulations for Preventing Collisions at Sea*, 1897.

*Under Article* 28 *of the Regulations for Preventing Collisions at Sea*, 1897, *the duty imposed on steam vessels which are in sight of one another under way, of indicating by signals on the whistle any course which a vessel intends to take, such course being authorized or required by the rules, is not limited to the case of vessels in narrow waters, but the word "authorized" is to be widely interpreted.*

On the 9th of June, 1902, at about 10.45 a.m., *The Minnetonka*, a steamship of 13,400 tons gross register, while on a voyage from New York to London, was proceeding up the English Channel between Beachy Head and *The Sovereign* lightship on a course of E ½ S. magnetic, making about fifteen knots. Those in charge of *The Minnetonka* alleged that they observed about two and a-half miles distant a steamship which proved to be *The Uskmoor*, a vessel of 3,587 tons gross, proceeding down channel. *The Uskmoor* was on a voyage from Blyth to Cape Town, and at the time in question was on a course of about W. ¾ S., making about eight knots. The weather was fine and clear with a light wind from the N.E. and the tide flood running from two to three knots. *The Minnetonka*, according to the plaintiffs' case (the plaintiffs being the owners of *The Minnetonka*), observing that *The Uskmoor* was acting under a port helm, also ported to bring the vessels port to port, but on observing that *The Uskmoor* was subsequently acting under a starboard helm, starboarded also. *The Uskmoor* was then observed to be again porting, and *The Minnetonka* ported her helm and blew one short blast on her whistle. *The Uskmoor*, however, again starboarded and came on, striking *The Minnetonka* on the port bow and afterwards on the port side. The defendants, the owners of *The Uskmoor*, alleged that when those in charge of *The Uskmoor* first observed *The Minnetonka* that vessel was about seven miles from *The Uskmoor* bearing about two and a-half points on her starboard bow, and that when *The Royal Sovereign* lightship was abeam of *The Uskmoor* she altered her course from W. ¾ S. to W. by N. magnetic, and that when *The Minnetonka* was about two miles from them she ported her helm so as to allow her to pass under the stern of the steamship *Avocet*, which vessel *The Minnetonka* had been overtaking. *The Minnetonka* then starboarded, and the engines of *The Uskmoor* were then stopped, and on *The Minnetonka* porting her helm the engines of *The Uskmoor* were put full speed astern and her helm hard a-starboard. Each vessel charged the other with neglecting, *inter alia*, to indicate by sound signal the course she was taking as prescribed by article 28 of the Regulations for Preventing Collisions at Sea, 1897. That article provides "when vessels are in sight of one another a steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle or siren—viz., one short blast to mean "I am directing my course to starboard"; two short blasts to mean "I am directing my course to port"; three short blasts to mean "My engines are going full speed astern."

*Pickford, K.C., Aspinall, K.C.*, and *Pritchard*, for the plaintiffs.

*Robson, K.C.*, and *Dawson Miller*, for the defendants.

JEUNE, P., in giving judgment, said that he accepted the view that the collision occurred about a quarter of a mile from *The Royal Sovereign* lightship, and that the two vessels were approaching port to port when *The Uskmoor* starboarded, which it was wrong for her to do. It was clear that she had performed an extraordinary series of manœuvres in front of *The Minnetonka*, first porting, then starboarding, then porting, and finally starboarding back again, and that being the case it appeared to the court very important that *The Minnetonka* should have given *The Uskmoor* the clearest possible indication of the course that she herself intended to take. Now article 28 is limited in two ways: firstly, in that the vessels must be in sight of one another; and, secondly, they must be "taking any course authorized or required by these rules." The first limitation is intelligible enough, and the rule does not apply where a vessel, in conducting manœuvres in the ordinary course of navigation, quite apart from seeing any other vessel, thinks it right to port or starboard her helm, but it is not easy to put a clear interpretation upon the second limitation. The word "required"

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

is clear enough, for there are certain things required by the rules to be done. But the word "authorized" is very much wider, and the court is of opinion that a wide interpretation ought to be given to it, and that it includes any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight. It is quite true, however, that in certain cases the authorization which arises is more distinct. For instance, a vessel which is overtaking another, and is *ipso facto* bound to keep out of that other vessel's way, is authorized to go to port or starboard, and so also under the rule applicable to the case of one vessel crossing another, the vessel which has to keep out of the way must be considered to be authorized to do so by one of several means, according to the circumstances. The course *The Minnetonka* took, according to her own story, was certainly a course authorized by the rules. The obligation, therefore, of sounding a blast upon her whistle was imposed upon *The Minnetonka* at a time earlier than when she actually did sound it. The reason put forward by the officer in charge of her was that he did not think it was necessary to comply with the rule except when vessels met in narrow waters. This reason was one which probably reflected the mind of a good many sailors, but the court wished to emphatically say that there was no such limitation of the rule. The court thought it necessary to say this with some emphasis because experience demonstrated to it that the rule had not been complied with with the completeness which its terms demand, and if masters of vessels were to err in future it was to be hoped that they would do so on the side of sounding their whistle rather than from not sounding it. In this case, in view of the somewhat extraordinary manœuvres that *The Uskmoor* was performing in in front of *The Minnetonka* it was the clearest possible duty of *The Minnetonka* to give the clearest possible indication to *The Uskmoor* of what she (*The Minnetonka*) was doing, and in not doing so she failed to do her duty. If she had given *The Uskmoor* a very clear indication that she was porting, the inference would have been that she meant to pass port to port, and that might have prevented *The Uskmoor* from afterwards attempting the extraordinary manœuvres she performed. The court therefore found both vessels to blame.

Solicitors for plaintiffs, *Pritchard & Sons.*

Solicitors for defendants, *Botterell & Roche.*

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## House of Lords.

From C. A. (England). June 17, 1902.

FARQUHARSON BROTHERS & CO. *v.* KING & CO. (*a.*)

*Principal and agent—Fraud of agent—Sale of goods—Conduct of principal enabling agent to commit the fraud—Estoppel.*

*The appellants, who were timber merchants, instructed a dock company to honour transfers or delivery orders signed by their confidential clerk. The clerk by means of orders signed by him in fraud of the appellants had timber transferred into a fictitious name, and then sold and transferred the timber in this fictitious name to the respondents. In an action by the appellants against the respondents to recover damages for the conversion of the timber,*

*Held, that the appellants were not precluded by their conduct from setting up the unauthorized action of their agent, for no representation was made by them or on their behalf to the respondents; also, that the goods were stolen by the clerk, therefore the respondents acquired no title to the timber and were consequently liable.*

*Decision of the* Court of Appeal (*reported* 49 *W. R.* 673, [1901] 2 *K. B.* 697) *reversed.*

Appeal from an order of the Court of Appeal (A. L. Smith, M.R., and Vaughan Williams, L.J., Stirling, L.J., dissenting, reported 49 W. R. 673, [1901] 2 K. B. 697).

The action was brought by the appellants against the respondents to recover certain timber, or damages for its conversion.

The appellants were timber merchants, and warehoused large quantities of timber at the Surrey Commercial docks, having an office in the city of London.

The timber, when sold to a purchaser, was handed over to him by means of a delivery order signed by the appellants and addressed to the dock company.

The appellants had a confidential clerk in their employment named H. J. Capon, whose duties were to attend at the office and to direct the business in the absence of the partners, and he had a certain authority to sell timber.

In 1895 the appellants sent the following written authority, signed by them, to the directors of the dock: "We hereby authorise you to accept all transfer or delivery orders which shall be signed on our behalf by Mr. H. J. Capon, whose signature is subjoined. The dock company acting also on our signature as heretofore." With it was sent a letter to the manager of the docks informing him of the arrangements made.

For some years from 1896 Capon manipulated appellants' books and signed transfers and delivery orders whereby he perpetrated a series of frauds. He transferred timber at the docks into the name of J. T. Brown, and writing from an address in Battersea, and representing himself as an agent of Bayley, a well-known firm, sold it in his fictitious name to the respondents. The respondents acted *bonâ fide* in the transaction, paid him the price, and obtained delivery of the timber from the docks by means of orders signed in the name of Brown.

It appeared that the prices paid by the respondents were fair and reasonable, and the business was carried through in the ordinary course.

The learned judge (Mathew, J.) asked the jury whether the appellants so acted as to hold out Capon to the respondents as their agent to sell to the respondents, and upon a negative answer, judgment was entered for the appellants for £1,200, the agreed amount.

The Court of Appeal set this aside, and entered judgment for the respondents, upon the ground that the present appellants had by their conduct enabled their clerk to commit the fraud, and that therefore the loss must fall upon them.

*Asquith, K.C.*, and *Danckwerts, K.C.* (*W. Whately* with them), for the appellants.—Capon was not held out to the respondents as having authority to sell the timber. There was no duty which the appellants omitted to do, and no estoppel can arise. They referred to *Henderson* v. *Williams*, 43 W. R. 274, [1895] 1 Q. B. 521, and Savage, C.J.'s, statement in *Root* v. *French*, 13 Wend. (N.Y. Supr. Ct.) 570, mentioned by the Lord Chancellor. As the goods were not sold "under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had": Sale

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

of Goods Act, 1893, s. 21. The Factors Acts are quite unnecessary if the view of the Court of Appeal is right: *Cole* v. *North-Western Bank*, L. R. 10 C. P. 354, 23 W. R. Dig. 186, approved in *Colonial Bank* v. *Whinney* 34 W. R. 705, 11 App. Cas. 426.

*Pickering* v. *Busk*, 15 East, 38; *Johnson* v. *Crédit Lyonnais*, 26 W. R. 195, 3 C. P. D. 32; *Lamb* v. *Attenborough*, 10 W. R. 211, 1 B. & S. 831; and *Swan* v. *North British Australasian Co.*, 11 W. R. 862, 2 H. & C. 175, were also cited.

*Lawson Walton, K.C.*, and *Cubabé*, for the respondents.—The purchaser could not know the limitations of Capon's authority. The case is like *Brocklesby* v. *Temperance Permanent Building Society*, 43 W. R. 606, [1895] A. C. 173. The words there quoted by Lord Halsbury from *Root* v. *French* in *Henderson* v. *Williams*—"when one of two innocent persons must suffer from the fraud of a third, he shall suffer who by his indiscretion has enabled such third person to commit the fraud"—are applicable. There was here a disposing power—an authority to sell and transfer given to agent—and Capon was not a mere custodian of the goods. He was enabled to hold himself out as the owner of the timber, and the true owner is precluded from setting up his title: *Dyer* v. *Pearson*, 3 B. & C. 38; *Vickers* v. *Hertz*, L. R. 2 Sc. & D. 113, 19 W. R. H. L. Dig. 15; *Ramazotti* v. *Bowring*, 8 W. R. 114, 7 C. B. N. S. 851; and *Babcock* v. *Lawson*, 27 W. R. 886, 4 Q. B. D. 394.

*Asquith, K.C.*, replied.

Earl of HALSBURY, L.C.—In this case I hesitate to speak all that is in my mind out of respect to the learned judges who have taken a different view; but for that I should have said that this was a particularly plain case in which no difficulty whatever arises. I think it might be stated compendiously in two sentences: A servant has stolen his master's goods, and the question arises whether the persons who have received those goods innocently can set up a title against the master. I believe that is enough to dispose of this case.

That it was a stealing there cannot be the smallest doubt, and indeed I feel great hesitation in treating seriously the argument that it was not. What possible difference is there between what was done here by Capon and the act of taking a pocket-handkerchief out of a man's pocket by a thief in the street? The man who steals is a servant; his possession is the possession of the master. It is not denied that he had no actual authority to dispose of these goods, and because by a circuitous process he allows an innocent agent (for all the persons who acted under his directions were perfectly innocent) to remove the goods from the place where they had been stored by the master, that, forsooth, is said not to be an *asportavit!* Why not? Assuming always the element of fraud, the intention to commit a crime, which is not denied, what element is there wanting to make that a stealing? I confess I am puzzled at the notion than anybody could entertain the smallest doubt in the world that that was a stealing.

Well, if it was a stealing, how has the person who has received the goods acquired a right to those goods which, it is equally not denied, originally belonged to the appellants in this case? When has the property been changed, and by what circumstances? It is impossible, I think, to answer that question except in one way. There has been no property changed; the thief could give no title whatever. The circumstances of this case show conclusively that there is nothing to prevent this being a theft, and it being a theft the thief could convey no title. That disposes of the case.

But for the respect I entertain for the learned judges who have taken a different view from myself, I should leave the case there, because I think it is too plain for argument: but a great deal has been said upon the subject of the right arising from estoppel. I really do not understand what estoppel has to do with this case. The mode by which the goods were removed, and the *asportavit* incident to the felony accomplished, was as a matter of fact the innocent act of the dock company; but it is a mistake to talk of the relations between the dock company and the appellants here as if there was any question of estoppel. It would not be true to say, even as regards the dock company, that there was an estoppel; there was no estoppel at all. Estoppel arises where you are precluded from denying the truth of anything which you have represented as a fact, although it is not a fact; but no such question arises here. All that the dock company did they were expressly authorised to do by the appellants; there would not therefore be an estoppel as between them and the dock company at all. It would be that they had acted in pursuance of the real and direct authority of the appellants; and after the letter of authorization what they did was expressly authorized by the appellants.

If it could be argued here that the appellants had represented their clerk Capon to be invested with what, over and over again with a degree of reiteration somewhat wearisome, we heard called a "disposing power," "perfect dominion," and "control"—words which are ambiguous in themselves unless you explain what the disposing power and what the dominion and control mean—I say, if they had represented their clerk Capon to be invested with disposing power, and (note the importance of the next sentence) if anybody supposing Capon to be invested with that power had acted upon it to his own prejudice, then undoubtedly estoppel would have arisen; the person who had improperly and negligently allowed Capon to be apparently so invested with authority would be estopped from denying that Capon had authority.

So far the matter would be quite clear; but when we come to look at what the facts of this case are, what in the world has that to do with the question that arises here? Capon was unknown, the appellants were unknown; nobody dreams of suggesting that the respondents here acted upon the faith of Capon's being invested with that authority; they never heard of Capon, they never heard of the appellants; but the clerk who has committed the fraud, ingeniously availing himself of his power of signing orders for delivery, gave a delivery order to change the name in which the goods were stored in the dock company's books to the name of Brown. Professing to be Brown, and professing to act on behalf not of the appellants, but of a third person named Bayley, he procures the removal of these goods by innocent agents, as I have described them, under the authority of Brown, he having fraudulently transferred the goods in the dock company's books from the name of his master to that of Brown, a fictitious person; and Brown in his turn procures these goods to be delivered to the present respondents; and forsooth it is said that that establishes an estoppel! I am bewildered at the absurdity of such a suggestion; I really do not understand in what possible way it can arise. That, I should have thought, was quite enough to dispose of this case.

I really am not concerned to defend, if it were attacked, the language which I appear to have used in *Henderson* v. *Williams*. I adhere to every word of the judgment I then delivered. It is not a question

of whether I am prepared to affirm the words which were quoted or not. I speak of it, I hope, impartially; if I thought the words were incautious I should not hesitate to correct them now; but I do not know now what it is I am supposed to have said that can have led to this misapprehension. I believe the proposition of law which I then gave is accurate, and I am prepared to adopt it; but what application has it to this case? Curiously enough, the only passage which has been assailed as giving rise to the difficulty here is not my own language at all, but the language of an American judge, though it is true I quoted it with approval. Let us see what the language is; I believe it to be accurate. I observe that a few words seem to have been omitted from the consideration of the learned judges who commented on this matter. The language of the learned judge (Chief Justice Savage) quoted by me is this: "Speaking of a *bonâ fide* purchaser who has purchased property from a fraudulent vendor and given value for it, he says, 'He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud.'" Those words "who by his indiscretion" appear not to have made much impression upon those who were commenting upon this matter. What indiscretion did the appellants here commit? They intrusted their clerk with the delivery orders. It is said that in some exceptional cases he was allowed to make a contract; but what has that to do with it? No one knew that, outside the firm themselves; and you might just as well say in the case of a shopman in a furniture broker's shop that because he is there, because he habitually delivers goods to the orders which his master receives, that gives him to all the world the power of giving a title if he steals his master's tables and chairs and delivers them to somebody else.

I confess I am a little surprised that two of the learned judges seem to be under the impression that my proposition, quoted as I have said, from an American judge, was that any person who has enabled another by any means to commit a fraud must be the person to suffer when two innocent persons are in question. Of course, it depends on the sense in which you are to understand the word "enabled." As I put it to the learned counsel yesterday, in one sense every man who sells a pistol or a dagger enables an intending murderer to commit a crime; but is he, in selling a pistol or a dagger to some person who comes to buy in his shop, acting in breach of any duty? Does he owe any duty to all the world, as is suggested here, to prevent people taking advantage of his selling pistols or daggers in his business, because he does in one sense enable a person to commit a crime? It seems to me that the moment you analyze what is intended by this argument the answer is plain; and when you analyze what is the only function which this man Capon was entitled to perform it is simply this—that he was a delivery clerk. But, say the learned counsel for the respondents, not only was he delivery clerk, but sometimes he had power and authority to make a contract. Suppose he had, what then? Was anybody misled by that? Did anybody act upon that belief? No one; therefore any notion of anybody's acting upon something that was held out and represented is entirely out of the question.

It appears to me, when one analyzes the matter it comes to this broad proposition, that because you have given authority to your clerk to deliver goods (for that is the sole thing that could be established by looking at the books either of the firm or of the dock company), therefore if any person in the employment of that master takes advantage of that for the purpose of committing a felony, thereupon that person is invested with the power to give the receiver a good title. I think the state of the law would have been perfectly clear without it, but the Sale of Goods Act has disposed of any such question, because it says, "Subject to the provisions of this Act where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying"—what—"the seller's authority to sell." Now, where comes in here the operation of that saving clause? What authority was there to sell? None. What representation was there of Capon's authority to sell? None. Therefore, when one analyzes this case, the two sentences with which I commenced my judgment appear to me to entirely dispose of it. This was a theft, and the thief could give no better title than he himself had—which was none. Therefore it seems to me *luce clarius* that the appellants are entitled to succeed, and I move your lordships to reverse the order appealed from, with costs.

Lord MACNAGHTEN.—I am of the same opinion. After what has fallen from my noble and learned friend on the woolsack I am almost ashamed to trouble your lordships with any observations of my own. But the case is peculiar in one point of view. I cannot remember any case in which the wealth of learning and argument was so far beyond the value of the poor and commonplace material on which it has been expended. And, besides, the question is not unimportant; the decision under appeal, if it could be supported, would have very far-reaching and, in my opinion, very pernicious consequences.

Vaughan Williams, L.J., expresses an opinion to the effect that the case is difficult. The very learned judge who differs from him on the result agrees with him on this. Speaking for myself, in the view I take of it, I must say that I cannot imagine a plainer or simpler case than this.

Messrs. Farquharson Brothers & Co. are timber merchants in a large way of business, with a turn over exceeding £200,000 a year. They had a confidential clerk called Capon, whom they trusted implicitly. A short time ago they discovered that this man had been robbing them for years, stealing small lots of their timber from time to time, passing the timber out of their names in the docks by means of a written authority they had given him, and disposing of it for his own benefit. They trace the stolen timber to the hands of Messrs. King & Co. They demand restitution or compensation; the demand is refused, and then this action is brought.

What is the defence? Not that the goods were bought in market overt, though that would be no defence now after the conviction of the thief. Not that Messrs. Farquharson led them to believe that Capon had their authority to sell what they supposed they bought. That defence is out of the question. They never imagined that they were dealing with Messrs. Farquharson or buying Messrs. Farquharson's goods. They never even dealt with Capon to their knowledge, they never dealt with him in his own name and in his proper person. They dealt with a phantom broker—an imaginary being, created, animated, and worked by Capon for his own purposes under the plain and unpretentious name of Brown. And from this Brown, whom they never saw in the flesh, and about whom they never made a single enquiry, they supposed they bought this timber. Whether Capon, who has apparently been convicted of forgery, could have been convicted of larceny or

not—though I think he could—it seems to me absurd to suppose that by this juggle of Capon's, all sham and pretence so far as he was concerned, the property in the stolen timber passed to Messrs. King & Co.

If it were permissible, it would be interesting to enquire which of the two parties to this litigation were the more blameworthy in a moral point of view. The plaintiffs trusted a man whom they had long known, and whom they believed to be honest. The defendants trusted a man they had never seen, and whom a breath of suspicion and the most ordinary enquiry would have unmasked. But we have nothing to do with this matter, though it does seem to have entered into the consideration of the Court of Appeal.

The real defence is a a singular one. It must come to this: The defendants say to the plaintiffs, "You, Messrs. Farquharson, have conducted your business in such an unbusinesslike way that you ought not to have your own goods back again. This misfortune, common to you and to us, is all your fault. By your blind and foolish confidence in Capon, and by the written authority you gave him, you 'enabled' him to commit this fraud upon us. And so Mr. Justice Ashurst's famous dictum comes in."

This defence, in my opinion, has no foundation in principle or authority. To try the principle, take a common case—a case which everybody understands. Nothing is better settled than this—that if a person buys a chattel, and it turns out that the chattel was found by the person who professed to sell it, the true owner can recover his property unless there has been a sale in market overt. The right of the true owner is not prejudiced or affected by his carelessness in losing the chattel, however gross it may have been. If I lose a valuable dog, and find it afterwards in the possession of a gentleman who got it from somebody whom he believed to be the owner, and paid for it accordingly, it is no answer to me to say that he never would have been cheated into buying the dog if I had chained it up, or put a collar on, or kept it under proper control. If a person leaves a watch, or a precious jewel, on a seat in the park, or on a table at a café, and it gets into the hands of a person who supposes that he has bought it from a rightful possessor, it is no answer to the true owner to say that it was his own carelessness that enabled the finder to pass it off as his own. If that be so, how can carelessness, however extreme, in the conduct of a man's own business, preclude him from recovering his own property which has been stolen from him?

Nor is the case without authority. In the case of the *Governor and Company of the Bank of England* v. *Evans's Trustees*, 5 H. L. Cas. 389, in this House, the trustees, who were a corporate body, called upon the Bank to replace stock which the Bank had sold under a forged power of attorney, bearing the genuine impression of the trustees' corporate seal. The defence of the bank was that the carelessness of the trustees in the custody of their seal enabled their clerk to impose on the Bank, and disentitled them from requiring the Bank to replace the stock. The judges were consulted. Their unanimous opinion, which this House adopted, was delivered by Mr. Baron Parke. He thought that the negligence, if there was negligence, in the custody of the seal was only remotely connected with the transfer which the Bank set up as good against the trustees, and then he proceeds in these words, at page 410: "If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?"

A somewhat similar contention was raised in the more recent case of *Scholfield* v. *Londesborough* (*Earl*), 45 W. R. 124. It was argued (and the argument found favour with some judges) that everybody who accepts a bill of exchange owes a duty which was defined as "the duty not to be negligent as to the form of the bill." That argument was rejected in this House. But in rejecting it both the Lord Chancellor and Lord Watson made observations of much wider application. The Lord Chancellor said: "I am not aware of any principle known to the law which should attach such consequences to a written instrument when no such principle is applicable in any other region of jurisprudence where a man's own carelessness has given opportunity for the commission of a crime. A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, or allowed his pocket handkerchief to hang out of his pocket, but could recover against a *bonâ fide* purchaser of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief." And Lord Watson, in his judgment, says: "It is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate."

The rules of law applicable to this case are, in my opinion, well settled. And I would venture to remind your lordships of an observation made by Lord Cairns in this House, to the effect that in cases of this sort, where your lordships have to perform the disagreeable duty of determining which of two innocent parties is to suffer by the fraud of a third, all your lordships have to do is to apply the settled and well-known rules of law, and apply them rigorously.

Lord SHAND.—In the course of the argument I felt that a difficulty arose in determining whether the principle in the *Brocklesby case* ought not to receive effect in favour of the respondents; for undoubtedly Capon had a general authority from the plaintiffs which gave him power to transfer in the dock company's books the timber which the respondents bought, and the limitation of that authority to certain sales of a restricted character was unknown to the purchasers of the timber. But, on the other hand, I have come to the conclusion, without difficulty, that the principle of that case does not apply, for the reasons which have been fully stated by the Lord Chancellor, and because no representation of Capon's authority was made to the respondents; indeed, the respondents were not even acquainted with the fact that they were dealing with Capon at all, but thought they were dealing with a fictitious person whom he named Brown. On that ground, therefore, I am of opinion that the argument so much pressed by the repondents fails.

But I am further of opinion with your lordships that the circumstances of the case show that this was really a theft on the part of Capon, and upon that second ground also I think that the order ought to be reversed. By putting the goods in a fictitious name Capon got them transferred to himself under that fictitious name, and thereupon he disposed of the goods. In so doing I think that that was a case of fraudulent appropriation, and really a theft of the

goods, and that the property in the goods therefore never passed to Capon or to anyone who purchased from him. On these grounds I concur with the motion which has been proposed.

Lord ROBERTSON.—It seems to me that the facts of this case hopelessly shut out the respondents from the legal principles which they invoke. When it is remembered that the respondents never heard of the appellants in connection with these purchases during their whole course; that they never knew of Capon's existence; that, instead of dealing with Capon as the agent of the appellants, they dealt with Brown as the agent of Bayley; that the right they expected to acquire was the right of Bayley, and not the right of the appellants at all—it is difficult to see how the cases cited have any bearing on the question. These things have ultimately reduced the respondents to relying on the fact that they paid their money in consequence of the dock company registering a transfer in their favour executed by Capon in his character of Brown, the previous transfer having been executed in favour of Brown by Capon purporting to act in his quality of clerk of the respondents. This recognition was given by the dock company to the transfer in favour of Brown in accordance with the general request of the appellants to the dock company to honour Capon's transfers. The place occupied, therefore, by this request to the dock company is merely that it was a *causa sine quâ non* and not the *causa causans* of the respondents being involved.

I think the respondents attach inordinate importance to this fact, and that the words "disposing power" are inapplicable. The authority conferred on Capon is not contained, and does not purport to be described, in the letter addressed to the dock company. That letter was in fact and of course a great deal broader than the authority of the servant; for no public company would undertake to discriminate among orders or to supervise the exercise by a servant of his master's delegated authority. Thus the dock company were clearly bound to recognize the transfer by Capon to Brown, and yet the transfer to Brown was a fraud.

This seems to me to be exactly the case of a servant having unrestricted access to goods for his master's purposes, and using that access to steal the goods and sell them. In the one case, as in the other, the innocent purchaser parts with his money on getting the goods; and does so, misled by the fact of possession given owing to the dishonest servant having access to the goods. And, unless the master is bound to all the consequences of the servant's access, I can see no ground for the respondents' argument on "disposing power."

Mr. Lawson Walton, whose faith in the "disposing power" was less absolute, endeavoured to piece on to it the circumstance that Capon had a limited authority to sell. But here again the facts preclude the respondents from any right to rely on the circumstance, for in the matters now in question that power was never exercised and never known. It would be extravagant to hold that in these sales of Bayley's goods by their agent Brown, of Battersea-rise, we are to recognize a mere excess of Capon's authority. The existence of that limited authority had nothing whatever to do with the purchases, and did not directly or indirectly facilitate the frauds. The appellants were wholly ignorant alike of the authority and the person authorized, and consequently drew no inferences from the exercise of the authority. The learned counsel frankly avowed that he had no case of holding out; and this being so, I do not think that the limited authority actually held by Capon can do the respondents any good. The case ultimately rests on the fact that, as the appellants' servant, Capon had the means of making away with their goods if he chose to steal them, and that is an impossible ground of judgment.

Lord LINDLEY.—I also think this case is extremely plain when it is understood.

Capon sold the plaintiffs' timber without their authority, and sold it to the defendants. The defendants honestly bought the timber, and they had no notice that Capon had no right to sell it. But there was no sale in market overt, and the Factors Acts do not apply. The mere fact, therefore, that the defendants acted honestly does not confer upon them a good title as against the plaintiffs, the real owners of the timber. The plaintiffs are entitled to recover the timber or its value, unless they are precluded by their conduct from denying Capon's authority to sell —Sale of Goods Act, 1893, s. 21 and see s. 61. Capon sold under the name of Brown, representing himself to be an agent of some persons named Bayley, who were well known in the timber trade. The defendants bought on the faith of his being what he pretended to be. What have the plaintiffs done which precludes them from denying as against the defendants Capon's right to do what he pretended he was entitled to do? Putting the question in another form, What have the plaintiffs done to preclude them from denying as against the defendants Capon's right to sell to them? To answer these questions it is necessary to consider what the plaintiffs did.

Capon was the plaintiffs' confidential clerk; they gave him a limited power of sale to certain customers and a general written authority to sign delivery orders on their behalf, and the plaintiffs sent that written authority to the dock company which stored the plaintiffs' timber. This authority would of course protect the dock company in delivering timber as ordered by Capon, however fraudulently he might be acting, if the dock company had no notice of anything wrong. By abusing his authority Capon made timber belonging to the plaintiffs deliverable by the dock company to himself under the name of Brown. In that name he sold it and procured it to be delivered to the defendants. What is there here which precludes the plaintiffs from denying Capon's right to sell to the defendants?

What have the plaintiffs done to mislead the defendants and to induce them to trust Capon? Absolutely nothing. The question for decision ought to be narrowed in this way; for it is in my opinion clear that when section 21 of the Sale of Goods Act has to be applied to a particular case the enquiry which has to be made is not a general enquiry as to the authority to sell apart from all reference to the particular case, but an inquiry into the real or apparent authority of the seller to do that which the defendants say induced them to buy.

It was pointed out by Parke, B. (afterwards Lord Wensleydale), in *Dickinson* v. *Valpy*, 10 B. & C. 128, at p. 140, that "holding out to the wo ld" is a loose expression; the "holding out" must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it The same principle must be borne in mind in dealing with cases like the present. I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist.

It was urged that the dock company were led by the plaintiffs to obey Capon's orders and to deliver to Brown, and that the defendants were induced by the dock company to deal with Brown, or, at all events,

to pay him on the faith of his being entitled to the timber; so that in fact the plaintiffs through the dock company misled the defendants. This is ingenious but unsound. Except that delivery orders were sent in the name of Brown to the defendants and were acted on by the dock company, there is no evidence connecting the dock company with the defendants in these transactions; and the answer to the contention is that the defendants were misled not by what the plaintiffs did, nor by what the plaintiffs authorized the dock company to do, but by Capon's frauds.

It is, of course, true that by employing Capon and trusting him as they did the plaintiffs enabled him to transfer the timber to any one; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense every one who has a servant enables him to steal whatever is within his reach. But if the word "enable" is used in this wide sense it is clearly untrue to say, as Mr. Justice Ashurst said in *Lickbarrow* v. *Mason*, 2 T. R. 63 "that whenever one of two innocent persons must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it." Such a doctrine is far too wide, and the cases referred to in the argument and commented on by Vaughan Williams, L.J., show that it cannot be relied upon without considerable qualification.

*Lamb* v. *Attenborough*, which is very like this, is a good illustration of the unsoundness of the doctrine in question if taken literally. *Johnson* v. *Crédit Lyonnais Co.* is another illustration to the like effect.

So far as I know, the doctrine has never been judicially applied where nothing has been done by one of the innocent parties who has in fact misled the other: see Story on Agency, section 133.

In *Vickers* v. *Hertz* the defendant acted on the faith of a document signed by the plaintiff. So in *Babcock* v. *Lawson*.

In *Brocklesby* v. *Temperance Building Society* the bank advanced money on the faith of the document signed by the plaintiff, and the defendants who had paid off the bank were entitled to the benefit of the bank's security. In *Henderson* v. *Williams* the defendant acted on orders given by the owner of the goods; the action was defended on his behalf, and he had entrusted the goods to Fletcher, to whom the defendant had attained. Those cases do not really assist the defendants. Nor does *Dyer* v. *Pearson*.

In the present case, in my view of it, Capon simply stole the plaintiffs' goods and sold them to the defendants, and the defendants' title is not improved by the circumstances that the theft was the result of an ingenious fraud on the plaintiffs and on the defendants alike. The defendants were not in any way misled by any act of the plaintiffs on which they placed reliance; and the plaintiffs are not, therefore, precluded from denying Capon's authority to sell.

The question which the defendants pressed Mathew, J., to leave to the jury, and which the late Master of the Rolls and Vaughan Williams, L.J., thought ought to have been left to them—namely, "Did the plaintiffs by their conduct enable Capon to hold himself out as the owner of the goods or as having the power to dispose of them?" would, in my opinion, have been seriously misleading unless accompanied by explanations which would have taken out of it the element of error introduced by the word "enable." I feel very strongly the observation that if the defendants are right the Factors Acts would never have been wanted.

In my opinion Mathew, J., was quite right in leaving to the jury the question as he framed it: "Did the plaintiffs so act as to hold Capon out to defendants as their agent to sell goods to the defendants?" The verdict is unimpeachable, and it is fatal to the defendants.

The appeal ought to be allowed with costs both here and below.

*Order of Court of Appeal reversed and judgment of Mathew, J., restored, with costs here and below.*

Solicitors, *Ward, Perks, & McKay*; *Bunning & Co.*

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## Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Nov. 19.

HAMLYN v. HOUSTON & CO. (a.)

*Principal and agent—Partnership—Liability of firm for wrongful act of partner—Scope of authority—Act done in course of business—Illegal means—Partnership Act,* 1890 (53 & 54 *Vict. c.* 39), *ss.* 5, 10.

*The defendant firm, which consisted of two partners, H. and S., carried on business as grain merchants, the whole management being under the control of H. It was in the course of the firm's business to obtain by legitimate means information as to contracts made by competitors in business. H. bribed a clerk of the plaintiff, who carried on a competing business, to give him access to the plaintiff's books, and thereby break his contract of service with the plaintiff. In an action to recover damages from the firm for the wrongful act of H.,*

*Held, that the firm was liable.*

Application by the defendants for judgment or a new trial in an action tried before Kennedy, J., and a jury.

The action was brought to recover damages for wrongfully inducing a clerk in the service of the plaintiff to commit a breach of his contract of service with the plaintiff.

The plaintiff carried on business as a grain merchant. The defendant firm, which consisted of two partners, Houston and Strong, also carried on business as grain merchants.

The plaintiff's cause of action was that Houston had bribed a clerk in the plaintiff's service to give Houston information, by showing him the plaintiff's books, with regard to the plaintiff's customers and his contracts with them, and that by the use of such information Houston had damaged the plaintiff's business.

Strong took no part in the management of the business of the defendant firm, which was entirely under the control of Houston, and it was admitted that Strong had not in any way authorised the acts complained of.

The jury found, in answer to questions left to them by the learned judge, (1) that Houston induced and procured the plaintiff's clerk to break his contract of service with the plaintiff by dishonestly and improperly communicating to Houston knowledge obtained by the clerk in the course of his employment in the plaintiff's office in regard to the private and confidential nature of his employer's business; (2) that it caused damage to the plaintiff; (3) that Houston so acted in order to obtain advantages in business for the defendant firm, and believed his actions to be for the interest of the defendant firm;

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

(4) that it was in the course of business of the defendant firm to obtain by legitimate means information in regard to the contracts made, or tendered for with brewers and with buyers of grains by competing firms; (5) that the moneys paid by Houston to the plaintiff's clerk were paid for or in consideration of the information which the clerk obtained for him; (6) that the moneys paid to the clerk were the moneys of the defendant firm; (7) and that the defendant firm profited by what Houston did.

The jury assessed the damages at £750, and Kennedy, J., directed judgment to be entered for the plaintiff for that amount.

The defendants applied for judgment or a new trial.

By section 5 of the Partnership Act, 1890, "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

By section 10, "Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

*Tindal Atkinson, K.C.*, and *Spencer Bower*, for the defendants.

*Ruegg, K.C.*, and *Montague Shearman*, for the plaintiff.

The following cases were cited: *Poulton* v. *London and South-Western Railway Co.*, 16 W. R. 309, L. R. 2 Q. B. 534; *Swift* v. *Jewsbury*, 22 W. R. 319, L. R. 9 Q. B. 301; *Dyer* v. *Munday*, 43 W. R. 440, [1895] 1 Q. B. 742.

COLLINS, M.R.—In my opinion the learned judge was right in entering judgment as he did on the findings of the jury. It appears that Strong was a sleeping partner in the firm which consisted of himself and Houston, and that he had given authority to Houston to act on his behalf in all matters relating to the business of the firm. The jury have found that part of that business was the obtaining by legitimate means information in regard to contracts made by competing firms. It was therefore within the scope of Houston's authority to obtain such information by legitimate means. Being armed with that authority, Houston resorted to bribing a clerk of the plaintiff, who was carrying on a competing business, to give him access to the plaintiff's business books. It is said that Houston, in doing this wrongful act, was acting so completely outside the scope of the authority conferred on him by Strong that the firm cannot be held responsible for it. It is contended that an act done by a partner which has for its object something illegal cannot be within the scope of his authority. But was the end which Houston had in view illegal? I do not think it was. One of the objects of the defendants' business, and, indeed, one of the well-known means of carrying on any such business, was to obtain information as to what competing businesses were doing. The obtaining of such information was within the scope of Houston's authority, as the jury have in effect found, and the end which he had in view—viz., the obtaining of such information, was not in itself illegal. It is now clearly established that a principal may be held liable for the fraud or other tort, and even for the crimes, of his agent, if the agent was at the time engaged on an act belonging to the class of acts which were within the scope of his authority. The mere fact that a tort or a crime has been committed does not necessarily take the act out of the scope of authority. The best test to apply is that which was applied by Kennedy, J., in the case—whether the partner was illegitimately doing that which was legitimately in the course of his business. If the thing which he is doing is legitimately in the course of his business, then he is acting within the scope of his authority, even though he seeks to effect it by illegal means, and his partner must take the consequences. That is what is enacted by section 10 of the Partnership Act. The case of *Swift* v. *Jewsbury*, which was cited in argument, was before that Act. The rule seems to me to rest not so much on the doctrine of implied authority or holding out as on this principle—that where a person chooses an agent, having an opportunity of judging his character, and intends to take the benefit of his acting successfully, it is only fair that he should also take the risk of his acting outside his authority by doing illegally something within the scope of his authority, and that he rather than the person who deals with the agent should bear the consequences. I therefore think that the appeal should be dismissed.

ROMER and MATHEW, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the plaintiff, *Wood & Wootton.*

Solicitor for the defendants, *C. J. Wilkinson.*

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From K. B. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) — Aug. 7, 1902.

DUNN v. BUCKNALL BROTHERS.
DUNN v. DONALD CURRIE & CO. (*a.*)

*Ship—Bill of lading—Liability of shipowner for delay in delivery of goods—Carriage of other goods intended for enemy—Arrest of ship—Exception of restraint of princes—Damages—Loss of market.*

*The plaintiffs during a time of war shipped goods on the defendants' vessel under a bill of lading containing an exception of liability for loss or damage occasioned by restraint of princes. The defendants took on board other goods which, as they knew, were intended for the Queen's enemies. The vessel was arrested by the British authorities before the goods were landed, and a suit was instituted in the Prize Court. In the result, the goods intended for the enemy were confiscated, but the ship was released. In an action brought by the plaintiffs for consequent delay in the delivery of their goods,*

*Held, that, even supposing that the defendants had not intended to land the goods without the consent of the proper authorities, they were not entitled to rely on the exception to excuse themselves from the consequences of a peril which their own negligence had contributed to bring about.*

*Held, also, that the measure of damages to which the plaintiffs were entitled was the difference between the market value of their goods at the time when they ought to have been delivered and the market value at the time when they were in fact delivered.*

Appeal from the judgment of Mathew, J., at the trial of an action without a jury.

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(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The plaintiffs were shippers of goods by the defendants' vessel, *The Mashona*, from New York to ports in South Africa.

The action was brought for the loss sustained by the plaintiffs by reason of delay in the delivery of the goods at their destination.

The delay was alleged by the plaintiffs to be due to the negligence of the defendants in permitting to be loaded on board *The Mashona* goods which were liable to confiscation, such goods consisting mainly of breadstuffs, which, it was said, were intended for the Queen's enemies in the Transvaal.

The ship sailed on the 5th of November, 1899, after war between Great Britain and the Boer Republics had been declared.

The bills of lading of the goods alleged to be intended for the enemy were dated one on the 17th of October, and the others on the 2nd of November, and they contained the following special clause: "As any cargo which may be deemed to be for the Transvaal and/or Orange Free State is liable to be detained, intercepted, confiscated, and/or otherwise restrained in the ports of Cape Colony or Natal, it is agreed by the shipper in accepting this bill of lading that the steamer, her owners, charterers, and/or agents are released from all responsibility in respect of goods so detained, intercepted, confiscated, and/or otherwise restrained."

No such clause appeared in the bills of lading issued to the plaintiffs, but they contained an exception of liability for loss or damage occasioned by restraint of princes.

The vessel arrived at Algoa Bay on the 5th of December. The bills of lading and the ship's manifest showed the character and the destination of the goods. The vessel was boarded by an officer of H.M.S. *Partridge*, who examined her manifest and ascertained that the goods were intended for ulterior delivery in the Transvaal. *The Mashona* was arrested and taken to Cape Town by order of the naval authorities. A suit was instituted in the Prize Court at Cape Town for the confiscation of the goods and the condemnation of the ship, as aiding, or attempting to aid, trading operations with the enemy; and the ship was detained, pending the proceedings, from the 5th of December till the end of the following March. By the judgment of the Prize Court certain of the goods on board were found to be intended for the enemy and were confiscated. The ship, however, was released; but it was held by the court that reasonable ground had been shown for arresting her, and the owners were ordered to pay the costs of the captors, except the cost of bringing the vessel round to Cape Town. In consequence of these proceedings great delay was occasioned in the delivery of the plaintiffs' goods.

At the trial Mathew, J., found as a fact that the agents of the ship knew the true character of the goods which were subsequently confiscated and the intention with which they were shipped and their liability to confiscation, and were guilty of negligence and breach of duty to the plaintiffs in permitting them to be put on board. With respect to the damages, he held that, as the defendants knew that the object of the plaintiffs' shipment was to supply the British troops in South Africa, and that the goods would sell at a much higher price if delivered in due course than if delivered at a later time, when a large importation of similar goods would force prices down, the true measure of damages in the case of goods delivered sound was the difference between the market rates when the goods ought to have been, and when they were in fact, delivered; and, further, that the defendants were liable for deterioration to certain of the goods caused by the delay.

The defendants appealed.

*Carver, K.C.*, and *Lewis Noad*, for the defendants Bucknall Brothers.

*Sir Edward Clarke, K.C., Scrutton, K.C.*, and *F. D. Mackinnon*, for the defendants Donald Currie & Co.

*Asquith, K.C., Bray, K.C.*, and *F. W. Hollams*, for the plaintiffs.

*Cur. adv. vult.*

Aug. 7.—COLLINS, M.R., read the following judgment of the court: This is an appeal from the decision of Mathew, J., in favour of the plaintiffs, who claimed damages from the defendants for delay in the delivery of goods shipped by the plaintiffs on the defendants' steamship *Mashona* for carriage to Algoa Bay. The bills of lading under which these goods were shipped excepted liability for loss or damage occasioned by restraint of princes. The ship sailed from New York with the plaintiffs' goods on board shortly after the outbreak of war with the Transvaal. On her arrival at Algoa Bay she was arrested by H.M.S. *Partridge*, when it was found that she contained goods consigned, if not to the Transvaal Government, certainly to residents in the Transvaal. The ship was accordingly taken to Table Bay, and the case was brought before the Prize Court, who condemned the goods, but released the ship, ordering the owners to pay the costs of the captors save those of bringing the ship round from Algoa Bay, holding that "there was reasonable and probable cause for seizing the ship, that there was certainly carelessness in taking the cargo on board at New York, and though the intention was, perhaps, not to have landed them without the consent of the proper authorities, still the ship had the goods on board." In consequence of these proceedings the delivery of the plaintiffs' goods was delayed for several months; the learned judge has held them entitled to damages based on the difference of the market value at the time they ought to have been delivered in ordinary course and the time at which they were in fact delivered. The defendants deny liability altogether and dispute the measure of damages.

The defendants' contention on the first point is that at the time of shipment they had reasonable grounds for supposing that by arrangements existing at South African ports ships containing cargo consigned to the enemy would be allowed to proceed on giving a bond in £10,000 for the discharge of such goods into the hands of the British authorities at their ultimate port of destination within British territory, and that their intention in proceeding to Algoa Bay was to report the facts to the British authorities there and act as directed by them—an intention which was defeated by the intervention of *The Partridge* before they had time to carry it out; and they relied on the case of *The Mercurius*, Edwards's Adm. Rep. 53, in support of this contention. We are of opinion that, if such was their real intention (and the Prize Court use the word "perhaps" in referring to it in the passage above cited), it affords no defence to this action. The court have found in the passage above cited that there was carelessness at New York, and that there was reasonable and probable cause for seizing the ship. Even if the finding of the court were not conclusive on this point, in our opinion the course which the defendants took in carrying the enemies' goods without the knowledge and consent of the other shippers was a breach of duty towards them, and was in effect to court detention, even if they had a well-founded hope of being able to give such explanations to the authorities as would avoid the condemnation of the ship. They took the risk of escaping detention without consulting the plaintiffs on the matter. They

are *primâ facie* liable to the plaintiffs for late delivery, and can only excuse themselves by the exception. But it is quite clear that they cannot rely upon an exception to excuse themselves from the consequences of a peril which their own negligence contributed to bring about. The principle is thus stated in Carver on Carriage by Sea (3rd ed.), s. 16: "A shipowner will not be exonerated from losses arising from any of these excepted causes when there has been any neglect on his part to take all reasonable steps to avoid them." See also section 77 of the same work, citing *The Xantho*, 36 W. R. 353, 12 App. Cas. 503, and Bowen, L.J. in *Steinman* v. *Angier Line* (*Limited*), 39 W. R. 392, [1891] 1 Q. B. 619. The converse case of the owner's right against the shipper is given by Lord Tenterden in his treatise on Shipping, chapter 7, as an instance of an unquestionable liability—and is quoted by Lord Campbell, C.J., in *Brass* v. *Maitland*, 4 W. R. 647, 6 E. & B. 470: "The merchant must lade no prohibited or uncustomed goods by which the ship may be subjected to detention or forfeiture"; and the liability of the shipowner under the express contract of the bill of lading is at least as clear as that implied as resting on the merchant. Here, as pointed out by Mathew, J., there can be no doubt as to the conduct of the shipowners. They had taken advice and caused a clause to be introduced into the bills of lading delivered to the shippers of goods for the Transvaal, pointing to the possibility of detention and excusing themselves from liability. Indeed, the defendants' counsel contended that, inasmuch as their conduct was deliberate, and with a view to carry such cargo to its destination only if the British authorities sanctioned it, the case came within *The Mercurius*, and the shipowners were excused. It certainly seems a startling contention that a liability for the consequences of an act, which would attach if the act were done negligently, would be excused if it were shown that the act was done deliberately. The question whether the conduct of the owners has been such as to justify the condemnation of the ship is quite independent of their responsibility to the shipper for detention brought about by their act, negligent or deliberate. If negligence in not taking all proper precautions to avoid the excepted perils debars them from relying on the exception, how can they better their position by showing that they deliberately encountered it, even though they had hopes more or less sanguine of avoiding serious detention? They clearly had no right to speculate on possible immunity at the risk of the plaintiffs without consulting them. In our opinion, therefore, on the undisputed facts in this case their liability is clearly established.

The only remaining question is whether the learned judge was wrong in his direction to the referee as to the measure of damages. On this part of the case *The Parana*, 25 W. R. 596, 2 P. D. 118, was strongly relied upon by the appellants as establishing that the plaintiffs could be entitled to nothing more than interest on the value of the goods when they ought in ordinary course to have been landed down to the date of actual delivery, and they contended broadly that damages could not be recovered for loss of market on a voyage by sea. But we do not understand *The Parana* as establishing any such general proposition. There can be no absolute peremptory rule taking voyages by sea out of the principles which regulate the measure of damages on breach of other contracts. It is only because the possible length of voyages and the consequent uncertainty as to the times of arrival may in many cases eliminate the supposition of any reasonable expectation as to the state of the market at the time of arrival that, as a general rule, damages for loss of market by late delivery are not recoverable from the carrier by sea. It is certainly not a rule of law; it is only an inference of fact that from the circumstances of the case no reasonable assumption as to the state of the market at the time of arrival could have been a factor in the contract between the parties. But, as the means of sea transit improve, voyages of three and four weeks' duration may be, and are now, accomplished with almost absolute certainty, and the state of the market at the reasonably calculated date of arrival may well be a vital factor present to the minds of both parties at the time of making the contract. Wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea, as of a land, transit there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases. This, indeed, if it were not self-evident, would seem to follow from the illustrations given by Mellish, L.J., himself in delivering the judgment of the Court of Appeal in *The Parana*. After giving other instances, he says, 2 P. D., at p. 121: "Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum." And he adds: "But there is in this case no evidence of anything of that kind." Here the learned judge has found as a fact "that it was known to the defendants what the object of the plaintiffs' shipment was—namely, the supply of the British troops, and that the goods would sell at a much higher price if delivered in due course than at a later time when a large importation of similar goods would force prices down." The appellants, indeed, suggested that evidence was wanting to support these findings, but on the admitted facts it seems to us a case of *res ipsa loquitur* as to the inference which both parties must have drawn as to the purpose of the shipment and the probable effect of delay in delivery. And, as is well known to practitioners in the Commercial Court, cases are there conducted on the basis of mutual admissions which do not always appear in the formal record. We are of opinion, therefore, that the judgment of the learned judge was right on all points, and that, consequently, this appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Hollams, Son, Coward, & Hawksley.*

Solicitors for the defendants, *W. A. Crump & Son; Parker, Garrett, & Holman.*

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From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — July 18, 19, 1902.

BARNARD CASTLE URBAN DISTRICT COUNCIL v. WILSON. (*a*.)

*Water—School—Swimming bath—Domestic purposes—Trade, manufacture, or business—Waterworks Clauses Act*, 1847 (10 *Vict. c.* 17), *s.* 53—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *ss.* 12, 17—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 56, 58, 65.

*A supply of water for a swimming bath constructed and required for the purposes of the business of a school is not a supply of water for "domestic purposes" within the meaning of section* 53 *of the Waterworks Clauses Act,*

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

1847, *but is a supply for the purposes of a "trade, manufacture, or business" within section* 12 *of the Waterworks Clauses Act*, 1863.

*Decision of* Buckley, J. (50 *W. R.* 92, [1901] 2 *Ch.* 813), *reversed.*

This was an appeal from a decision of Buckley, J. (reported 50 W. R. 92, [1901] 2 Ch. 813).

The plaintiffs were the urban sanitary authority for the district of Barnard Castle, in the county of Durham, and under the authority of the Public Health Act, 1875, and the Acts incorporated therewith, provided a water supply for the district. Under section 56 of that Act they might charge for water a water rate assessed on the premises supplied, or might enter into agreements on other terms; by section 58 they could supply water by measure; and by section 65 they might supply water for trading purposes on such conditions as might be agreed upon between themselves and the persons supplied.

The defendants were the governors of the North-Eastern County School, Barnard Castle. This school was not carried on for purposes of profit, but was a charity administered under a scheme settled by the Charity Commissioners in 1882.

The school had accommodation for three hundred boarders and fifty day boys, and was supplied with water by the plaintiffs for drinking, washing, cooking, and other domestic purposes at the usual rate levied by them in the district for domestic purposes, and for cricket ground and steam-boiler by special agreement.

In 1896 the governors erected on their premises a swimming bath with a cubical capacity of 35,000 gallons. The plaintiffs supplied the water for this bath under a special agreement till March, 1899, when they gave the governors notice that in future the charge for water would be 6d. per thousand gallons, which was the usual price paid for water supplied in the district for trade purposes. The governors refused to agree to this, and the plaintiffs brought the present action against them for a declaration that the governors were not entitled to demand or receive from the plaintiffs a supply of water for the swimming bath as for domestic purposes within the meaning of the Waterworks Clauses Acts, 1847 and 1863, as incorporated by the Public Health Act, 1875, and that the plaintiffs were entitled to payment from the defendants for the bath at the rate of 6d. per 1,000 gallons, and that the plaintiffs were entitled to cut off the water till payment was made, and an injunction to restrain the defendants from taking the water except as water for purposes other than domestic purposes within the meaning of the Acts.

The prospectus of the school stated that a swimming bath was provided and that the swimming bath fee was 3s. 6d. a term, payable by every boarder. A swimming master was kept to instruct the boys, and a fee was paid by such day boys as used the bath.

Buckley, J., held that the water for the swimming bath was supplied for domestic purposes within section 12 of the Waterworks Clauses Act, 1863, and dismissed the action.

The plaintiffs appealed.

By section 53 of the Waterworks Clauses Act, 1847, "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall . . . be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

By section 12 of the Waterworks Clauses Act, 1863, "A supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages where such horses or carriages are kept for sale or hire by a common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose."

*Upjohn, K.C.*, and *S. G. Lushington*, for the appellants.—The supply of water for a swimming bath is not a supply for domestic purposes within section 12 of the Waterworks Clauses Act, 1863. It is really a supply for the purposes of a trade—the trade of a school. The Legislature cannot have contemplated laying such a heavy burden on a water company as to enable anyone to require an unlimited supply for domestic purposes.

They referred to *Smith* v. *Müller*, [1894] 1 Q. B. 192; *Pidgeon* v. *Great Yarmouth Waterworks Co.*, [1902] 1 K. B. 310, 50 W. R. Dig. 183; *Busby* v. *Chesterfield Waterworks and Gas Light Co.*, 6 W. R. 515, E. B. & E. 176; *Liskeard Union* v. *Liskeard Waterworks Co.*, 30 W. R. 292, 7 Q. B. D. 505.

*A. T. Lawrence, K.C.*, and *R. C. Glen*, for the respondents.—The swimming bath is merely an adjunct to the school and is not used for the purposes of the business of the school. Bathing must be considered a domestic purpose.

They referred to *Bristol Waterworks Co.* v. *Uren*, 15 Q. B. D. 637, 33 W. R. Dig. 239.

*Upjohn, K.C.*, replied.

VAUGHAN WILLIAMS, L.J.—This case is a troublesome one, and in my judgment depends entirely upon a question of fact as to which different minds may arrive at different conclusions. According to my view we have not very complete information as to what the circumstances are from which we are to draw our inferences of fact. In construing an Act of Parliament I do not think it a right course to pursue to ask, Is this particular case one which it would be right or reasonable for the Legislature to include within the enabling powers of such or such a section? and I do not think myself that it is a proper way to approach the particular case with which we have to deal here to ask whether it is likely that the Legislature in passing the Waterworks Clauses Acts of 1847 and 1863 could have intended that a supply of water for large swimming baths for schools should be included under the term "for domestic purposes." It seems to me that a great part of Mr. Upjohn's argument is based upon the suggestion that it was not likely that the Legislature intended to put a water company or a local authority who supply water in such a position that they would have to supply a large swimming bath with water. I do not think it right to deal with the Act in that way. We ought to look at the words of the statute, and unless their natural construction would lead to some absurd result we ought to give them their natural meaning. Now, section 53 of the Waterworks Clauses Act, 1847, provides that "every owner and occupier of any dwelling-house" within the district "shall be entitled to demand and receive a sufficient supply of water for his domestic purposes." We have got to say what is the meaning of the words "for his domestic purposes" when used in relation to owner and occupier of any dwelling-house. On looking at the cases which have been decided on this section it is plain that it cannot be said that the domestic purpose must be one which has to be attained inside the dwelling-house of the occupier or that it must be such as is essential to the occupation of the house, or even to the healthy occupation of the house. It is plain on the authorities that there is no such limitation of the meaning of domestic purposes. Before dealing with the authorities I wish to say a word about section 12 of the Waterworks Clauses Act, 1863. [His lordship read the section.] The inference which I draw from those express statutory

exceptions is that the things thus excepted would before the Act of 1863 have fallen with the meaning of domestic purposes in section 53 of the Act of 1847, and that it was necessary to have an express statutory provision to take them out of that section. A remarkable instance of what was held to be intended under the term domestic purposes before the Act of 1863 is to be found in *Busby* v. *Chesterfield Waterworks and Gas Light Co.*, in which it was held that an occupier who kept a carriage and a horse for private use was entitled to call on the water company to supply him under the head of domestic purposes with water for the horse and for washing the carriage. In giving judgment Lord Campbell, C.J., said: "The horse and carriage were for private use, and were kept on the premises. That being so, the water used for them was applied to domestic use. If that be not so, I do not see how we are to distinguish between a horse so kept and a dog or cat. The horse and carriage are kept for the use of the occupier of the house for his health and enjoyment in an outhouse belonging to his premises." In that judgment Erle and Crompton, JJ., agreed. After that decision it seems to me impossible to say that water which is applied for the purpose of making a house more convenient or for increasing its amenities to the owner or occupier is not supplied for domestic purposes. That decision was approved in *Bristol Waterworks Co.* v. *Wren*, when Smith, J., who delivered the judgment of the court, said: "In our judgment water used for the mere amenities of the house such as in this case, the watering of the pleasure garden surrounding and attached to and occupied with the house, may legitimately and fairly be held to be used for domestic purposes within the meaning of the statute in question." I cannot doubt after reading these two cases that if the water is really used for the more convenient occupation of the house or for the purpose of increasing its amenities to the owner or occupier that is *primâ facie* a user for domestic purposes. And I do not think that you can cut down the rule by saying that the user must be one which is usual, and that it is not usual to have a swimming bath in a dwelling-house, and therefore water supplied for it is not a domestic use within the meaning of the section. I cannot agree with that view. If that were the true rule I think the courts would have been obliged to hold that a supply of water for a fixed bath was not a supply for domestic purposes, for when the Act of 1847 was passed the houses in the United Kingdom which had not a fixed bath were in a large majority, and even now in the twentieth century I think that no person could come to the conclusion that a majority of them are provided with fixed baths. I think, therefore, that the true definition of "domestic purposes" is that which I have already stated—namely, the purpose of making a house more convenient or increasing its amenities. Another limitation which has been suggested is that the user must be reasonable with reference to the capacity of the water company or the water authority to supply their district. In the present case the plaintiffs admit their capacity to supply the defendants' swimming bath, but they say they are entitled to make a special charge for so doing. Then it was said, suppose every occupier in the district insisted on having a supply of water for a swimming bath. But you must consider the Act of Parliament having regard to the real facts, and it is idle to suggest that everyone would require a supply of water for a swimming bath, which in fact could only be wanted in exceptional circumstances. Then it is said that the supply required must be reasonable as regards the subject-matter. I cannot find, either in the Act or in any of the decided cases any trace of such a limitation. As regards the exception in section 12 of the Act of 1863, that "a supply of water for domestic purposes shall not include a supply for any trade, manufacture, or business," I agree that the carrying on of a school is a business within the meaning of those words, but I also agree with Buckley, J., that the fact that a house is used for the purpose of a business does not prevent the use of water for domestic purposes within that house. The mere fact that in such a house there is a swimming bath does not make the supply of water to the bath a supply for the purposes of the business. It may still be a supply for the domestic purposes of the residents in the house. The conclusion at which Buckley, J., arrived was that this swimming bath was used in order that the occupation of the house by the boys might be more healthy. If that is a right conclusion of fact, the supply of water to the bath would be for domestic purposes within the meaning of the Act of 1847, and would not be a supply for any trade, manufacture, or business. It is said that this conclusion of fact is wrong, and that the proper conclusion to arrive at is that the bath was not erected for the healthy occupation of the school by the boys, but for the purpose of teaching swimming to the boys. I understand that both my brethren think that this is the right conclusion in fact, and I do not think I ought to differ from them, though I should have preferred to have further information upon this point. I assent, therefore, to the appeal being allowed, but I base my decision on the ground that the bath is used for the purpose of making the teaching of the school more effectual, and not for the purpose of making the occupation of the house more convenient. But I do not intend to decide that a supply of water to a swimming bath is necessarily in every case a supply for non-domestic purposes.

ROMER, L.J.—As this case gives rise to questions of great general importance I feel it right to state my view of them. It has been argued on behalf of the defendants that the only test whether a supply of water is required for domestic purposes within the meaning of the Act of 1847 is to see whether the water is used or consumed by an occupier for the private purposes only of himself, his household, and his premises. In my opinion that is too wide a proposition. Let me give one example to show that the suggested test would not be a proper one. Suppose that water supplied at high pressure (as it generally is) were used by an occupier to drive a dynamo for the purpose of lighting his house by electricity. In my opinion, it could not be said that such a user of the water would be a use for domestic purposes. Again, could an occupier, who had a very large garden attached to his house, call upon a water company to fill with water a pond which he chose to dig in his garden for the purpose of boating? I think such a use of the water would not be for domestic purposes within the meaning of the Act. In considering what is a domestic purpose regard must be had to the ordinary habits of domestic life in this country. And I think that regard should be had, in considering the question, also to what is a reasonable user, as tested by the amount of water required. I think this is shown by section 17 of the Act of 1863, which imposes a penalty on any person supplied with water who "wilfully or negligently causes or suffers any pipe . . . or other apparatus . . . to be so used or contrived as that the water supplied to him is or is likely to be wasted, misused, unduly consumed, or contaminated." In determining what is to be regarded as a domestic purpose, I think you ought to consider not only the consumer but also the obligation of the water com-

pany or authority to afford a compulsory supply to their district for domestic purposes. It is a very serious question if it is to be held that in every case in which an occupier desires to have a supply of water for his enjoyment and pleasure the water company or authority are bound to supply him without regard to the ordinary requirements of their district for the purposes of drinking, washing, and sanitation. Let me give an example to show what I mean by saying that you must take a reasonable view of what is a domestic purpose. I agree that a householder would be entitled to allow his dog or his cat to drink the water supplied for domestic purposes, and to use it for washing them. So, again, as has been decided, he might use the water for washing his horse and carriage and for watering the horse. There must, however, be some limitation. Suppose a wealthy proprietor chose to keep other tame animals—for instance, a tame elephant, would it be reasonable for him to call upon a water company to supply him with water to fill a special bath for the elephant? In my opinion that would not be a supply for domestic purposes. Again, it might be reasonable to use the water to fill a small tank for gold fish. But suppose an occupier wished to keep a private aquarium, and wanted a supply of running water to keep the specimens in it alive, I should not be disposed to hold that he could call on a water company to furnish him with such a supply. In my opinion you must approach each case with regard to its particular circumstances, and see whether the supply of water which is wanted is reasonably a supply for domestic purposes. Again, take the circumstances of the present case. I am not prepared to say that in every case a supply of water to a swimming bath erected by the owner of a house would be a supply for domestic purposes. If a person chooses to construct a swimming bath he is not, in my opinion, entitled to call on a company to supply the bath with water for his recreation or pleasure on the ground that the supply is required for domestic purposes within the meaning of the Acts. But whether that be so or not, looking at the circumstances of the present case I think the water for the bath is not required for domestic purposes. In my judgment the bath was really constructed, and is required and used, for the purposes of the business of the school, and not for the domestic purposes of the school considered as the *domus* or home of the boys. That being so, I think this appeal should be allowed.

STIRLING, L.J.—This case is one of some difficulty. The question arises upon the construction of two sections in two Acts of Parliament which have already created difficulties and will probably do so again. I wish to confine my observations as nearly as possible to what is necessary to the decision of the present case and not to deal with any general propositions of law. [His lordship read section 53 of the Act of 1847, section 12 of the Act of 1863, and continued:] It is plain from the decided cases that the words "domestic purposes" in section 53 of the Act of 1847 ought to receive a wide and not a narrow construction. That is shown by *Busby* v. *Chesterfield Waterworks and Gas Light Co.* At the same time I do not think that the words can be treated as having an unlimited meaning. Speaking for myself, I am not prepared to say that every one of the cases which are excepted by section 12 of the Act of 1863 would, but for that exception, have been included under domestic purposes in section 53. I think some of the exceptions must have been introduced merely by way of precaution. In *Busby* v. *Chesterfield Waterworks and Gas Light Co.* the decision was based on the fact that the horse and carriage was kept for private use, and I am not satisfied that the court there would have come to the same conclusion if they had been kept for purposes of trade. The question in the present case is whether a supply of water to a swimming bath at a school is a supply for domestic purposes or for the purposes of the business of the school. For myself I am not prepared to say that if the owner or occupier of a house constructed a swimming bath simply for the use of himself and his household a supply of water to it would not be a supply for domestic purposes. For the present purpose I will assume that it would. But if the occupier carried on the business of teaching swimming and used the bath for the purpose of giving lessons in swimming it is admitted that that would be a use of the water for purposes of a business within the exception contained in section 12 of the Act of 1863. The present case lies between the two cases I have put. I agree with the decision of Buckley, J., that the carrying on of the school is a business. Then comes this difficulty, in order to carry on the business of a school there must be residences for the boys. But the fact that those residences form part of and are for the purposes of a school, does not prevent their constituting the home of the boys, and I think that a supply of water to the house in which the boarders live would be a supply for domestic purposes. I am not there prepared to differ from *Pidgeon* v. *Great Yarmouth Waterworks Co.* But looking at all the circumstances of the case, I have come to the conclusion that this swimming bath is used not for the purposes of the school considered as the home or residence of the boys, but for the purposes of the business of the school. In the prospectus this swimming bath is put forward as one of the advantages of the school, and it is stated that a separate fee is to be charged for the use of it. I think the inference to be drawn is that the bath is used for one of the educational purposes of the school; in other words, it is used for the purposes of the business which is carried on at the school. Upon this question of fact, therefore, I differ with the greatest respect from the conclusion of Buckley, J., and I think that this appeal should be allowed.

Solicitors, *Doyle, Devonshire, & Woodhouse*, for *J. Ingram Dawson*, Barnard Castle; *Huntington & Leaf*, for *A. T. Piper*, Barnard Castle.

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From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — July 11, 1902.

ROBINSON GOLD MINING CO. (LIMITED) AND OTHERS v. ALLIANCE MARINE AND GENERAL ASSURANCE CO. (LIMITED). (a.)

*Insurance—Bullion—Detainments of foreign government—"Free of capture, seizure, and detainments"—Seizure by enemy of property of its own subject—Commandeering of gold.*

*The plaintiffs, a gold mining company incorporated under the laws of the South African Republic, insured gold whilst on transit from the mine to the United Kingdom with the defendants against arrests, restraints, and detainments of kings, princes, and people. The policy contained this clause: "Warranted free of capture, seizure, and detention and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." While in transit the gold was seized at the frontier under orders from the Government of the South*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*African Republic. At that time war had not been declared against Great Britain, but the commandoes had been called out, and evidence was given that the seizure was in accordance with the laws of the Republic.*

*Held, that the defendants were not liable, as the loss was caused by "seizure" within the meaning of the exception in the policy.*

*Judgment of* Phillimore, J., 50 *W. R.* 109, [1901] 2 *K. B.* 919, *affirmed.*

Appeal by the plaintiffs from a decision of Phillimore, J. (50 W. R. 109, [1901] 2 K. B. 919).

The plaintiffs were ten gold mining companies incorporated under the laws of and carrying on business in the late South African Republic, who by the action sought to have the defendants declared liable under a policy for loss of gold commandeered by the Executive Council of the Government of the Transvaal Republic on the eve of the war of that state with this country.

Under the policy the gold was insured against arrests, restraints, and detainments of kings, princes, and people while in transit from the companies' mines at Johannesburg to the United Kingdom. The policy contained the following exception clause: "Warranted free of capture, seizure, and detention, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of riot, civil commotions, hostilities, or warlike operations whether before or after the declaration of war."

On the 2nd of October, 1899, gold to the value of £223,750, to which the policy attached while in course of transit from the mines to the coast, was "commandeered" at Vereeninging, the last station on the Transvaal territory, by officials of the Transvaal Government, acting under the orders of the Executive Council, and on the 9th of October a further quantity of gold amounting to £11,800 was seized at a bank at Johannesburg, where it had been deposited by the plaintiffs. In addition to relying on the "free of capture and seizure" clause, the defendants pleaded the same points of defence as were raised in the case of the *Driefontein Consolidated Mines* (*Limited*) v. *Janson*, 49 W. R. 660, [1901] 2 K. B. 419.

Phillimore, J., held that the loss was caused by "seizure" within the meaning of the exemption in the policy and that the defendants were not liable.

The plaintiffs appealed.

*Lawson Walton, K.C., J. A. Hamilton, K.C.*, and *John Dove*, for the plaintiffs.

*Lord Robert Cecil, K.C., Alfred Lyttelton, K.C.*, and *Loehnis*, for the defendants.

COLLINS, M.R.—In this case a large quantity of gold was consigned by a subject of the late South African Republic, or at any rate by a person living under the protection of the laws of that republic, to this country, and the gold was insured with the defendants during transit against "arrests, restraints, and detainments of all kings, princes, and people." During transit the gold was commandeered, and the defendants denied liability, contending that the loss fell within the exempting words of the policy, "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, commotions, hostilities, or warlike operations, whether before or after declaration of war." A few days before the declaration of war the gold was arrested at Vereeninging by an official of the South African Republic, under orders of the government of that state. The commandoes had then been called out and the railway and its staff had been taken over by the government of the republic. In these circumstances the plaintiffs claimed under the policy as upon a loss caused by an "arrest, restraint, and detainment of kings, princes, and people." The defendants said the loss did not come within these words, but that if it did, it came within the exception contained in the warranty clause. The plaintiffs were placed in this difficulty: The risks insured against, within which they sought to bring the case implied an act of superior force or of paramount authority which they were not in a position to resist. To succeed they had to bring in the element of force and at the same time to attenuate that element as far as possible so as to prevent the application of the exception contained in the warranty clause. They had to get in a sufficient element of force, but not enough to bring the case within the meaning of the exception. What did they do? They attempted to get over the difficulty by saying that there was evidence upon which we might hold that there had been an acquiescence on the part of the owners of the gold to hand it over to the Government of the Republic under the law of the state, and that amounted to an "arrest" but not to a "seizure" within the meaning of the exception. That certainly is an attempt to draw a very fine line, and, speaking for myself, I think the learned counsel who attempted to argue the question failed to get out of the difficulty. What was the evidence? There had been an ultimatum at the time, which was immediately followed by the calling out of the forces of the country. That in itself was a preliminary of warlike operations, and which led to the suspension of the constitution, letting in the maxim *salus populi suprema lex*, a maxim of law that stands above all law. The taking possession of the gold for the benefit of the country in those circumstances brings the case, in my judgment, within the word "seizure" as it was intended by the parties to be construed in the exception. To attempt to argue that the surrender of property under such circumstances was not a yielding to a *vis major*, and that the taking possession was not a "seizure" seems little short of impossible. Cases have been referred to with a view to show that such an act of authority was not a "seizure." But when those cases are looked into they really support the contrary view. In *Cory* v. *Burr*, 31 W. R. 894, 8 App. Cas. 393, Lord Selborne said: "The first question which has been considered in the argument has been, What is the meaning of the words 'capture and seizure'? 'Warranted free' clearly means that the insurers are not to be liable for the things to which the warranty applies. I own I should have hesitated, even if there had been no authority, before I should have been brought to agree with the view which was thrown out in the course of the argument . . . the view, I mean, that 'capture and seizure' in such a warranty must be taken to mean *primâ facie* belligerent capture and seizure only. My reasons for saying so are that the word 'seizure' is used as well as the word 'capture.' I am disposed to agree that if the word 'capture' had stood alone it might have appeared to point to belligerent capture, but the addition of the word 'seizure' is only officious, as I read the warranty, by supposing that it is to exclude that narrow construction of the word 'capture' and to let in other 'seizures' such as Cotton, L.J., suggests by means of the revenue laws of a foreign state. . . ." Here the plaintiffs, by surrendering the gold to the South African officials, yielded to an act of paramount authority, and the seizure was none the less a seizure because it was justified under the laws of the republic. I do not think that the distinction attempted to be made between arrest and seizure is justified by the authorities cited, and Lord Blackburn in *Cory* v. *Burr*, where he referred to the decision in *Havelock* v. *Hancill*, 3 T. R. 277, shows that in his

opinion there was no such distinction. It is clear that the seizure of the gold here was accompanied by the *indicia* of overwhelming force, the authority to seize the gold being based on the suspension, it might be constitutional suspension, of the ordinary law. There is another ground upon which the defendants might, if needs be, deny liability, and that is that the warranty clause excepts beside capture, seizure, and detention, "all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." We know that the commandoes had been called out, which let in the suspension of the ordinary laws of the state. It was only a supreme emergency that could warrant that being done, and it therefore let in the doctrine of *salus populi*. There were, therefore, warlike operations before the declaration of war, and the seizure of the gold was a consequence of those warlike operations. The case falls within more than one of the risks excepted from the policy.

For the reasons I have stated, the judgment of Phillimore, J., appears to me to be perfectly right, and this appeal fails.

MATHEW and COZENS-HARDY, L.JJ., gave judgments concurring.

*Appeal dismissed.*

Solicitors, *Ingle, Holmes, & Sons; Waltons, Johnson, Bubb, & Whatton.*

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## High Court of Justice.

Chan. Div. Kekewich, J. — Nov. 13.

*In re* HALL.

FOSTER *v.* METCALFE. (*a.*)

*Will—Contingent legacy—Appropriation.*

*An executor is entitled to appropriate a particular sum to meet a contingent legacy without interest in the meantime where the residuary legatee does not object to the appropriation. But a contingent legatee, not entitled to interest in the meantime, cannot insist upon an appropriation as against the residuary legatee, and can only require the residuary legatee to give security for payment of the legacy when the contingency happens.*

This was a summons taken out by the surviving trustee of the testator to determine the validity of certain appropriations of stock made by the trustees to meet certain contingent legacies bequeathed by the testator.

By his will, William Hall gave to each of his godchildren (by name) who should survive him and who should attain twenty-one years or marry under that age a legacy of £1,000 free of legacy duty, but without interest in the meantime.

The testator died on the 14th of October, 1897.

Phyllis Chalmers, one of the godchildren named in the will, was, at the date of the testator's death, an infant and unmarried, but she had since attained twenty-one. Two other godchildren were still infants and unmarried.

In 1899 the trustees of the will invested three several sums of £1,000 in the purchase of trustee securities to meet the three contingent legacies, and one of the securities, being £700 Great Eastern Railway Irredeemable 4 per Cent. Stock, was appropriated by them to meet Miss Chalmers' legacy.

The stock in question depreciated in value, and when Miss Chalmers came of age she refused to accept the stock in satisfaction of her legacy.

This summons was thereupon taken out.

*T. K. Crossfield*, for the trustee.

*J. D. Davenport*, for the residuary legatee.

*G. R. Northcote*, for other beneficiaries under the will.

*W. P. Baildon*, for Miss Chalmers.—There can be no appropriation in the case of a contingent legacy where interest is not payable in the meantime: Roper on Legacies (4th ed.), vol. 1, p. 931. The ordinary practice of the court is to order the fund to be paid to the person entitled to the residue upon his giving security to the legatee for payment of the legacy when the contingency happens: *Webber* v. *Webber*, 1 Sim. & St. 311.

*A. C. Clauson*, for infant legatees.—It is doubtful whether section 4, sub-section 1, of the Land Transfer Act, 1897, has not altered the law as to appropriation; none of the requirements of that section have been complied with by the trustees here.

He referred to *In re Beverley, Watson* v. *Watson*, 49 W. R. 343, [1901] 1 Ch. 681.

KEKEWICH, J., said that although the language of Leach, V.C., in *Webber* v. *Webber* appeared to support the contention that there could not be an appropriation in the case of a contingent legacy where no interest was payable in the meantime, yet, having regard to the question which was before the court in that case, he thought that Leach, V.C., merely meant to decide that a contingent legatee not entitled to interest in the meantime could not insist upon an appropriation as against the residuary legatee, but could only require him to give security. It did not follow that the executors were not entitled to appropriate a particular sum for such a legacy, where the residuary legatee did not object. In his lordship's opinion, *Webber* v. *Webber* did not govern the present case. With regard to section 4 of the Land Transfer Act, 1897, the transaction in the present case was entirely different from that contemplated by the Act, and it was impossible that the Legislature could have intended by a remedial provision to sweep away a doctrine which had been well established for a long time. His lordship thought that the trustees had done their duty as pointed out by the authorities, and that the appropriation was good. With regard to the costs, as the litigation had been forced upon the trustee by the refusal of the legatee to accept the stock, his lordship ordered the legatee to pay the costs of all parties, upon the ground that the summons ought to be treated as a summons by the legatee.

Solicitors, *J. A. Bartrum; Ford, Lloyd, & Co.; Collyer-Bristow & Co.; Edgar, Robins, & Clark.*

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Chan. Div. Byrne, J. — July 3, 4, 28, 1902.

*In re* HART'S TRADE-MARK. (*a.*)

*Trade-mark — Registration — Dormant mark — Entire class — Use of mark in respect of part of class—Assignment—Limitation of use of mark to part of goods in class—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 90.

*The register of trade-marks may be rectified by exclud-*

(*a.*) Reported by C. B. CAMM, Esq., Barrister-at-Law.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

*ing from the specification of goods in respect of which a mark is registered, goods in regard to which at the time of registration there was no actual employment of such mark nor any intention to employ the same, although the person registering the trade-mark may have sold such goods under other marks.*

This was a motion by the Anglo-Swiss Condensed Milk Co., having registered offices at 10, Mark-lane, London, that the register of trade-marks might be rectified by expunging a trade-mark No. 22,206 therefrom, or in the alternative by excluding condensed milk from the specification of goods in respect of which the same was registered.

The respondents were Mr. M. J. Hart, of Peninsular House, Monument-street, London, and the Comptroller-General of Patents, Designs, and Trade-Marks.

The trade-mark in question consisted of a geometrical *quasi*-floral device with the words "red rose" underneath, and was registered in the name of Mr. Jacob S. Gates on behalf of the firm of H. K. & F. B. Thurber & Co. on the 6th of October, 1880, in class 42, being substances used as food or ingredients in food.

Mr. Gates at the time that he registered this registered also the devices of the yellow rose, white rose, and tube rose, thus making a series of roses, and also a device lily of the valley.

The business of H. K. & F. B. Thurber was divided, and the English business, to which these trade-marks belonged, was carried on by Mr. Gates under the title Thurber, Gates, & Co. The latter then assigned it to a Mr. Dottridge, by whom it was subsequently assigned to a Mr. Wilson, who later assigned it to Thurbers (Limited), which latter company worked the business with that of another company known as "Thurber Whyland Co.," but in course of time failed.

The receiver, on behalf of the debenture-holders of the same, assigned the goodwill and trade-marks to Mr. Hart.

The Anglo-Swiss Condensed Milk Co., who sold condensed milk in tins, had for seventeen years used in connection with the same the device of a red or pink rose and two buds and leaves after nature.

On the 12th of September, 1901, the Anglo-Swiss Condensed Milk Co. applied to register their mark in class 42, stating the essential particulars to be the device and the word "rose," and disclaiming any right to the added matter or to the exclusive right of the word rose. The comptroller refused to register the mark without the consent of Hart on the ground of the existence on the register of mark 22,206. Hart declined to consent to the alteration, and accordingly the plaintiffs brought the action. The motion was heard as a witness action, the witnesses being cross-examined on their affidavits. Hart stated in his evidence that he bought the business from the receiver of Thurbers (Limited), largely with a view of obtaining their trade-mark, which he thought that he might use in connection with his business. And there was evidence that in 1901 he intended to put upon the market a brand of condensed milk with the trade-mark of Thurbers (Limited). He further stated that he intended in the future so to use it. It further appeared in evidence that Hart's predecessors in title had used their "rose" marks for certain goods in class 42, but not for condensed milk, and that they had never had any *bonâ fide* intention so to use it.

Hart's title to mark 22,206 was further attacked on the ground that he was not the original proprietor, and that there could have been no valid assignment to him of the mark except with the goodwill of the business in condensed milk. At the hearing the applicants stated that they would only ask for the exclusion of condensed milk from the articles in respect of which Hart's mark was registered.

*Rowden, K.C.*, and *Sebastian*, for the applicants.—There is no evidence that the respondent ever used the mark in respect of condensed milk, or that he or his predecessors in title had any intention of so using it. The respondent's right to use the mark should be limited in respect of the articles that he does use: *Edwards* v. *Dennis*, 30 Ch. D. 454, 34 W. R. Dig. 197; *Hargreaves* v. *Freeman*, [1891] 3 Ch. 37, 40 W. R. Dig. 266; *In re Batts & Co.'s Trade-Marks*, [1898] 2 Ch. 432; *In re Suter, Hartman, & Rahtjen's Composition Co.'s Trade-Mark*, 19 Rep. Pat. Cas. 42.

*Parker*, for the comptroller.—There is a strong public objection to the existence of these dormant marks on the register. It is contrary to the intention and policy of the Trade-Mark Acts that such marks should be on the register which are not in actual use. On this ground the applicants are supported by Comptroller-General.

*Levett, K.C.*, and *Griffith Jones*, for the respondent.—Although Hart's predecessors in title may not have used the mark for condensed milk, they have made use of it for many of the articles in class 42. On this ground the mark should not be expunged. It is a sufficient defence if the owner of the mark deals in articles in respect of which it is desired to rectify the register. The original registration was *bonâ fide*, and it is intended now to use the mark for condensed milk.

*Rowden, K.C.*, replied.

*Cur. adv. vult.*

BYRNE, J. (after stating the facts).—When the respondent Hart took an assignment in April, 1901, he did so, he states, with the intention of putting on the market a brand of condensed milk with the trade-mark of Thurbers (Limited). [After commenting further on the evidence, his lordship continued:] The circumstances of the present case differ from the circumstances in *Edwards* v. *Dennis* in this respect, that the business whereof the goodwill had been assigned to Hart was a business which included the sale of condensed milk, whilst in *Edwards* v. *Dennis* the business of the respondents did not include dealing in the description of goods in respect of which the applicants sought to have the register rectified. The first point for consideration is whether or not the principle applied in *Edwards* v. *Dennis* ought to be acted upon in a case where the goods of a particular description in class 42 have been sold, but never in connection with the trade-mark in question. It is, I think, clear on the facts that not only was there no user of the mark in connection with condensed milk, but that there could have been no intention so to use the mark when it was originally registered. If ever there was any vague original intention of this kind (in support of which there is no evidence) it was not acted upon and was given up, as is shown by non-user and subsequent user of other marks for the same description of goods. There is no such difference between the provisions of the Act of 1875, which was the Act considered in *Edwards* v. *Dennis*, and the provisions of the Act which is now in force, as to render that case inapplicable as an authority. It follows, therefore, that notwithstanding the fact that after five years from the date of registration such registration is conclusive evidence of right to the exclusive use of the mark, it does not preclude an application to remove if it ought not originally to have been placed there. I have not to deal with a case where there has been some *de facto* use of the mark in respect of the particular goods

nor with a case where a mark having been used in connection with certain goods, the business has been or is about to be extended to the sale of other goods within the class for which registration has been effected, and I can see that different considerations may also well arise in varying circumstances; but confining myself to the facts of the present case, first, registration of the mark for a whole class, then user of the mark for some goods in that class, sale of other goods in that class for more than twenty years, always in connection with other marks and never in connection with the mark in question, I can only come to the conclusion that there never was at the time of registration any such intention to use the mark as to bring the case within the principle requiring *de facto* user or immediate intention to use the mark in connection with a particular description of goods at the time of the registration, to entitle a man to be on the register in respect of such goods. I think that the case *In re Butts' Trade-Mark* supports the view that I take.

This renders it unnecessary to decide the question of abandonment, and I will only say that this must be a question of intention, as was pointed out by Chitty, J., in *Mouson & Co.* v. *Boehm*, 32 W. R. 612, 26 Ch. D. 398, and I should find great difficulty in holding that where, as in the present case, the only user relied on, so far as concerns the particular goods, is that evidenced by the mark having been for five years on the register, there has been no abandonment, when for more than fifteen years, subsequent to such five years, and prior to the assignment to the respondent, there has been no user; but a sale of the description of goods with user of other and different marks. I think that the register ought to be amended by excluding condensed milk from the class of goods for which the mark stands on the register. I have not sufficient materials before me to enable me to place any greater limitation upon the class, unless the respondent for his own protection against possible subsequent applications desires it, in which case I will assist him. The respondent must pay the costs of this application and of the comptroller.

*Judgment for the applicants.*

Solicitors, *McKenna & Co.; Solicitor to the Board of Trade; N. G. Driver.*

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Chan. Div. }
Buckley, J. } Nov. 3, 8.

BOYCE *v.* MAYOR, ALDERMEN, AND COUNCILLORS OF THE METROPOLITAN BOROUGH COUNCIL OF PADDINGTON AND ANOTHER. (*a.*)

*Local government—Hoarding—Open space—Adjoining landowner—Access of light—Building—Right to sue without Attorney-General—Metropolitan Open Spaces Acts*, 1877 (40 & 41 *Vict. c.* 35), *s.* 1; 1881 (44 & 45 *Vict. c.* 34), *s.* 5; 1887 (50 & 51 *Vict. c.* 32), *s.* 4—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

*A local authority managing an open space under statutory authority for the benefit of the public, if it acts in contravention of its statutory duties and thereby injures the property of an adjoining landowner, as by erecting a building so as to darken his windows, may be sued by the injured party without the Attorney-General, as he is suing either in respect of a private right or in respect of a right from the interference with which he has suffered special damage.*

*A hoarding upon a disused churchyard managed under the Metropolitan Open Spaces Acts*, 1877, 1881, *and* 1887, *and the Disused Burial Grounds Act*, 1884, *erected for the purpose of preventing an adjoining landowner from acquiring by prescription a right to access of light to windows of his houses overlooking the churchyard, is not a building within the meaning of those Acts, and its erection is therefore not prohibited by them.*

The plaintiff was the owner of land in the parish of Paddington, abutting on the north-east upon the parish church of St. Mary's, Paddington, and he had lately erected blocks of flats upon the ground containing numerous windows which overlooked the churchyard.

The churchyard had become a disused burial ground within the meaning of the Metropolitan Open Spaces Acts of 1877, 1881, and 1887, and of the Disused Burial Grounds Act, 1884; and by virtue of those Acts, and of an indenture of April, 1892, made between the vicar of the parish (who was one of the defendants) and the Vestry of Paddington, who were the predecessors in title of the defendant borough council, and of a faculty granted by the Bishop of London in December, 1892, the defendant borough council had the control and management of the churchyard.

In January, 1901, the defendant borough council proposed to erect a hoarding or screen in the churchyard in front of the windows of the plaintiff's flats which would have the effect of darkening them. The plaintiff brought this action claiming an injunction to restrain the defendants from erecting any screen, wall, or building in the churchyard so as to occasion nuisance, annoyance, or damage to the plaintiff and the tenants of the flats.

By section 1 of the Metropolitan Open Spaces Act, 1877, the Metropolitan Board of Works might acquire and hold the open space "in trust for the perpetual use thereof by the public for exercise or recreation . . ." By section 5 of the Act of 1881, the open space, &c., is to be held by the board or vestry of the parish where it is situate "in trust to allow, and with a view to the enjoyment by the public of such open space, churchyard, cemetery, or burial ground in an open condition, free from buildings, and under proper control and regulation, and for no other purpose. . . ." The Disused Burial Grounds Act, 1884, s. 3, enacts: "It shall not be lawful to erect any buildings upon any disused burial grounds, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

*Astbury, K.C.*, and *M. L. Romer*, for the plaintiff.—[BUCKLEY, J.—Ought not the Attorney-General to have been a plaintiff?] It is submitted that that is not necessary. The plaintiff is suing in respect of a right peculiar to himself as adjoining owner. His windows, and not those of the public, are affected. He suffers a private injury: *Lyon* v. *Fishmongers' Company*, 25 W. R. 165, 1 App. Cas. 662. Moreover, the plaintiff suffers special damage beyond that suffered by the rest of the public from the erection of the hoarding, and thus can sue alone: *Winterbottom* v. *Lord Derby*, 16 W. R. 15, L. R. 2 Ex. 316. As regards the main question the Metropolitan Open Spaces Act, 1881, s. 5, requires the churchyard to be kept in an open condition, free from buildings, for the enjoyment of the public, and the Disused Burial Grounds Act, 1884, forbids the erection of "any buildings" upon it. The hoarding proposed to be erected would be a building: *Pocock* v. *Gilham*, 1 Cab. & Ell. 104; *Foster* v. *Fraser*, 42 W. R. 11, [1893] 3 Ch. 158; *Wood* v. *Cooper*, 43

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

W. R. 201, [1894] 3 Ch. 671. *Foster* v. *Fraser*, where a hoarding was held not a building, turned upon the words of a particular covenant. Suppose the proposed hoarding were extended all around the churchyard, could the churchyard be considered an open space kept for the enjoyment of the public.

*H. Terrell, K.C.*, and *T. A. Nash*, for the defendant.—The churchyard is to be kept as an open space for the enjoyment of the public and not for the benefit of the adjoining landowners. The plaintiff has no special right of access, as was the case in *Lyon* v. *Fishmongers' Company*, he is only entitled to the open space as one of the public, and cannot sue without the Attorney-General: *Stoke Parish Council* v. *Price*, 47 W. R. 663, [1899] 2 Ch. 277. A hoarding is not a "building": *Foster* v. *Fraser*, *Wilson* v. *Queen's Club*, 40 W. R. 172, [1891] 3 Ch. 522; *Vicar, &c., of St. Botolph* v. *Parishioners of Same*, [1900] P. 69, 48 W. R. Dig. 62; *Slaughter* v. *Mayor of Sunderland*, 65 L. T. Rep. 250, 60 L. J. M. C. 91, 39 W. R. Dig. 113.

*C. A. M. Barlow*, for the defendant vicar.

*Cur. adv. vult.*

Nov. 8.—BUCKLEY, J,—When stripped of all technicality the question to be determined in this action is whether the owners of lands circumjacent to and abutting upon other land which has become an open space within the Metropolitan Open Spaces Acts, 1877, 1881, and 1887, and the Disused Burial Grounds Act, 1884, became at once, by virtue of those Acts, or must be allowed to become, after the period of the Prescription Act, by virtue of an enjoyment which cannot be excluded by the erection of a hoarding, entitled as of right to the access of light to the windows of any buildings which they may erect contiguous to the open space. The defendants contend that they are entitled to erect a hoarding in front of these windows so as to preclude the plaintiff from prescribing for rights of light. The plaintiff says they are not so entitled, and asserts his case upon two grounds. He says, first, that he, as a member of the public, is entitled to insist that the space shall be an open space, from which it results that there will be free access of light to his windows; and, secondly, that, whether this is so or not, the defendants cannot erect a hoarding so as to prevent his becoming entitled by prescription, because they are by the relevant Acts of Parliament forbidden to erect any building, temporary or movable, except for the purpose of enlarging the church. A hoarding erected for the purpose of preventing the acquisition of a prescriptive right to light is, he says, a building.

The defendants have raised the contention that the plaintiff cannot maintain the action without the concurrence of the Attorney-General. This contention, to my mind, cannot succeed. The plaintiff is suing either in respect of an alleged right to the free access of light to his windows over the open space, or in respect of a public right to have the space maintained as open and without the erection of a hoarding, which he calls a building. In the former case he is suing upon an alleged private right; there is no public right of access of light to private property. In the latter he is suing in respect of an interference with a public right from which he personally sustains special damage. In either case he can sue without joining the Attorney-General. The public are not the owners of the lights overlooking the space, and there is no public right to access of light to any such windows. The public right is to have the open space so kept as to allow the enjoyment by the public of the space in an open condition, free from buildings. That right the plaintiff is entitled to as a member of the public, but any right of access of light to the windows of his property is not a public right. It is not a right which any member of the public enjoys in common with himself. If, therefore, he claims upon the footing that he has a right to the access of light to his windows, he is suing in respect of a private, and not a public right, and the Attorney-General is not a necessary party. Further, if he is suing in respect of his right as a member of the public to say no building shall be put on the land, and this hoarding is a building, then he would be suing in respect of a public right, and the Attorney-General would be a necessary party, but for this fact—that the plaintiff personally upon this hypothesis suffers special damage from the breach of a public right, and if he do so suffer then he can sue without joining the Attorney-General. A plaintiff can, as it seems to me, sue without joining the Attorney-General in two cases; first, where the interference with the public right is such as that some private right of his is at the same time interfered with—as *e.g.*, where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway; and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. The former proposition I think is to be deduced from *Lyon* v. *Fishmongers' Company*, and *Fritz* v. *Hobson*, 28 W. R. 459, 722, 14 Ch. D. 542, and was one which I had to consider in *Chaplin* v. *Mayor of Westminster*, 49 W. R. [1901] 2 Ch. 329; while the latter is to be found in *Iveson* v. *Moore*, 1 Ld. Raym. 486; *Hart* v. *Bassett*, 4 Viner's Abridgment, 519; *Benjamin* v. *Storr*, 22 W. R. 631, L. R. 9 C. P. 400; and *Winterbottom* v. *Lord Derby*.

I think, therefore, that the action is well constituted, and I pass on to consider whether the plaintiff has the right which he claims. At the outset it would seem to be an extraordinary proposition that, because an open space is devoted to the public enjoyment in an open condition, free from buildings, for exercise and recreation (see Metropolitan Open Spaces Act, 1877, s. 1; Act of 1881, s. 5), the result should be to give immediately, or by the unavoidable operation of the Prescription Act to the circumjacent owners, as matter of right, an easement of light which theretofore they had not enjoyed. I may point to one case in which such a construction certainly is not admissible. A disused burial ground which is so dealt with as to become an open space under these Acts may nevertheless be used for the purpose of enlarging a church, chapel, meeting-house, or other place of worship (see the Act of 1884, s. 3). If the plaintiff's proposition were true, the owner of the adjoining land would, after the Prescription Act had run, become (without any power on the part of the owners of the open space to prevent his becoming) entitled to rights of light over the open space which might prevent the subsequent erection of such an enlargement as that Act allows. The proposition for which the plaintiff contends is evolved from the premises that because the space is to be an open space, therefore there must be free passage of light over it to the windows of houses built on the adjacent land. This begs the question and assumes that a hoarding cannot be erected. The Acts do not contemplate the statutory creation of any such consequential rights in the neighbouring owners. The space is to be open for the public purposes for which it is to be enjoyed—that is,

for exercise and recreation. It is not to be open so as to create rights in favour of adjoining landowners. The statute is not dealing with the creation of easements or the creation of any right other than a right in the public to enjoy the space as an open space for the purposes indicated in the Acts. As an adventitous advantage the owner of the adjoining land would, no doubt, in most cases in fact obtain the benefit of air and light. But he is not, I think, entitled to it as a matter of right. The rights created are public rights. There is no public right to have free access of light to windows on the land surrounding the open space, or any part of it. The plaintiff's contention really is that he has that right which would be a private right because there is another and a different public right. But then the plaintiff says, "Assume by virtue of the statute I do not immediately acquire an easement, still as a member of the public I have a right to insist that no building shall be put upon the open space, and if no building" (which he says includes a hoarding for the purpose of preventing a prescriptive right) "is put up I shall under the Prescription Act get a right in time, and the effect of the Acts is that matters must be so left as that I shall acquire that right." This argument is rested upon a contention that a hoarding put up for the purpose of preventing the plaintiff prescribing under the Prescription Act is a building. Several cases have been referred to as to whether a hoarding is a building. In *Pocock* v. *Gilham* and *Wood* v. *Cooper* it was held that a hoarding or a screen was, and in *Slaughter* v. *Mayor of Sunderland*, *Wilson* v. *Queen's Club*, and *Foster* v. *Fraser* that it was not, a building. From these cases I can derive no principle other than this—that a hoarding may or may not, according to the context, be a building. If the building spoken of be one which it is contemplated shall have a stuccoed front and a slate roof (*Foster* v. *Fraser*) or a building to be erected under a building lease (*Wilson* v. *Queen's Club*) a hoarding will not be a building. If the question arises under a lessee's covenant not to put up a building, and he does put up a hoarding which affects the adjoining occupier (*Pocock* v. *Gilham* and *Wood* v. *Cooper*) it may be a building. What I have to consider is whether such a hoarding as the defendants would put up to prevent the plaintiff from acquiring prescriptive rights would be a building within the Acts with which I have to deal. In my opinion it is not so. It would be an erection, not put up for any purpose of building, but as a necessary act to prevent the acquisition of a prescriptive right. The word in section 5 of the Act of 1881 occurs in the connection that the land is to be enjoyed "in an open condition free from buildings." I think this means such buildings as would preclude or diminish its enjoyment in an open condition for exercise and recreation (Act of 1877, s. 1). In section 3 of the Act of 1884 the erection of any buildings upon a disused burial ground is forbidden except for the purpose of enlarging a church. I think the word "buildings" there means erections which would cover some part of the ground, as the enlargement of a church would do. It does not refer to something in the nature of a fence or barrier to prevent the acquisition of prescriptive rights to light. Upon these grounds I come to the conclusion that the plaintiff has not by virtue of the Acts acquired such an easement as he seeks to enjoy, and that the defendants are not by the Acts precluded from erecting such a hoarding as is necessary to prevent him from obtaining the benefit of the Prescription Act.

*Action dismissed.*

Solicitors, *Cheston & Sons; J. H. Hortin.*

Chan. Div. Joyce, J. } July 5, 1902.

*In re* POLLARD.
POLLARD *v.* POLLARD. (*a.*)

*Practice—Sequestration—*Chose in action—*Banker—Customer—Dealings with customer's account after notice of writ of sequestration against customer.*

*Mere notice of a writ of sequestration does not bind a* chose in action *in the hands of a third party.*

*A defendant in an administration action was ordered to pay a sum of £136 odd into court to the credit of the action. Failing to do so, a writ of sequestration was issued against him on the 20th of May,* 1902. *The sequestrators attended at the defendant's bank on the same day and gave notice of the writ, and demanded payment to themselves of the amount (which consisted of £204 odd) standing to defendant's credit at that date. The bank undertook not to deal with defendant's account pending consultation with their solicitors. Notwithstanding the undertaking, the defendant was permitted to draw on his account, and on the 22nd of May his balance was reduced to £137 odd. On the 22nd of May the sequestrators gave formal notice in writing of the writ to the bank, and took out a summons asking that the bank might be ordered to pay to them the amount standing to the defendant's credit in the books of the bank on the 20th of May,* 1902.

*Held, that an order could not be made for the full sum of £204 standing to defendant's credit at the bank on the 20th of May, but an order was made, without costs, for the amount standing to defendant's credit at the bank on the 22nd of May,* 1902.

Adjourned summons.

This was a summons taken out by the plaintiffs asking that the London and County Banking Co. (Limited) might be ordered to pay to the sequestrators, acting under a sequestration order issued in the action against the defendant H. E. Pollard, the amount standing to the credit of the defendant in the books of the bank on the 20th of May, 1902.

The action was instituted against the defendant, who was a legatee and executor under the will of Mrs. Jane Pollard, to recover a sum of money due from him to the testatrix, and for administration of her estate, and the defendant was ordered to pay into court to the credit of the action the sum of £136 3s.

The defendant failed to comply with this order, and on the 20th of May, 1902, a writ of sequestration was issued against him, directing the sequestrators to collect, receive, and sequester all his goods, chattels, and personal estate whatsoever, and to detain and keep the same under sequestration until the defendant should lodge in court the sum of £136 3s., and clear his contempt.

The sequestrators, on the same day, attended on the managers of the Covent-garden branch of the London and County Banking Co. (Limited), where the defendant kept an account, and gave notice of the writ and demanded payment of the amount standing to the defendant's credit in the books of the bank. It was admitted that, on that date, there was a sum of £204 7s. 8d. standing to the defendant's credit.

The plaintiffs alleged that the bank manager undertook not to allow the defendant to deal with his account, and to communicate with the solicitors of the plaintiffs and the sequestrators when he had consulted the bank's solicitors.

It appeared that, notwithstanding the bank manager's undertaking, the bank had subsequently

(*a.*) Reported by C. B. CAMM, Esq., Barrister-at-Law.

honoured cheques drawn by the defendant, and on the 22nd of May the defendant's balance at the bank amounted only to £137 7s. 5d.

On the 22nd of May the sequestrators served a formal written notice on the bank manager and took out the present summons asking that the bank might be ordered to pay to the sequestrators the amount standing to the defendant's credit in their books on the 20th of May, 1902.

*Hughes, K.C.*, and *G. N. Marcy*, for the plaintiffs, contended that the bank was not justified in paying any more money to the defendant after receiving notice of the sequestration without giving the sequestrators a reasonable opportunity of applying for an order against them; and they referred to *Wilson* v. *Metcalfe*, 1 Beav. 263; *Miller* v. *Huddlestone*, 31 W. R. 138, 22 Ch. D. 233; *Ward* v. *Booth*, 20 W. R. 880, L. R. 14 Eq. 195; *Ex parte Nelson*, 28 W. R. 554, 14 Ch. D. 41.

*F. H. Maugham*, for the bank, was not called upon, except as regards costs.

JOYCE, J., said that he did not see his way to make an order with respect to the larger sum of £204 7s. 5d. It was stated in the text-books that mere notice of a writ of sequestration did not bind a *chose in action* in the hands of a third party, and his lordship thought that the authorities bore out that proposition. No case had been cited in which it had been held that mere notice of sequestration was sufficient to bind a *chose in action*, and certainly it did not create a charge. He was very far, however, from approving the conduct of the bank, although they might be right in law. Upon the evidence he did not think that they ought to have paid their customer without giving the sequestrators an opportunity of opposing that course of action. The order would accordingly be made for payment by the bank of the money standing to the defendant's credit on the 22nd of May only, but without costs, and without prejudice to any other action which the sequestrators might take.

Solicitors, *S. R. Pollard; Wilkinson, Howlett, & Wilkinson.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) Oct. 29.

McNAIR *v.* CAVE. (*a.*)

*Adulteration — Milk — Inspector — Sample taken by inspector at a place outside his district—Certificate given by analyst of inspector's district—Sale of Food and Drugs Acts*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 13, 21; *and* 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

*By the provisions of the Sale of Food and Drugs Act*, 1875, *it was necessary that there should have been a sale or a contemplated sale of the milk of which samples were taken by an inspector under the Act within his district, and he was only authorized to take samples at the place of sale.*

*By section* 3 *of the subsequent Act of* 1879 *an inspector was authorized "to procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk."*

*Held, that the magistrate was right in refusing to convict the respondent of selling milk found on analysis to contain* 21 *per cent. of added water, on the ground that the sample had been taken compulsorily by the inspector at a place outside his district, and that in doing so he had acted beyond his powers.*

Case stated by Mr. d'Eyncourt, a metropolitan magistrate, sitting at Clerkenwell.

An information was preferred by the appellant McNair, under the Sale of Food and Drugs Acts, 1875 and 1879, against the respondent Cave, charging the respondent with an offence under section 6 of the Act of 1875—namely, the sale of milk not of the nature, substance, and quality demanded.

On the hearing of the information the following facts were admitted or proved: The appellant was a sanitary inspector appointed for the City of Westminster, and the respondent was a farmer of Shottle Belper, Derbyshire. A contract was entered into between the respondent and Messrs. Pryce & Harris, dairymen, of Craven-yard, Westminster, whereby the respondent agreed to deliver milk to them at St. Pancras Station.

The appellant, acting on instructions given him by the Westminster City Council, and in pursuance of section 3 of the Sale of Food and Drugs Act, 1879, went to the St. Pancras Station of the Midland Railway Co., where the milk was delivered, and took without payment from the churns a sample of the milk supplied by the respondent.

The analyst for Westminster, to whom one-third of the sample was sent for analysis, certified that he was of opinion that the sample contained 79 per cent. of genuine milk of the poorest quality and 21 per cent. of added water.

For the respondent the admission of the certificate as evidence was objected to, and it was contended that the inspector of the City of Westminster had no power to procure a sample at St. Pancras, outside the district for which he was appointed, and that the analyst appointed for the City of Westminster had no power to analyze the sample and give a certificate that would be evidence, and that the place of delivery being in the borough of St. Pancras, and outside the City of Westminster, the proceedings and certificate were nugatory, the inspector and analyst being appointed only to act in respect of samples taken within the City of Westminster and have power to deal only with articles sold or procured within their own district, and that an inspector for the borough of St. Pancras was the proper person to procure the sample and the analyst for the borough of St. Pancras should have analyzed it.

The learned magistrate dismissed the information on these grounds, and the inspector appealed.

*Horace Avory, K.C.*, and *D. C. Bartley*, for the appellant. — The question here is whether an inspector by reason of the increased powers given him by the Act of 1879 has power to take a sample outside his own district for the purpose of having it analyzed and taking proceedings under the Act. The offence was committed at St. Pancras, and the magistrate at Clerkenwell therefore had jurisdiction to deal with the case, if, as we say, the inspector for the City of Westminster could institute the proceedings. The only material question is whether the certificate of the analyst for Westminster was evidence on which he could act under section 21 of the Act of 1875. There is no limiting proviso in that section. These proceedings were taken under section 3 of the subsequent Act of 1879, and that section, read with section 13 of the earlier Act show that an inspector who takes the sample is bound to have it analyzed by an analyst of his own district. If, therefore, the inspector had power to take the sample, the magistrate must have convicted. All the provisions in the earlier Act need not necessarily be incorporated in the later, if to do so

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

would prevent the operation of the later statute: *Rouch* v. *Hall*, 29 W. R. 304, 6 Q. B. D. 17.

*Morton Smith*, for the respondent.—No proceedings can be instituted by an inspector under the Act except the offence charged was committed within his district. *Harris* v. *Williams*, 6 Times L. R., 47, shows that only an inspector can take a sample. [He cited also *Reg* v. *Smith*, 44 W. R. 492, [1896] 1 Q. B. 596.] Under the earlier Act an inspector could not have taken a sample except in his own district and section 3 of the Act of 1879 does not extend the power of either an inspector or an analyst.

Lord ALVERSTONE, L.C.J.—In my opinion this case is not free from difficulty, but the point we really have to decide is what are the extended powers given to inspectors by section 3 of the Sale of Food and Drugs Act, 1879. We have during the argument been referred to the previous legislation, and I think what we have been told may be summarized thus: Under the Act of 1875 the analysts were intended to act locally, and the inspectors were certainly intended to act locally, because it is expressly enacted that any person authorized to act in place of a person charged with a duty under the Act was to obtain first authority from his superior so to act. In other words, all the earlier legislation points to the local action of the inspectors and analysts. When our attention was first brought to section 13 of the Act of 1875 by Mr. Horace Avory, I thought his argument was sound that the inspector might act outside his district, because such an inspector was authorized to take the sample to the analyst of the district for which he acted, but I think that that section is also required for this purpose, that he was allowed to go to another analyst if there was no analyst for that place. It is not in dispute that section 3 of the Act of 1879 materially increased the powers of these inspectors. Under the earlier Act there must have been a sale or a contemplated sale, and the samples must have been taken at the place of sale. Now, by section 3 of the Act of 1879 the inspector is allowed to "procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale of such purchaser or consignee of such milk." These words would clearly limit any improper action on the part of inspectors. Even if the intention of the Legislature was that inspectors should act in respect of milk that was going to be sold in their own district those words would limit their power to inspect any milk whatever. In my view section 3 was necessary in the case of inspectors acting within their own districts to get over the necessity of the milk being taken at the place of sale. Accordingly, the words "at the place of delivery, in the course of delivery to the purchaser" were necessary and desirable to enable the inspector of the district to take milk at any stage. If this particular point had been brought before the notice of the Legislature—namely, that it would have been desirable to deal with the common case of milk coming up by rail, where, as in this case, delivery was made at the railway station, and then going to be used in some other part of London—it would possibly have been provided for. But I think, in view of the previous legislation and the obligation which previously existed on the inspectors to act locally, that if it had been intended to give the inspectors of one district power to take samples compulsorily in another district, different language would have been used. The mere use of the words "place of delivery" in section 3, read with the context, clearly does not give power to the inspectors to go to any place of delivery under the contract whether it is in their district or not. The conclusion I have come to is that the magistrate has come to a right decision, and that for him to have held otherwise there must have been in the Act some special language giving inspectors power to act compulsorily outside their own district. I do not think that the introduction of the words "place of delivery" is sufficient, as the object which the Legislature had for inserting those words was not to give the inspectors powers outside their own district, but for the reason I have already referred to.

WILLS and CHANNELL, JJ., concurred.

*Appeal dismissed.*

Solicitors, *Allen & Son*; *W. T. Ricketts & Son.*

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## Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew, L.J.) — Nov. 10.

DU PASQUIER v. CADBURY, JONES, & CO. (LIMITED). (a.)

*County court—Practice—Costs—Action founded on tort—Detinue—Recovery of goods in specie—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

*Section* 116 *of the County Courts Act*, 1888, *does not apply to an action of detinue in which the goods claimed are recovered in specie.*

Appeal by the plaintiff from an order made by Bucknill, J., in chambers.

The action was brought by the executor of one Ferguson for the return of certain drawings which had been entrusted by Ferguson to the defendants as his agents, and for damages for their wrongful detention; and also for an account of all moneys received by the defendants as such agents for and on behalf of Ferguson, and payment of the amount found due.

The statement of claim alleged that Ferguson, who was an artist, had entrusted a number of drawings, over £100 in value, to the defendants for exhibition and sale as his agents, and that the defendants had illegally detained from the plaintiff and refused to return to him on demand the drawings, and that they had further refused to account to him for any sums of money received by them in respect of any sales of the drawings.

In the statement of defence the defendants admitted that they had received the drawings and had sold certain of them to the total amount of £33, but they denied the wrongful detention. Paragraph 3 of the defence was as follows: "The defendants have always been and still are ready and willing to return the remainder of the said drawings, and hereby offer to return the same forthwith on obtaining a proper receipt therefor." The defendants further alleged that they had a set-off or counterclaim against the claim of the plaintiff to the amount of £14 4s. 6d. for mounts and frames supplied by them for the drawings at the request of Ferguson, and they brought into court the sum of £18 15s. 6d. as sufficient to satisfy the plaintiff's claim.

In his reply the plaintiff said that he was willing to accept the sum of £33 in part satisfaction of the cause of action, and he accepted the sum of £18 15s. 6d. in

(a.) Reported by W. F. BARRY, Esq., Barrister-Law.

part discharge thereof, but he denied the set-off or counterclaim for the sum of £14 4s. 6d.; and he accepted the offer of the defendants as set out in paragraph 3 of the defence to return the remainder of the drawings in satisfaction of the remainder of the cause of action.

The drawings were accordingly handed over to the plaintiff before the action came on for trial.

At the trial the defendants abandoned the set-off and counterclaim, and judgment was given for the plaintiff for £33 upon the claim with costs, and for the plaintiff upon the counterclaim with costs.

Upon taxation the master, holding that the action was "founded on tort" within section 116 of the County Courts Act, 1888, taxed the plaintiff's costs on the High Court scale, the value of the pictures being considerably over £20.

Upon appeal, Bucknill, J., in chambers, held that the action which was tried, and in which judgment was given, was an action founded on contract, and he referred the taxation back to the master to tax the plaintiff's costs on the county court scale.

*Macoun*, for the plaintiff. — This is an action "founded on tort" within the meaning of section 116 of the County Courts Act, 1888, in which the plaintiff recovered a sum exceeding £20. The plaintiff is therefore entitled to have his costs taxed on the High Court scale. The action as launched was an action of detinue—that is, an action founded on tort: *Bryant* v. *Herbert*, 26 W. R. 898, 3 C. P. D. 389; *Turner* v. *Stallibrass*, 46 W. R. 81, [1898] 1 Q. B. 56; *Sachs* v. *Henderson*, 50 W. R. 418, [1902] 1 K. B. 612. Secondly, the action does not come within section 116 at all, because the value of the drawings recovered and the £33 exceeded £50.

He referred to *Solomon* v. *Mulliner*, 49 W. R. 364, [1901] 1 K. B. 76. [COLLINS, M.R., referred to *Keates* v. *Woodward*, 50 W. R. 258, [1902] 1 K. B. 532.]

*E. W. Hansell*, for the defendants.—In order to see whether an action comes, as regards amount, within section 116 of the County Courts Act, 1888, the time when the amount is adjudicated upon by the court is the material time to look at: *Solomon* v. *Mulliner*, 49 W.R., at p. 365, [1901] 1 Q. B., at p. 83. In the present case the plaintiff only recovered judgment for £33 on a claim for money had and received—that is, a claim founded on contract. The claim in detinue had been disposed of long before the trial, and formed no part of the judgment. Further, if the claim in detinue could be looked at for this purpose, the nature of the detinue must be considered. It is not every detinue which gives rise to an action of tort. In *Corbett* v. *Packington*, 6 B & C. 268, a count stated that the plaintiff had delivered certain animals to the defendant to be taken care of by him for reward, and in consideration thereof the defendant undertook and agreed to take care of them and to re-deliver them to the plaintiff on request, and that the defendant, though requested to do so, did not re-deliver them to the plaintiff. The court held that the count stated a promise to do something beyond the common law duty—namely, a promise to re-deliver them to the plaintiff, and that therefore it was a count in assumpsit, and could not be joined with a count in tort. In the present case the statement of the cause of action is very similar, alleging a refusal to return the drawings on demand. It is not an action founded on tort, but on a promise to return the drawings on demand. The order of the learned judge was therefore right.

COLLINS, M.R.—In my opinion this appeal must be allowed. Upon either of two views the plaintiff is entitled to succeed. In the first place the plaintiff sued in tort to recover more than £20. The action was "founded on tort," because the plaintiff claimed the return of certain drawings which had been entrusted by a Mr. Ferguson, whose executor the plaintiff is, to the defendants as his agents, and for damages for their wrongful detention. That was clearly an action founded on tort, though no doubt the plaintiff went on to claim an account of all moneys received as such agents for Ferguson, and payment of the amount found due. To those claims the defendants pleaded, and in their statement of defence they offered to return the drawings, an offer which the plaintiff in his reply accepted. It seems to me that the plaintiff has, by the exigency of the action, recovered the drawings as effectively as if he had obtained judgment for their return. It is conceded that the value of the drawings exceed £20. Upon that ground I am of opinion that the plaintiff is right. It is not competent for the defendants to say that if the action had gone on to trial they could have proved a special contract by them to return the drawings, and that the plaintiff is suing for breach of that contract and not upon the common law duty of the defendants. The plaintiff, as appears by the writ and the statement of claim, was clearly suing in respect of a tort—namely, the wrongful detention of the drawings.

There is also another ground upon which the plaintiff is entitled to succeed. That ground is based upon the decision of this court in *Keates* v. *Woodward*. The plaintiff has by the exigency of the action recovered the drawings, and he would no doubt have been entitled as well to nominal damages for their detention. In *Keates* v. *Woodward* the action was for damages for trespass to land and for an injunction, and the plaintiff recovered nominal damages and obtained an injunction. We held that, as the injunction was the main part of the relief sought, the action was not of that class which came within section 116 of the County Courts Act, 1888. In that case we approved and followed a decision in Ireland—*Bradley* v. *Archibald*, [1899] 2 Ir. R. 108—which decided that, for the purposes of an order of the Supreme Court in Ireland relating to costs somewhat similar to section 116 of the Act of 1888, in an action of detinue, where the goods claimed are recovered in specie, though the damages for their detention may be nominal, the order as to costs does not apply. In that case the action was brought in detinue to recover certain promissory notes and damages for their detention. At the trial the defendants handed over the notes to the plaintiff, and the jury assessed the damages at £4, and judgment was entered for the plaintiff for £4 with costs. The court stated that the plaintiff had substantially recovered the notes in the action, and that they must judge the question of costs as if there had been judgment for the plaintiff for the recovery of the notes, or a nominal sum for their value—there being no finding of the jury as to their value—with £4 damages for their detention. They held that the rule as to costs had no application to such a case. That case is exactly in point. If I am right in saying that the drawings in the present case were recovered by the exigency of the action, the case does not come within section 116 at all. The appeal must therefore be allowed.

MATHEW, L.J., concurred.

*Appeal allowed.*

Solicitor for the plaintiff, *J. B. Edwards.*

Solicitor for the defendants, *H. H. Fanshawe.*

From K. B. Div.
(Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) } Nov. 4.

READ v. FRIENDLY SOCIETY OF OPERATIVE STONEMASONS AND OTHERS. (a.)

*Trade union — Inducing breach of contract — Illegal means—Bona fides.*

*By an indenture of apprenticeship a firm of stonemasons contracted to teach the plaintiff, who was twenty-five years of age, the trade of a mason. By becoming parties to the rules of the defendant trade union the firm had contracted not to take apprentices over sixteen years of age. In order to compel the firm to comply with this latter contract the defendants threatened to withdraw the workmen employed by the firm if the plaintiff was taught the trade of a mason; and in consequence of this the firm broke their contract with the plaintiff.*

*Held, that the plaintiff was entitled to maintain an action against the defendants, for the defendants had knowingly and for their own ends procured the commission of an actionable wrong, and had procured it by the use of illegal means, and it was immaterial that they seemed to have acted in good faith and in the best interests of their society.*

*Judgment of the* Divisional Court (50 *W. R.* 619, [1902] 2 *K. B.* 88) *varied.*

Appeal by the defendants from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) on the hearing of an appeal from a judgment of the judge of the Ipswich County Court: 50 W. R. 619, [1902] 2 K. B. 88.

The action was brought for wrongfully and maliciously procuring to be broken an indenture of apprenticeship made between the plaintiff of the one part and the firm of Wigg & Wright, stonemasons, of the other part, and for maliciously conspiring to procure the indenture to be broken. The plaintiff claimed damages and an injunction.

The deed of apprenticeship was entered into on the 11th of August, 1900, at which date the plaintiff, who was the son of a mason, was twenty-five years of age, and by it he covenanted to serve Wigg & Wright as an apprentice for three years at 15*s* a week, which were ordinary labourer's wages, and they covenanted to teach him the trade of a stonemason.

The plaintiff had previously been employed by Wigg & Wright as a labourer.

The defendant society was a trade union, of which all the masons employed by Wigg & Wright were members. The plaintiff, however, was not a member of the society. The other defendants were certain officers of the society.

Wigg & Wright were parties to the working rules of the trade union, and had signed them.

Rule 6 of the working rules was as follows: "Apprentices.—That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average."

The plaintiff, in pursuance of the terms of the indenture, commenced to serve Wigg & Wright as an apprentice. They were employing four masons, and had one apprentice besides the plaintiff.

At a meeting of the defendant society on the 13th of August, 1900, it was resolved that, if the plaintiff started work for Wigg & Wright as a mason, one of their employees was to report the fact in two hours. Owing to the action of the defendant society from the 13th of August, 1900, to the 20th of May, 1901, Wigg & Wright did not employ the plaintiff as a stonemason or teach him the trade, but he continued to do labourer's work.

On the 20th of May, 1901, the following letter was written by Wigg & Wright to the secretary of the defendant society: "Dear Sir,—As it appears we have inadvertently taken an apprentice contrary to the rules of your society (for which we are very sorry) we should be glad to give an explanation of how it occurred, as we had no intention whatever of infringing the rules. We had taken an apprentice before on the same condition, with the exception of age, and note the rule says, 'And in no case to be more than sixteen years of age, except masons' sons and stepsons.' Now this seems to us to entirely do away with limit of age providing they are masons' sons. What else can it mean? The fact seems to be this rule wants revising and making plainer, so that there could be no mistakes in future. When Mr. Read spoke to me about taking his son as an apprentice I told him we were not entitled to take another apprentice, but he said, 'Oh, yes, you can take him, being a mason's son.' Now, this coming from a member of the society, we took it to be the meaning of the rule, and we never heard a word to the contrary. If we had, we should certainly not have taken this one. Well, now he has been bound just a year. We don't know if we are legally bound to keep him, being over age, and we should not be at all sorry to get rid of him, although we should wish to behave honourably in the matter, and it seems to us the best way out of the difficulty would be to let him finish his time out, and we hope you will be able to view the matter in the same light, as we should be exceedingly sorry that there should be any unpleasantness between us and the society."

On the 22nd of May, the secretary of the defendant society wrote the following reply to Wigg & Wright: "Dear Sirs,—Your letter of the 20th was laid before the members of my society on that date, and I am instructed to inform you that you have misunderstood the meaning of the rule. It admits of a mason's son learning the trade without being bound apprentice; but we cannot understand a man twenty-five or twenty-six years of age claiming that right, nor an employer who would take him without first consulting us. Had you done so, we should have expressed our intention in the matter at once plainly. As the matter stands, we regret your firm has placed itself in a difficult position; but my members consider your action a direct infringement of the rule; and if the man in question starts working at the trade, we are bound to protest against you for introducing an individual not of the trade; and in accordance with our general rule we have empowered our members working for your firm to take prompt action in the matter. We regret the thing has occurred, but we feel that the blame does not rest with us in any way."

Certain interrogatories were administered on behalf of the plaintiff for the examination of the defendants, which were answered by the defendants' secretary. The answers to interrogatories 4 and 8 were as follows: "(4) (*a*) At a meeting held on the 21st of May, 1900, summoned for ordinary quarterly business, it was reported to the meeting that there was a man working at Messrs. Wigg & Wright's, named Mr. Read, bringing a mallet and tools, stating that he was going to be an apprentice, but he was still working as a labourer; but if he should start at the banker (it was noted on the minutes that) Brother Turner had a right to report the same. (*b*) At an ordinary fortnightly meeting held on the 13th of August, 1900, it was reported that Mr. Read had

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

been made an apprentice, but he had not started masonry. It was resolved that if he started work two hours' notice should be given to Messrs. Wigg & Wright by members working there. (c) At an ordinary quarterly meeting held on the 20th of May, 1901, it was resolved that the secretary write to Messrs. Wigg & Wright respecting L. Read entering the trade, his age being twenty-five years. (d) The fortnightly meeting held on the 29th of July, 1901, was specially summoned in consequence of J. Read" (the father of the plaintiff) "writing his intention of visiting the meeting. Resolutions were passed as follows: 'That J. Read be admitted to the lodge on his consenting to be duly read in as a member. That J. Read be allowed fifteen minutes to state his case of complaint *re* his son. That after hearing the explanation and arguments of Brother Read this society does not see any reason to recede from the position taken up by the society in the letter, dated the 22nd of May, sent to Messrs. Wigg & Wright.' Carried, all present voted for, except J. Read. The meetings were held at the Friar's Head Inn, Ipswich; but I am unable to specify the names of all those who were present." "(8) The prompt action referred to in my letter, referred to in paragraph 2, was that the masons in Messrs. Wigg & Wright's employ should give two hours' notice and leave Messrs. Wigg & Wright's employ if they thought fit."

In consequence of the action taken by the defendants the plaintiff was never taught the trade of a mason.

The county court judge held that the facts as proved or admitted before him fell short of giving any ground of action against the defendants; that the defendants seemed to have acted *bonâ fide* in the interest of the Society of Masons, and were not in any way actuated by improper motives; that the defendants gave a certain interpretation to rule 6 and acted upon it; and though their interpretation might or might not be correct, yet, as it was honestly held, he did not consider they had acted improperly in their method of enforcing it. He accordingly gave judgment for the defendants. On the appeal of the plaintiff the Divisional Court reversed the decision of the county court judge, and ordered a new trial, Lord Alverstone, L.C.J., being of opinion that the plaintiff was entitled to judgment. The defendants appealed, and the plaintiff brought a cross-appeal, asking that judgment might be entered for him

*Cohen, K.C.*, and *Chester Jones*, for the defendants.

*F. Low, K.C.*, and *Henlé*, for the plaintiff.

*Cur. adv. vult.*

Nov. 4.—COLLINS, M.R., read the following judgment: This is an appeal by the defendants from the decision of the Divisional Court ordering a new trial of a case decided by a county court judge in favour of the defendants. There is a cross-appeal by the plaintiff asking that this court should give judgment for the plaintiff with damages. The court below, while agreed that the decision was unsatisfactory, were divided as to the relief, Darling and Channell, JJ., holding that there ought to be a new trial, while the Lord Chief Justice was of opinion that the plaintiff was entitled to judgment. The parties agreed before them and before us that if judgment were given for the plaintiff the court should assess the damages.

The facts are stated in the judgments as reported below, and I need do no more than summarize them for the purpose of this judgment. The claim was for £50 damages for wrongfully and maliciously inducing Messrs. Wigg & Wright to break their contract of apprenticeship with the plaintiff. The evidence for the plaintiff was that he had become bound by an indenture of apprenticeship to Messrs. Wigg & Wright, stonemasons, of Ipswich, whereby they undertook to teach him the trade of a mason, paying him wages of 15s. a week during a period of three years. Messrs. Wigg & Wright had in their capacity as masters agreed to certain working rules with the defendant society, one of which (6) was as follows: "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average." The plaintiff's father was a mason. The plaintiff was not a member of the society, and was twenty-five years of age when he entered into the indenture of apprenticeship. The defendant society in concert with the other defendants, on becoming aware that the plaintiff had been taken as an apprentice by Messrs. Wigg & Wright, took steps to enforce compliance by them with rule 6 as interpreted by the defendants by threatening in the language of their letter of the 22nd of May: "If the man in question (the plaintiff) starts working at the trade, we are bound to protest against you for introducing an individual not of the trade, and in accordance with our general rule we have empowered our members working for your firm to take prompt action in the matter. We regret the thing has occurred, but we feel that the blame does not rest on us in any way." This was in effect a threat that they would call out the workmen in Messrs. Wigg & Wright's employ, all of whom were members of the defendant society, and, as was explained by counsel, if so empowered, would be supported while off work out of the funds of the society. Messrs. Wigg & Wright disputed the construction placed by the defendants on rule 6, contending, and as I think rightly, that it did not extend to masons' son. Feeling, however, that they could not resist the coercion brought to bear on them, they dismissed the plaintiff. It was not suggested before us that the acts complained of were not all done by the defendants in concert. The plaintiff has therefore lost the opportunity, which he was lawfully entitled to, of emerging from the position of a labourer at 15s. a week to that of a mason who may earn up to 35s., and he has brought his action accordingly. No evidence was called for the defendants, and no proof given of assent by Messrs. Wigg & Wright to any rules other than those put in, of which rule 6 is one.

On these facts the learned county court judge held as follows: "I hold that the facts as proved and admitted before me fall short of giving any ground of action against the defendants. The defendants seem to me to have acted *bonâ fide* in the best interests of the Society of Masons, and not to have been in any way actuated by any improper motives. They gave a certain interpretation to rule 6 and acted upon it, and though their interpretation may or may not be correct, yet, as it was honestly held, I do not consider they have acted improperly in their method of enforcing it."

On these facts the case seems to me to be clear. The plaintiff was entitled to the benefit of the contract which he had made, and that benefit he would have continued to enjoy but for the intervention of the defendants. The object of the defendants' intervention was to deprive him of that benefit. The facts leave no room for doubt as to that. He was not a member of their society, and was under no obligation, legal or moral, to conform to their rules. In these circumstances they conspired to enforce by threats of a formidable character, which they had the means of carrying into effect, a breach

by his employers and instructors of the contract which the latter had made with him; and the only justification they can suggest for this conduct is that Messrs. Wigg & Wright had come under an obligation to them, not perhaps legally enforceable, if not illegal, not to make such a contract as they had made with the plaintiff. But the justification to be of any avail must cover their whole conduct, the means they used as well as the end they had in view. As against Messrs. Wigg & Wright they had whatever rights within the law the rules assented to by Messrs. Wigg & Wright afforded them. But to combine to coerce them, by threats of the character I have described, to break their contract with the plaintiff was in my judgment an illegal act carried out by illegal means. They cannot be in a better position if the rules are unenforceable than they would have been had a breach of them given them a legal cause of action. But in such case how can they possibly justify taking the law into their own hands and compelling the opposing litigant by coercion to give effect to their view of a disputed obligation by breaking his contract with the plaintiff? Further, does not such conduct demonstrate that their object was to defeat the plaintiff's purpose of becoming a mason? Belief, however honest, that in what they did they were acting in the best interest of the Society of Masons could be no excuse for conspiring to deprive the plaintiff of the advantages of his contract. Persuasion by an individual for the purpose of depriving another person of the benefit of a contract, if it is effectual in bringing about a breach of the contract to the damage of the person, gives a cause of action (*Lumley* v. *Gye*, 1 W. R. 432, 2 E. & B. 216); and a strong belief on the part of the persuader that he is acting for his own interests does not seem to me improve his position in any respect. Still less can it do so when he does not confine himself to persuasion, but joins with others to enforce their common interests at the plaintiff's expense by coercion. "That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted": see per Lord Macnaghten in *Quinn* v. *Leathem*, 50 W. R. 139, [1901] A. C. 495; see also per Lord Brampton, in the same case. It seems to me, therefore, that this case stands wholly outside the debatable ground traversed in the discussion of *Allen* v. *Flood*, 46 W. R. 258, [1898] A. C. 1. The action of the defendants was as clearly malicious, or, if the phrase be preferred, "without just cause or excuse," as in *Lumley* v. *Gye* which as well as *Temperton* v. *Russell*, 41 W. R. 565, [1893] 1 Q. B. 715, has been finally established in *Quinn* v. *Leathem* to be a binding authority. "There are," says Lord Watson in *Allen* v. *Flood*, "in my opinion, two grounds only on which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces the other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrong as far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye*, the inducer may be held liable if he can be shown to have procured his object by the use of illegal means." This passage is approved by Lord Macnaghten and cited by him as embodying the opinion of the majority in that case. The present case inevitably falls under one or other of those propositions, and I think within both. The defendants did knowingly and for their own ends induce the commission of an actionable wrong, and they employed illegal means to bring it about. Such conduct would be actionable in an individual and incapable of justification, *a fortiori* where the defendants acted in concert. These considerations seem to me to exclude from discussion in this case the illustrations given in argument of what might in given circumstances be "just cause," or, in other words, suffice to negative malice. There was no relation between the defendants and either of the parties in this case at all analogous to those existing in the instances put of father and child or doctor and patient, which I leave for solution when the case arises. The defendants have no higher immunity from legal obligations than any other members of the community, and if they have legal rights they can enforce them by legal means only. It is not at all necessary in this case to embark upon the question whether "without just cause" is a complete equivalent for what was meant in the common law by malice. I am inclined to think that, though in many cases adequate as a description, it is not co-extensive with it, nor do I think that in civil actions any more than in criminal it will be possible to eliminate motives from the discussion: see the weighty observations of Lord Brampton on this point in *Quinn* v. *Leathem*. It is, however, very desirable to guard against the notion that if the act done be illegal "just cause" may still be averred to purge the wrong. For instance, where illegal means have been used to bring about the breach of a contract to the detriment of a party thereto, "just cause" cannot come into the discussion at all. The use of illegal means evidenced malice, and in this connection malice was not equivalent to "without just cause." The cause of intervention might be just, but the means used to enforce it might be illegal. The common law action threw the burden of proof on the plaintiff. It was not enough for him to show that the defendant had brought about the breach of a contract between a third party and the plaintiff. He had to show that it was done maliciously, and the burden of proving malice lay upon him. It was not a case of a *primâ facie* cause of action based on the fact that a breach of contract had been brought about to the detriment of the plaintiff, party thereto, by a stranger to the contract. The common law did not lightly extend rights arising out of contracts to and against persons not parties thereto, owing to the absence of privity: see the cases collected in the notes to *Pasley* v. *Freeman*, 2 Smith's Leading Cases, 64. Some nexus had to be established between the plaintiff and the stranger, and this was found in malice. Unless the plaintiff could show this, he failed to bring the stranger into such relations with him as to ground a cause of action, and therefore the burden was upon the plaintiff to prove a cause of action, not upon the defendant to justify. I think some confusion has crept into the discussions on this matter through want of sufficient regard to these elementary points. I think the materials before us are sufficient to enable us to enter judgment, and I agree with the Lord Chief Justice that the defendants' appeal should be dismissed and the plaintiff's cross-appeal allowed, and judgment entered for the plaintiff for £50.

STIRLING, L.J., read the following judgment: The evidence in this case establishes, in my opinion, that the defendants knowingly procured Messrs. Wigg & Wright to violate a contract which they had entered into with the plaintiff. In so doing the defendants acted without any improper motives; but I take the law to be as stated by Lord Macnaghten—"A violation of legal right committed knowingly is a cause of action, and . . . it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the

interference": *Quinn* v. *Leathem*. This proposition was not seriously questioned in argument, but it was contended on behalf of the defendants that there was a sufficient justification for their interference, because Messrs. Wigg & Wright had, previously to the contract with the plaintiff, entered into a contract with them, the defendants, which is said to be inconsistent with the contract between Messrs. Wigg & Wright and the plaintiff. Some difficulty appears to have arisen in the Divisional Court as to what the terms of this contract were; but at the hearing before us counsel on both sides agreed and invited us to decide the case on the footing that the terms of this contract are contained in a printed document put in evidence which purports to be "working rules agreed to and signed by the employers and the operative stonemasons of Ipswich and district," and to have been signed by (amongst others) Wigg & Wright, as employers, and the president and other officers of the defendant society. It was contended in argument that this agreement was illegal as being in restraint of trade. As at present advised, I am not satisfied that this is so; but in the view which I take it is unnecessary to decide the point, and I shall assume for the purpose of the present judgment that the agreement between Wigg & Wright and the defendants was in all respects valid and binding. The particular clause relied on is rule 6: "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons." This I refer to as the first part of the rule. It proceeds: "Employers to have one apprentice to every four masons on an average." This I refer to as the second part of the rule. It is contended on behalf of the defendants that the first part of the rule prohibits employers from taking apprentices over sixteen years of age; and if this were the true construction of the rule, and it were applicable to persons in the position of the plaintiff, there would be, to say the least, a serious question whether the justification set up by the defendants was not made out. But whatever the true construction of this part of the rule may be, it does not, in my opinion, apply to the plaintiff. He was a mason's son, and by the terms of this part of the rule mason's sons are exempted from the operation of this part of it. As regards the second part, it is not well expressed; but it may be read as prohibiting employers from having more than one apprentice to every four masons. If this be the true meaning, Wigg & Wright violated it. It is not every violation of these rules which would justify the defendants in what they did. It appears to be plain from the letter, the 22nd of May, 1901, that the defendants' ground of complaint against Wigg & Wright was not that they had two apprentices when they ought to have had only one, but that they had taken the plaintiff as an apprentice when his age was between twenty-five and twenty-six. The objection that Messrs. Wigg & Wright had more than the proper number of apprentices might have been got over if they had entered into some arrangement by which the services of the other apprentice were transferred to another master. But the letter shows plainly that the defendants would not have been satisfied so long as the plaintiff was allowed to work at the trade. I think that the object of the defendants, as shown by that letter, was to prevent Messrs. Wigg & Wright from giving the plaintiff the benefit of his contract with them, and I find nothing in the rules which entitled them to insist on that. It was said, however, that the defendants acted in good faith and honestly believed that the true construction of the rules was different from that which it appears to me to be. But, in the absence of fraud, good faith is not of itself a sufficient defence to an action founded on tort, though it may in some cases be an essential element of such a defence. If an action is brought for a trespass to land and the defendant justifies under an alleged right of way, judgment must go against him if he fails to establish the right, however honest he may have believed in its existence. If an action is brought for the publication of defamatory matter and the defendant sets up that it was published on a privileged occasion, he will fail in his defence unless the privilege is established, however clear his good faith may be. I do not think that the present defendants occupy a better position than a defendant setting up privilege in an action for libel or slander, and as they fail to establish the existence of the contract on which they rely, I think that they fail in their defence. I desire to express no opinion on the important question whether, if the contract had been such as they believed it to be, they would have been justified in point of law in doing what they did. For these reasons, which appear to agree in substance with those given by the Lord Chief Justice in the Divisional Court, I think that the decision of that court should be varied and judgment entered for the plaintiff.

COZENS-HARDY, L.J., said: I agree. The judgment of the Master of the Rolls, which I have carefully read and considered, so completely expresses my own views that I do not desire to add a word.

*Appeal dismissed. Cross-appeal allowed.*

Solicitors for the plaintiff, *Leighton & Aldous*, Ipswich.

Solicitors for the defendants, *Shaen, Roscoe, & Co.*

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From K. B. Div. (In Bkcy.) (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Oct. 31.

*In re* SMITH.
*Ex parte* DURBAN. (*a*.)

*Bankruptcy—Notice—Judgment creditor—Security given to satisfaction of creditor—Right to issue second bankruptcy notice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (g).

*A creditor having obtained a judgment against a debtor issued a bankruptcy notice on it but subsequently entered into an agreement with the debtor by which the latter gave certain property by way of security, part of which property he was to be at liberty for a year from the date of the agreement, to repurchase. Six months after the agreement the creditor issued a second bankruptcy notice in respect of the debt against the debtor, on which a receiving order was made.*

*Held, that the creditor had no right to issue the second notice while the option to repurchase existed.*

These were appeals (1) from a receiving order made by the registrar and (2) from his refusal to rescind it on an application made for that purpose.

The facts were as follows:

A creditor, in January, 1902, obtained a final judgment against a debtor in the King's Bench Division, and issued a bankruptcy notice against the debtor in respect of the judgment debt. The debtor was arrested under the process of the court, and thereupon an agreement in writing was entered into between the creditor and debtor, the terms of which were as follows: The debtor was to be released from

(*a*.) Reported by H. W. LAW, Esq., Barrister-at-Law.

custody on paying to the creditor £75 in cash, handing over a specified bill of exchange for £400, and transferring 4,000 £1 shares in a certain bank, with liberty to him to repurchase them on or before the 28th of January, 1903. The debtor also assigned his interests in the estates of two specified bankrupts. The assignment was expressed in the agreement to be by way of security and in part payment. The debtor wished to insert in the agreement a clause providing that all further proceedings should be stayed, but the creditor refused to agree to this, and the agreement in fact provided that the judgment was still to be in full force.

The bankruptcy notice was thereupon set aside by the court on the 29th of January, 1902.

In July, 1902, the creditor issued a second bankruptcy notice against the debtor in respect of part of the judgment debt, and this not having been complied with, a receiving order was made against the debtor, which the registrar refused to rescind.

The debtor appealed.

*Mellor*, for the appellant.—The second bankruptcy notice was wrongly issued. The debtor had complied with the first notice by giving security to the satisfaction of the creditor, and thereafter the creditor was not in a position to issue a fresh notice in respect of the debt while the debtor still had the option to repurchase the shares.

He referred to the Bankruptcy Act, 1883, s. 4 (1) (*g*).

*Muir Mackenzie* and *J. G. Joseph*, for the creditor.—After the agreement the creditor was a duly secured creditor, and could exercise all his rights. [STIRLING, L.J.—Can you issue a bankruptcy notice after taking security?] The personal remedy remains. It is the same in principle as issuing a *fi. fa.* There was no stay within the meaning of the section; by the agreement the judgment was to remain in full force. The agreement clearly never meant that the security was to be security within the meaning of the section, it was merely security given in consideration of forbearances and did not take away the creditor's right to issue execution. Our refusing to insert the clause as to staying proceedings shows that this was the intention.

A reply was not called for.

VAUGHAN WILLIAMS, L.J.—Construing the agreement in the creditor's favour, and assuming all the facts in his favour, I still think he had no right to issue the second notice. [His lordship read section 4 (1) (*g*).] It must be admitted that such security was given after the first notice as made it impossible to take bankruptcy proceedings on it, because the security was given to the satisfaction of the creditor; but it is said that he could nevertheless issue a fresh bankruptcy notice the next day, and that this was the intention of the parties to the agreement. It is said that it was only intended that he should forbear to proceed with the first notice. I think that when one comes to look at the agreement it is clear that the intention of all parties was that there should be no proceedings by way of execution or of notice while the option to repurchase the shares remained, and that under these circumstances it was impossible for the creditor to issue a fresh bankruptcy notice till the debtor had made default in giving security or the option had expired, which it was not to do till the 28th of January, 1903. This seems to me the plain meaning of the agreement. Mr. Mackenzie and Mr. Joseph urge against this view that the judgment was to be in full force; but this only means that the judgment was not to be merged or extinguished, so that if the security did not realize the amount of the debt the creditor could then put it in force. As to the clause which the creditor refused to insert with regard to his staying proceedings, its omission does not affect my opinion. The creditor had no power to issue the second notice, and the appeal must be allowed.

STIRLING, L.J.—I am of the same opinion. The creditor had recovered judgment against the debtor and properly issued a bankruptcy notice upon it. [His lordship stated the facts, and continued:] Then came the agreement, under which it is clear that the property was to be realized and not taken in specie in satisfaction of the debt; but the shares could not be realized till the expiry of the option to repurchase them. The giving of the security was a complete compliance with the first bankruptcy notice, and it was not within the power of the creditor, nor was it the intention of the parties, that a fresh notice should be issued while the security could not be realized.

COZENS-HARDY, L.J., concurred.

[The court allowed the appeal from the receiving order with costs, but gave no costs of the appeal from the registrar's refusal to rescind it, on the ground that that application should not have been made. Leave to appeal to the House of Lords was refused.]

*Appeal allowed.*

Solicitors, *Farlow & Fuller; Ernest Salaman, Fort, & Co.*

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From P. D. & Ad. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 20, 1902.

"THE SWINDON." (*a.*)

*Ship—Loading coal—Trimming charges—Self-trimmer—Jurisdiction of Trimming Committee.*

*Held, that the Trimming Committee at Cardiff had jurisdiction to decide that a ship was a self-trimmer, and that their decision was final.*

Appeal from a judgment of a Divisional Court of Admiralty dismissing an appeal from the decision of the judge of the Cardiff County Court, who had held that the defendants, the Swindon Steamship Co. (Limited) were liable to pay to the plaintiffs, Miller & Cory's Cape Verde Island (Limited), a sum of £66 7s. 1d., the expense of trimming a cargo of coal in the steamship *Swindon* at Cardiff, in April, 1900.

*The Swindon* was chartered by her owners, the defendants, to the plaintiffs, to load a cargo of coal for St. Vincent (C.V.) at a freight which was to be in full of trimming, and was to be trimmed by men appointed by the charterers at "the tariff rate of the port." The vessel was loaded with 5,791 tons of coal at Cardiff, and about 1,250 tons were trimmed. The case for the plaintiffs, who paid for the trimming, was that they were entitled to recover from the defendants the sum of £66 7s. 1d., the tariff rate of the port at 2¾d. a ton. The defendants' contention was that the vessel had been held by the trimming committee or board at Cardiff to be what is termed a self-trimmer, and that all they were bound to pay was £30 3s. 3d., which was at the rate of 1¼d. per ton as fixed by the board.

The county court judge held that on the evidence before him the vessel was not a self-trimmer and that the trimming committee had no jurisdiction to hold that she was. In his opinion somebody else must

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

determine whether a vessel was a self-trimmer or not before the trimming committee could determine the rate to be paid.

The Divisional Court (Sir F. Jeune and Barnes, J.) on appeal upheld the view of the county court judge, and dismissed the appeal. "Whatever," they said, "might have been the result if such evidence (viz., as to construction) had been given we are of opinion that upon the evidence which was before the court in the present case the vessel has not been brought within that part of the tariff which relates to self-trimmers and that the ordinary rate contended for by the plaintiffs must be paid."

The defendants' appealed, contending that the trimming committee or conciliation board were competent to decide that the vessel was a self-trimmer, and that their decision was final.

*Abel Thomas, K.C.*, and *Montague Lush, K.C.*, for the appellants.

*J. Eldon Bankes, K.C.*, and *Bailhache*, for the respondents.

COLLINS, M.R.—The question arises from a dispute as to what rate should be paid to the trimmers of a certain vessel under the terms of a charter-party which provided that the cargo was to be trimmed at the tariff rate applicable to the port of Cardiff. Now it seems to me that that depends—and it is admitted to be the only question in this case—on whether what has been called the conciliation board in the port of Cardiff had jurisdiction to decide the question which they did decide. They did decide in respect of this vessel that a certain rate is applicable to it. The learned county court judge has come to the conclusion, and the Divisional Court has upheld his view, that the conciliation board has no jurisdiction to decide that question, and therefore it is sought to apply a scale other than that which the conciliation board had decided.

The question depends on what is the true construction of certain rules which have been adopted by agreement in the port of Cardiff, and what is the true construction of the agreement itself. They are all published in a little book which begins in this way:—"To Shipbrokers, Masters and Owners of Vessels. On and after the 15th day of December, 1890, the charges for trimming coal and coke on board sailing and steam vessels in the port of Cardiff will be in accordance with the following scales." Then follow a series of charges—first of all, as to the side bunkers; then, "cargoes tipped into the hold of 1-decked steamers," so many hatches, so much a ton; and then 1½-decked steamers, 2-decked steamers and so on, fixing the rate according to the hatchways in each case. Then comes the coke tariff, and afterwards a number of other provisions—vessels partly loaded, leaving off work, and finally on p. 7, "all work to recommence at 6 a.m. on Mondays," and special arrangement must be made for anything not provided for in the tariff. Well, apparently, in the first instance the tariff stopped there. Then comes another paragraph which is more material in this case. "It is hereby agreed by and between the undersigned representatives of the coal shippers, and of the Cardiff, Penarth, and Barry Coal Trimmers' Union that, supplemental to the terms of the tariff arranged and bearing date the 15th of December, 1890, in respect of steamers denominated 'self-trimmers,' the rates shown on attached schedule, being those now paid, shall apply to steamers already known as frequenting the port, and that such steamers shall be classified according to the rates paid into groups, and any new steamers or boats not included in this list, but which may be of the same type as regards the work involved in trimming shall be included in the corresponding group." Up to that point there is a provision that rests exactly on the same foundation as the earlier provisions as to decks and hatchways, and so on—a provision dealing with steamers denominated self-trimmers, contemplating that there are certain vessels of that class which have been recognized as frequenting the port, and providing for their being classified, and following up with a list of them. But there is also a provision for new steamers which are not known as frequenting the port as self-trimmers, but as to which questions may arise afterwards. "Any new steamers or boats not included in this list, but which may be of the same type as regards the work involved in trimming." These are very large words, leaving a good deal of latitude for experts to decide whether, having regard to their mechanism and so on, and the work involved in trimming, they do or do not come within what can be fairly described as self-trimmers, and these are the steamers that are being included in the corresponding group. It seems obvious it is a matter that must necessarily involve some discussion, and it may be some difference of opinion, as to what the particular group ought to be, what the class ought to be, and what the tariff ought to be applicable to such steamers. As you would expect, they then go on to provide in the first paragraph: "In the event of any question arising as to the proper classification of such steamer, or any other question as respects the application of the tariff generally, the same shall be referred for settlement to a committee consisting of two shipowners, two coal shippers, to be nominated by the undersigned representatives of the coal shippers, and two trimmers to be nominated by the Trimmers' Union, whose decision shall be final upon all such questions." Then comes a list of the steamers already known, with the sums payable by them, and blank spaces are left for the introduction of other steamers when they require to have their classification ascertained and the amount they have to pay, and at the end of all comes this: "The charges for any self-trimmers not in this list must be fixed by the disputes committee." Now on the words I have read, was it or was it not intended to except out of the jurisdiction of this committee, which is appointed for the purpose of settling disputes—certainly some disputes, that is not denied—was it intended to cut out from its jurisdiction that which on the face of the very provision letting in their jurisdiction is the most probable dispute of all that is likely to arise? Having regard to the words they use in describing the class of vessel that they want to introduce—namely, a vessel that may be "of the same type as regards the work involved in trimming," they are absolutely formulating a definition which I might say almost necessarily involves a doubt and a difficulty in applying it to a particular case. In the clause in which they introduce that somewhat difficult definition, they are also supplying a means for settling disputes, and yet it has to be contended that they have deliberately excepted out of the jurisdiction of this conciliation tribunal that which in the very forefront of their mandate bears the characteristics of a possible difference? It seems to me that would be a very strange and narrow view to take of a clause which has for its object the settling of disputes by practical men conversant with this particular class of business and conversant with the particular class of steamers in question. That being in my view the *primâ facie* difficulty in limiting this charter-party, what justification is there for saying that any such special intention to limit can be got out of these words? It appears on the face of the language used that this agreement is supplemental to

an already existing tariff. What words could you well introduce for letting in under the jurisdiction of this rule all questions arising out of this tariff other than the words that are used? "In the event of any question arising as to the proper classification of such steamer." That steamer cannot be properly classified unless a decision is arrived at as to whether it does or does not come in as a self-trimmer. If it does not come in, it is said it must come under some of the earlier classes mentioned. "Or any other question as respects the application of the tariff generally." That must embrace the application of the tariff to this steamer? Has any question arisen as to the application of the tariff to this steamer? Of course it has. One side says this steamer is a self-trimmer. The other says it is not, and it must go under some other scale in the tariff. Then it seems to me the question does arise, and in most distinct terms, as to the application of the tariff to this steamer. If it is so, it seems to me to be in the jurisdiction of the committee. A point was vaguely suggested by Mr. Bankes that for other reasons the committee itself was not properly constituted, and has therefore never had legitimate jurisdiction. In my judgment that point was certainly not open for Mr. Bankes. Under these circumstances it seems to me the finding of the Divisional Court is wrong, and that the appeal ought to be allowed.

MATHEW and COZENS-HARDY, L.JJ., delivered judgment to the same effect.

*Appeal allowed.*

Solicitors for the plaintiffs, *Downing, Bolam & Co*, for *Downing & Handcock*, Cardiff.

Solicitors for the defendants, *Botterell & Roche*, for *Vaughan & Roche*, Cardiff.

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## High Court of Justice.

Chan. Div. } July 1, 1902.
Kekewich, J. }

*In re* WOOLFE'S PATENT.
WOOLFE *v.* AUTOMATIC PICTURE GALLERY (LIMITED). (*a.*)

*Patent — Amendment of specification — Petition for revocation presented during proceedings for amendment —Jurisdiction of comptroller—Patents, Designs, and Trade-Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 18 (10), 19—*Patents, Designs, and Trade-Marks Act,* 1888 (51 & 52 *Vict. c.* 50), *s.* 5.

*A patentee applied under section* 18 *of the Patents, &c., Act,* 1883, *for leave to amend his specification by way of disclaimer. After the application had been made, but before the comptroller had given his decision, the defendants in this action presented a petition for revocation of the patent. The comptroller subsequently granted the patentee leave to amend. The patentee brought this action to restrain the defendants from infringing his patent as amended. The defendants pleaded that the patent had not been duly amended, on the ground that the presentation of their petition had ousted the comptroller's jurisdiction to hear and determine by virtue of section* 18 (10) *of the Act of* 1883, *as amended by section* 5 *of the Act of* 1888, *unless leave was first obtained from the court under section* 19 *of the Act of* 1883.

*Held, that the application to amend having, in the first place, been properly made at a time when no action for infringement or proceeding for revocation was pending, could be proceeded with and adjudicated upon by the comptroller without leave of the court, notwithstanding that a petition for revocation had been presented before final adjudication, and that liberty to amend the specification of the patent had been duly given.*

Point of law.

On the 1st of April, 1901, the plaintiff, who was the owner of letters patent No. 12,160 of 1898, for improvements in apparatus for receiving coin and displaying stereoscopic pictures in exchange, applied to the Patent Office under section 18 of the Patents, Designs, and Trade-Marks Act, 1883, for leave to amend his patent by way of disclaimer.

On the 3rd of July, 1901, before any decision on the application had been given, the defendants presented a petition for revocation of the plaintiff's patent.

On the 9th of August, 1901, the plaintiff's application came on for hearing before the comptroller, when the defendants contended that the presentation of their petition had deprived the comptroller of jurisdiction to hear and decide the application by reason of section 18 (10) of the Act of 1883, unless leave were first given to the plaintiffs by the court under section 19 of the same Act.

On the 14th of August the comptroller granted leave to amend the specification in the manner desired.

On the 26th of September, 1901, the plaintiff issued the writ in this action for infringement of his patent on the amended specification, and the defendants by their defence pleaded that the application and the leave to amend were *ultra vires* and of no effect.

Section 18 of the Act of 1883 provides (in effect) that a patentee may seek leave to amend his specification by way of disclaimer, correction, or explanation, and prescribes the formalities requisite prior to and upon such application, and the effect of leave given, and sub-section 10 is as follows: "The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending."

Section 19 provides that "In an action for infringement of a patent or in a proceeding for revocation of a patent the court or a judge may (in effect) order that the patentee shall be at liberty to apply for leave amend his specification by way of disclaimer, but gives no power to grant liberty to apply when amendment is sought by way of correction or explanation.

The plaintiff took out this summons to determine (amongst others) the following questions of law: (1) Was the decision of the comptroller on the 14th of August effectual to authorize and enable the plaintiff to amend his specification? and (2) did the presentation of the petition on the 3rd of July render the plaintiff unable during the pendency thereof to make any application at the Patent Office having for its object to obtain leave to amend his specification, save only such application as the court or a judge should, under section 19 of the Act of 1883, order that the plaintiff should be at liberty to make and did it, save in respect of such an application so ordered, deprive the comptroller of jurisdiction to hear and determine the application of the plaintiff?

*Terrell, K.C.*, and *A. J. Walter*, for the plaintiff.—The word "pending" in section 18 (10) means "pending" at the time the application is made: see the remarks of Fry, L.J., in *Singer* v. *Stassen & Son*, 1 Rep. Pat. Cas. 121, at p. 126. The defendants say we ought to have got leave under section 19, being a proviso to section 18 (10), but it is not a proviso,

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

for it deals only with the case of "disclaimer" and not with the cases of "correction" or "explanation."

They also referred to *In re Deeley's Patent*, 11 Rep. Pat. Cas. 72; *Farbenfabriken v. Fr. Bayer & Co.* v. *Bowker*, 8 Rep. Pat. Cas. 389; *Andrew & Co. (Limited)* v. *Crossley Bros. (Limited)*, 40 W. R. 586, 9 Rep. Pat. Cas. 165, at p. 173.

*J. Fletcher Moulton, K.C.*, and *J. W. Gordon*, for the defendants.—The statement relied on in *Singer* v. *Stassen* is merely a *dictum* and no authority whatever; *In re Deeley's Patent* is a distinct authority in our favour. Application for leave to amend is not contained merely in one document; it is a continued process involving a series of steps and acts, and the series is suspended so soon as a petition is presented.

They also referred to *Farbenfabriken, &c.* v. *Bayer* and *Andrew & Co.* v. *Crossley Bros.*

KEKEWICH, J., in giving judgment, said that unless he could find authority the other way, he thought there was no reasonable doubt as to the construction of the sections in question. [His lordship read sections 18 and 19 of the Act of 1883, and section 5 of the Act of 1888.] Though as a general principle it was not safe to construe Acts of Parliament by *a priori* considerations, it was yet necessary to look at the intention of the Legislature in framing a given statute. Here it was obvious that the Legislature recognized that it would be a fair right to confer on a patentee to allow him to make, those amendments in his specification which through carelessness or ignorance or otherwise had been omitted—to allow him to come and say that after all he did not claim something or all he had originally claimed, or that he had made a slip which needed correction, or that he had not properly explained something which required proper explanation. But this was recognized as fair only provided no other person was injured by it; it would be obviously unfair to allow a patentee to do this when some rival inventor or claimant had presented a petition to revoke the grant originally made to the patentee. But if there was no harm done, no reason could be urged why honest alterations should not fairly be made. The Act went even further, for by section 19, even when proceedings against the patent had commenced, the court might still in its discretion give a patentee leave to apply for amendment by way of disclaimer though not by way of correction or explanation. Such being the scheme of the Act, why should an application properly made in the first instance be suspended by proceedings begun at a later date? If the defendants were right in their contention, then the very day before the comptroller gave his decision upon the application for amendment, after all the preliminary notices and advertisements had been given and made with regard to the application, it would still be possible by presenting a petition for revocation to stop all further proceedings at the last moment and to nullify all that had gone before. That would be a monstrous construction to put upon the Act, and he should decline to put it unless forced thereto by authority. If no legal proceeding was pending the application might be made, and there was nowhere to be found any provision that an application, having been once duly made, should not be proceeded with. Nor was he forced by the authorities to construe the Act in any other way. In *Singer* v. *Stassen*, Fry, L.J., was of the same opinion as his lordship, but as the remarks of Fry, L.J., in that case were *obiter dicta*, he should not rely upon them as an authority, although they were entitled to great weight. In *In re Deeley's Patent*, it was true, Chitty, J., said that proceedings before the comptroller under section 18 were suspended by the subsequent presentation of a petition for revocation, and gave leave to proceed under section 19, but the point was not argued before Chitty, J., so as to elicit a definite opinion from him, and he merely gave leave upon the hypothesis, and there was nothing to show that the mind of the learned judge was so brought to bear upon the point as to constitute his remarks a judicial decision thereon.

His lordship therefore held that the application could properly go on and be adjudicated upon, and that the comptroller's jurisdiction was not ousted by the presentation of the petition.

*Judgment for plaintiff.*

Solicitors, *Field, Roscoe, & Co.; W. V. H. Cobbett.*

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Chan. Div. } Farwell, J. } Aug. 5, 6, 12, 1902.

CORPORATION OF BRADFORD AND OTHERS v. FERRAND AND ANOTHER. (*a.*)

*Water—Underground water—Unknown but ascertainable channel.*

*The Morton Beck, a river in Yorkshire, derived some of its water from the Sweet Well Spring. Defendants sank wells or shafts on their land in close proximity to the Sweet Well Spring, and by this means some of the water from the spring was alleged to be diverted. Plaintiffs were riparian proprietors on the banks of the Morton Beck.*

*Held, that plaintiffs had no right of action for the abstraction of the said water, as even assuming the existence of a defined channel, along which the underground water flowed to the well, such channel was not known and could not be ascertained except by excavation of the soil.*

Ewart v. Belfast Poor Law Guardians, 9 *L. R. Ir.* 172, *approved.*

The plaintiffs were the mayor, aldermen, and citizens of Bradford and other persons interested in mills erected on the Morton Beck in Yorkshire. They were the owners and occupiers of mills situate close to the junction of the Bradup Beck and Fenny Shaw Beck. These two becks unite to form the Morton Beck, which flows into the River Aire in Yorkshire. The defendant, William Ferrand, was the owner and occupier of an allotment of moorland, part of Morton Moor, and upon this allotment a spring known as the Sweet Well Spring rises and flows by means of a natural stream known as the Sweet Well Dyke into the Sunnydale Reservoir on the Bradup Beck.

The plaintiffs alleged that before issuing to the surface, the water that issued at Sweet Well Spring flowed in a well-defined and ascertained channel under the surface of the ground, and that from time immemorial the spring has been, and up to the beginning of 1901 was, one of the main feeders of Morton Beck, and had been in dry seasons the principal feeder. About the year 1900 the Shipley Urban District Council, one of the defendants in the action, entered into an arrangement with William Ferrand whereby Ferrand granted the council permission to sink certain shafts or wells on his land.

The plaintiffs claimed an injunction restraining defendants from intercepting, diverting, or obstructing the water flowing in a defined channel to and feeding the Sweet Well Spring so as to diminish the

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

quantity of the said water flowing from the Sweet Well to the Sunnydale reservoir, and directing them to remove all shafts, drains, and works constructed by them whereby the flow of water from the said spring into the Sunnydale reservoir was or might be wholly or partially diverted or obstructed.

The defendants denied that the water which issued at Sweet Well Spring before issuing to the surface flowed in a well-defined or in an ascertained channel under the surface of the ground or in any defined or any ascertained channel, and they further pleaded that if such water before issuing to the surface did flow in a well-defined channel under the surface of the ground, such channel was not an ascertained or known channel.

On the 25th of April, 1902, the court was moved by plaintiffs asking for leave to make the necessary excavations, experiments, and observations upon the land for the purpose of ascertaining whether or not the waters which previously issued at Sweet Well Spring before so issuing flowed in a definite underground channel.

No order was made in the motion.

The plaintiffs appealed, and on the appeal being heard on the 14th of May, 1902, it was agreed that the defence should be amended by raising a direct issue between the parties on the point of law, and that an application should be made to Farwell, J., to decide that point before the trial.

Accordingly, the defendants amended their defence, and raised the point of law as follows: "Assuming that underground water flows or flowed to the said Sweet Well Spring in a defined channel, but that the existence and course of that defined channel is not and cannot be ascertained or known except by excavation of the soil, the plaintiffs have no right of action for the abstraction of such underground water, and are not entitled to maintain this action."

*Butcher, K.C.*, and *A. P. Longstaffe*, for the defendants, argued that there could be no right to the water flowing in an underground channel unless the channel were known. The notoriety of the flow of these natural streams was of the utmost importance: *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R. Ir. 172; *Black* v. *Ballymena Township Commissioners*, 17 L. R. Ir. 459, 35 W. R. Dig. 216; Angel on Watercourses (6th ed.), p. 157. It was decided in *Chasemore* v. *Richards*, 7 W. R. 685, 7 H. L. Cas. 349, that every owner has a right to dig in his own soil and take water subject to the rights of other people as to the quantity of water. No other person has such right in an unknown underground stream.

*Buckmaster, K.C.*, and *Austen Cartmell*, for the plaintiffs.

*Butcher, K.C.*, replied.

FARWELL, J.—The rights in relation to water flowing in a defined and known channel on or under the surface of the earth are now well settled; every riparian proprietor has an equal right to the ordinary use of the water which flows in the stream adjacent to his lands as it has been wont to run: *Miner* v. *Gilmour*, 7 W. R. 328, 12 Moore P. C. 131. This right is an incident to the property in the land through which it passes, *Embrey* v. *Owen*, 6 Exch. 352, and does not depend upon a supposed grant, but is *jure naturæ*: *Shury* v. *Piggott*, 3 Bulst. 339. But the right does not extend to water percolating through the strata in no known channel (*Chasemore* v. *Richards*) or to common surface water rising out of springy or boggy ground and flowing in no definite channel: *Rawstron* v. *Taylor*, 11 Exch. 369, 4 W. R. Dig. 166. No English authority has yet dealt with the rights to water flowing underground in a defined but unknown channel, and although there is the express authority of the Court of Appeal in Ireland I feel bound to form my own opinion on the point, as that decision does not bind me. After the manner in which the case of *Chasemore* v. *Richards* was argued and decided in the House of Lords, I cannot treat the right to the flow of the stream as founded on a rule of positive law, the origin of which is lost by the progress of time, as suggested by Tindal, C.J., in *Acton* v. *Blundell*, 12 M. & W. 324 but I feel bound to try to find the principle on which the right rests. The foundation of the right, as stated throughout all the cases, is *jus naturæ*. What, then, is the meaning of *jus naturæ*? It cannot be that it means merely that the water is an incident or accessory to the land by the gift of nature, for this would not be a sufficient foundation for the right claimed. The mere statement that water, light, or air is a gift of nature does not necessarily involve the general conclusion that there can be no interference with their enjoyment. I have come to the conclusion, therefore, that *jus naturæ* is used in these cases as expressing that principle in English law which is akin to, if not derived from, the *jus naturale* of Roman law. English law is of course quite independent of Roman law, but the conception of *aequum et bonum* and the rights flowing therefrom which are included in *jus naturale* underlie a great part of English common law, although it is not usual to find the law of nature or natural law referred to in so many words in English cases. [His lordship then referred to the decisions in *Moses* v. *Macferlan*, 2 Burr. 1005. at p. 1012; *Freeman* v. *Jeffries*, L. R. 4 Ex. 189, 17 W. R. C. L. Dig. 87; *Master* v. *Miller*, 4 T. R. 320, and an article on the Law of Nature by Sir F. Pollock in the Journal of Comparative Legislation for 1901, and continued:] I am not, therefore, introducing any novel principle if I regard *jus naturale*, on which the right to running water rests, as meaning that which is *aequum et bonum* between the upper and lower proprietors. This appears to me to be the view expressed by Dodderidge, J., in *Shury* v. *Piggott*, when he gives a second reason "drawn from the nature of water, the which will naturally descend, and will make a way for its passage if stopped." He is evidently considering the relative positions of the upper and lower owners. Each has his right *jus naturæ* If the upper owner dams the stream, the lower loses the passage of the water. If the lower owner dams the stream, he floods the higher owner's lands. What, then, is fair and reasonable between the parties? *Aqua currit—i.e.*, it is obvious to all that the water in the known and definite channel runs down toward the lower ground, therefore *debet currere ut currere solebat*; it is *aequum et bonum* that neither owner should interfere with this, and thereby each avoids injuring the other and escapes injury himself.

This, too, is the only explanation of the continued reference to knowledge of the existence of the stream which occurs in the cases. But I fail to see how ignorance or knowledge on the part of a defendant can affect the right of the plaintiff in a civil action to enforce his legal right except on the footing that the existence of such right depends on the consideration of what is *aequum et bonum* between the two parties.

In the present case there is a spring issuing from the defendant's land. It is fed *ex hypothesi* by a subterranean stream flowing in a defined channel from the higher ground. This ground may extend to a large number of acres, and may belong to many different owners. No one can tell where or in whose land this hypothetical stream runs. If the plaintiffs are right, no proprietor of land above the spring can

sink a well or make excavations on his own ground without the risk of incurring liability, possibly to a very large amount, to the plaintiffs for interfering with the spring, and this is a much larger liability than that unsuccessfully sought to be established in *Chasemore* v. *Richards*, for a defined stream may flow for miles, whereas the gathering ground of water penetrating by percolation is of comparatively small extent. I apply Lord Chelmsford's question in *Chasemore* v. *Richards*: "Are the most distant landowners as well as the adjacent ones to be bound at their peril to take care to use their lands so as not to interrupt the oozing of the water through the soil to a greater extent than shall be necessary for their own actual wants?" and Lord Wensleydale's observation in the same case: "In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and in so doing he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbour's land." I desire respectfully to adopt Palles, C.B.'s, statement in *Ewart* v. *Belfast Poor Law Guardians*, when he says: "If the view which has been contended for by the plaintiffs in this case is correct, we would have the startling doctrine that an action at law would lie against a man without any limit to the damages that could be recovered, for doing an act which as far as he knows, or as far as can be known by reasonable inquiry, is a lawful act, and the unlawfulness of which would depend upon the fact that, by some newly-discovered method of examination being resorted to, it was ascertained that the water flowed in a defined channel, a fact which, but for that method being resorted to, would have remained for all ages unknown. That would be a monstrous doctrine." [His lordship also read the remarks of Fitzgibbon, L.J., to the same effect, and continued:] There is nothing inconsistent with this view in cases like the River Mole, where a river disappears into the ground and what is apparently the same river appears on lower ground. In such cases there is a *terminus a quo* and a *terminus ad quem*, and the owners of land between the two can fairly be presumed to know of the existence and course of the stream. As Pollock, C.B., says in *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. Ch. 282, at pp. 300, 301: "If the course of a subterranean stream were well known as is the case with many, which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." That passage was cited with approval by Lord Chelmsford in *Chasemore* v. *Richards*. At any rate, cases of that class rest on the knowledge, actual or possessed, of the existence of an underground stream. Finally, regarding the case as one to be decided on the general consideration of *aequum et bonum*, it is not immaterial to remember that three eminent judges of appeal in Ireland have decided that the lower owner has no right to prevent the obstruction of a subterranean stream flowing in a defined but unknown course, and that such view also accords with American decisions. "The defined watercourses spoken of in *Wheatley* v. *Baugh*, 25 Penn. St. Rep. 528, which a man may not divert to the hurt of an inferior proprietor are not the hidden streams of which the owner of the soil through which they pass can have no knowledge until they have been discovered by excavations made in the exercise of rights of property": Angell on Watercourses (7th ed.), p. 156. I am at any rate confirmed in my view of what is *aequum et bonum* by finding that I share it with such eminent persons, although their opinions are not authorities behind which I can take shelter.

There will be a declaration that there is no right in underground water where the course of its channel is unknown; and the plaintiffs will pay the costs of this application.

Solicitors for the plaintiffs, *Nussey & Fellowes*, for *Vint, Parkinson, Hill, & Killick*, Bradford.

Solicitors for the defendants, *Johnson, Weatherall, & Sturt*, for *Wade, Bilbrough, Booth, & Co.*, Bradford.

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Chan. Div. } Farwell, J. } July 31; Aug. 6, 1902.

*In re* BOWLES.

AMEDROZ v. BOWLES. (*a*.)

*Perpetuity — Appointment — Personal estate — Remoteness — "Possibility on a possibility."*

*The old rule against "a possibility on a possibility," though applicable to legal limitations of real estate—namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person, as purchasers—does not apply to personal estate; as regards limitations of personal estate the ordinary rule against perpetuities is the only rule applicable.*

This was a summons to determine whether an appointment made under a marriage settlement was void for remoteness. By a settlement dated the 6th of October, 1818, made upon the marriage of the Rev. George Downing Bowles and Anne his wife, certain stocks and funds were transferred to trustees upon trust after the death of the survivor of the husband and wife for the child or children of the said marriage, "or such one or more exclusively of the other or others of them, or any issue born in the lifetime of the said G. D. Bowles and Anne Stillingfleet or the survivor of them, of any such child or children, with such provision for their respective maintenance, education and advancement, and at such age or time or respective ages or times not being after twenty-one years to be computed from the decease of the survivor of the said G. D. Bowles and Anne Stillingfleet, and if more than one in such shares and proportions and with such limitations over for the benefit of some or one of the said children or issue as to part of the funds as the said Anne Stillingfleet alone during her life, and as to the other part of the said funds as the said G. D. Bowles and Anne Stillingfleet jointly during their joint lives should by deed appoint."

In a subsequent deed dated the 28th of February, 1849, made between the said G. D. Bowles and Anne his wife and their children, all the trust funds were duly appointed, subject to the life interests of the said G. D. Bowles and Anne Bowles, in equal third shares in trust for each of the three children of the marriage for their respective lives, and after the death of each of them in trust for his or her children born in the lifetime of the said G. D. Bowles and Anne Bowles, who should live to attain the age of twenty-one years.

*H. E. Wright*, for the trustees.

*Upjohn, K.C.*, and *Underhill*, for persons entitled in default of appointment.

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(*a*.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

*Jenkins, K.C.*, and *Gatey*, for persons claiming under the appointment.

FARWELL, J.—I think it is reasonably plain that, whatever the doctrine of "a possibility on a possibility" may have originally meant, at present it exists only to the extent stated in the head-note to *Whitley* v. *Mitchell*, 38 W. R. 337, 44 Ch. D. 85: "The old rule against 'a possibility on a possibility,' applicable to legal limitations of real estates—namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person, as purchasers, is still existing, and has not been abrogated by the more modern rule against perpetuities." It is obvious that the rule cannot apply to personal estate, because there is no such thing as a remainder in personal estate, nor do I see any reason why a similar rule should now, for the first time, be applied to limitations of personal estate, having regard to the fact that personal estate is already sufficiently protected from any undue restriction on alienation by the ordinary rule against perpetuities. The rule against "a possibility on a possibility" came into existence in the case of real estate before the ordinary rule against perpetuities was formulated, and just because of the non-existence of any such ordinary rule; and it continued to exist partly because the new rule against perpetuities was said not to apply to remainders, and partly because it was never formally abrogated. So far as touches the present question there is no express decision on the point. Certainly, however, the opinion of Sir Richard Pepper Arden, M.R., is very clearly stated in *Routledge* v. *Dorril*, 2 Ves., jun., 356, to the effect that, so long as you make it clear that the rule against perpetuities has not been transgressed you may appoint to an unborn child for life, with remainder to unborn children: *ibid*, at p. 362. This, therefore, although it is not a decision, is an expression of the opinion of Sir R. P. Arden more than one hundred years ago; and I think that it is a perfectly correct statement of the law on the subject. I therefore declare that the trust now in question is not void for remoteness.

Solicitors for the trustees, *Fladgate & Co.*

Solicitors for persons entitled in default of appointment, *Lovell, Son, & Pitfield.*

Solicitors for persons claiming under the appointment, *Ellis, Munday, & Co.*, for *Lambert & Rogers*, Great Malvern.

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Chan. Div. }
Buckley, J. } Nov. 4, 5.

ATTORNEY-GENERAL *v.* ASHBORNE RECREATION GROUND CO (LIMITED). (a)

*Injunction — Jurisdiction — Attorney-General — Public right—New statutory offence—Special statutory remedy —Bye-laws —Penalties—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 183, 251.

*The Attorney-General is entitled to an injunction, as an ancillary remedy, to restrain the breach of a public right in the same way as a private person is so entitled in respect of a breach of his private rights; and this is so in a case where the public right has been created by a statute which also provides a special remedy for its breach, as, for instance, the recovery of a penalty in a summary way.*

*An urban district council having, by its bye-laws, prescribed (amongst other things) the width of new streets under section* 157 *of the Public Health Act*, 1875, *and imposed penalties for offences against the bye-laws under section* 183, *which penalties were, by section* 251, *to be recovered before a court of summary jurisdiction, the Attorney-General at the relation of the council brought an action in the High Court against the defendant, who had contravened the bye-laws, for an injunction.*

*Held, that the action lay, and that the injunction should be granted.*

This was an action by his Majesty's Attorney-General (at the relation of the Ashborne Urban District Council) and the council, as plaintiffs, against the defendant company and one Smith, their contractor, asking for a declaration that the defendants were laying out, or had laid out, a new street in contravention of the bye-laws of the council, and for an injunction to restrain them from doing so. The action had originally been brought by the plaintiff council alone, but after the decision of Joyce, J., in *Mayor of Devonport* v. *Tozer*, [1902] 2 Ch. 182, 50 W. R. Dig. 97, the Attorney-General was added as a plaintiff to the action.

The street in question was one proposed to be made at Ashborne over the property of the defendant company. It had originally been shown in a certain plan, B, submitted (as alleged by the plaintiffs) for their approval, as extending from a certain road called Station-road on the west to Compton-street on the east, and the part next to Compton-street, part of which was between already existing buildings, was shown as less in width than thirty-six feet, which was the width required by the bye-laws of the plaintiff council. Subsequently a plan, C, was submitted to the plaintiff council showing the proposed street as not extending along the narrow part near Compton-street. The plaintiffs alleged that the road was being laid out according to plan B. The defendants denied that the plan B was submitted with their authority, or that they were laying out the street according to it, and they submitted that the proposed street as shown by plan C was in conformity with the bye-laws. They also submitted as a preliminary objection that the only remedies open to the plaintiffs were those prescribed in section 158 of the Public Health Act, 1875, and in the plaintiffs' bye-laws, and that consequently this action did not lie.

The bye-laws of the plaintiff council upon the matter were as follows:

"4. Every person who shall lay out a new street which shall be intended for use as a carriage-road, shall so lay out such street that the width thereof shall be thirty-six feet at the least."

"8. Every person who shall construct a new street shall provide, at one end at least of such street, an entrance of a width equal to the width of such street, and open from the ground upwards."

"98. Every person who shall offend against any of the foregoing bye-laws shall be liable for every such offence to a penalty of five pounds, and in the case of a continuing offence to a further penalty of forty shillings for each day after written notice of the offence from the sanitary authority."

The court first heard the preliminary objections.

*Macaskie, K.C.*, and *A. F. Peterson*, for the defendant council.—The alleged acts complained of in this action are a new offence created by the Public Health Act, 1875, and by the bye-laws of the plaintiff council thereunder. The Act (section 251) provides a special

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

remedy for this offence—namely, by the enforcement of penalties before a court of summary jurisdiction or by pulling down or removing the road after notice of disapproval (section 158). That being so, no other proceeding can be taken: *Reg.* v. *Hall*, [1891] 1 Q. B. 747, 39 W. R. Dig. 67; *Barraclough* v. *Brown*, [1897] A. C. 615, 46 W. R. Dig. 64. It is clear that the plaintiff council cannot sue without the Attorney-General being a party: *Mayor of Devonport* v. *Tozer*, [1902] 2 Ch. 182, 50 W. R. Dig. 97. Nor can the action be maintained when he is joined, for the act complained of is a criminal offence, and consequently an injunction cannot be granted in respect of it: *Mellor* v. *Denham*, 5 Q. B. D. 467, 28 W. R. Dig. 163. Moreover, an injunction will not in any case be granted to restrain an act which is not an interference with property: *Emperor of Austria* v. *Day*, 9 W. R. 712, at pp. 717, 718 3 De G. F. & J 217 at p. 253; *Springhead Spinning Co.* v. *Riley*, 16 W. R. 1138, L. R. 6 Eq. 551.

*Macmorran, K.C.*, and *Hextall*, for the plaintiffs.—The courts have granted injunctions in many cases similar to this, as in *Attorney-General* v. *Hatch*, [1893] 3 Ch. 36, 41 W. R. Dig. 124, *Attorney-General* v. *Rufford & Co. (Limited)*, 47 W. R. 405, [1899] 1 Ch. 537. The Act contains a provision (section 341) that the powers of the Act are to be in addition to any other powers conferred by law or custom. This section was considered in *Attorney-General* v. *Tod-Heatley*, 45 W R. 394, [1897] 1 Ch. 560, where an injunction was granted. [BUCKLEY, J.—That section only refers to such powers as existed before the Act.] There is no need to show any injury to the public. The Attorney-General may sue for any breach of public duty: *per* Fry, J., in *Attorney-General* v. *Shrewsbury Bridge Co.*, 30 W. R. 716, 21 Ch. D 752, at p. 756, *Attorney-General* v. *London and North-Western Railway Co.*, [1900] 1 Q. B. 78, 48 W. R. Dig. 160. The principle of all these cases is that where illegal acts affect the public rights the Attorney-General may have them restrained by injunction. It is true that the penalty for the offence is imposed by the bye-laws, but that is equivalent to being imposed by the Act by which the bye-laws are authorized. And these bye-laws when made are binding upon the local authority, and cannot be waived (*Yabbicom* v. *King*, 47 W. R 318, [1899] 1 Q. B. 444, and *per* Wright, J., in *In re McIntosh and Pontypridd Improvements Co.*, 61 L. J. Q. B. 164, at p. 167, 40 W. R. Dig. 128), but the Attorney-General may consider whether he will join in bringing the action if he thinks the case trivial: see observations of Halsbury, L.C., in *London County Council* v. *Attorney-General*, 50 W. R. 497, [1902] A. C. 165, at p. 168.

BUCKLEY, J.—A preliminary objection has been taken by the defendants. They say that even although the Attorney-General is a party the action cannot be maintained. The urban district council is a body which has powers under section 157 of the Public Health Act, 1875, of making bye-laws. They have made such bye-laws, which among other things prescribe the width of new streets. They say that the defendant company have acted in breach of those bye-laws, and for the present purpose I will assume that to be the case. The defendants say that the Public Health Act, 1875, has created a new offence and has imposed penalties for its breach. That is not correct. Section 183 gives to the local authority power to make bye-laws by which penalties may be imposed for the breach of the bye-laws, and the plaintiff council have imposed a penalty by their bye-laws for this offence. There might be a case where there were no bye-laws imposing any penalty. And the question would then arise what remedy was there then for offences against the Act. But the argument is that as the local authority have made these bye-laws the only remedy for offences against them must be under section 251 of the Act to recover them before a court of summary jurisdiction under the Summary Jurisdiction Acts, and that there is no jurisdiction in this court to grant an injunction. In *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 7 W. R. 464, 6 C. B. N. S., 336, at p. 356, Willes, J., said: "There are three classes of cases in which a liability may be established founded upon a statute. One is where there is a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law, there, unless the statute contains words which expressly or by necessary implication include the common law remedy, the party suing has his election to pursue either that or the statutory remedy." This case is not within that class because there was not before the statute any remedy at common law; the obligation was created by the statute. He continues: "The second class of cases is where the statute gives the right to sue merely, but provides no particular form of remedy; there the parties can only proceed by action at common law." In a sense this case does fall within that class, because if no bye-laws had been made no remedy would have been provided. But I pass by that. The learned judge continues: "But there is a third class, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is competent to the party to pursue the course applicable to the cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue." This case comes within that third class. I start, then, with this, that as a general proposition the remedy provided by the statute must be followed. But there is at least one exception to this rule, for there may co-exist with the statutory remedy a remedy by injunction to protect the right created by the statute. It cannot be disputed after *Cooper* v. *Whittingham*, 28 W. R 720, 15 Ch. D. 501, that if a plaintiff is suing in respect of a right personal to himself which has been infringed by the commission of a statutory offence, he is not precluded from bringing his action for an injunction. In that case Jessel, M.R., said, referring to the Copyright Act of 1842: "It is said that the seventeenth section of the Act created a new offence of importation and enacted a particular penalty, and it was argued that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for. That is true as a general rule of law. But there are two exceptions. The first of these exceptions is the ancillary remedy in equity by injunction to protect a right"—a remedy which he granted in that case. He then says that the second exception is that created by section 25 of the Judicature Act, 1873, but after *North London Railway Co.* v. *Great Northern Railway Co.*, 31 W. R. 490, 11 Q. B. D. 30, this exception cannot, I think, be relied on. He goes on, in reference to the first exception, to say "That is a mode of preventing that being done which, if done, would be an offence. Whenever an act is illegal, and is threatened, the court will interfere and prevent the act being done—and, as

regards the mode of granting an injunction, the court will grant it either when the illegal act is threatened, but has not been actually done, or when it has been done, and seemingly is intended to be repeated." But it is said that without disputing that case the plaintiffs cannot have an injunction, because the act complained of was not an interference with any right of property, but only with public rights. Is that a good ground of objection? I think not. I think that the Attorney-General, acting on behalf of the public, must have in respect of public rights at least as large a remedy as a private person has in respect of his private rights. I find that judges of first instance, and also the Court of Appeal, have in cases of this kind assumed that as a matter of course the Attorney-General could sue, although it is true that the objection now taken was not raised before them. Such cases were *Attorney-General* v. *Hatch*, *Attorney-General* v. *Rufford & Co.*, and *Attorney-General* v. *London and North-Western Railway Co.* In the last case the offence restrained by injunction was an indictable one and not subject to special jurisdiction, but I do not think the case differs in principle. That being so, it is not for me as a judge of first instance to say that these decisions were erroneous. But apart from their authority, I am of opinion that there is nothing to prevent the Attorney-General suing.

Other considerations assist me in coming to this conclusion. If there were no remedy for offences against the bye-laws other than that conferred by the statute, the local authority would in many cases become impotent. Not only may a penalty be imposed by the bye-laws, but under section 158 a person may be ordered to pull down and remove buildings erected contrary to the bye-laws. But this can only be done after the local authority has signified its disapproval within one month of the delivery of the plan. And, consequently, if they are inert the only remedy would be to recover the penalty. Again, there are many things which may be required by the bye-laws for the breach of which pulling down or removing the building would be an inappropriate remedy. Thus water-closets may be required to be sufficiently flushed with water, and rooms properly ventilated, but it is quite inadequate to say that the local authorities may pull down the house if details of this kind are not carried out. That cannot have been the intention of the Act. The object of the Public Health Acts is to secure the observance of the rules necessary for public health, and the Attorney-General ought to be able to have them enforced.

*Objection overruled.*

The case was then heard, and his lordship having come to the conclusion that the defendants and others had intended to make the new street into Compton-street of a width less than that required, granted an injunction as claimed.

Solicitors, *J. B. R. Conder*, for *Bamford, Son, & Wilson*, Ashborne; *Taylor, Hoare, & Pilcher*, for *Wise & Cook*, Ashborne.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — Nov. 7.

WILLIAMS (*Appellant*) v. BLAKEWAY (*Respondent*). (a.)

*Election law — Registration — Municipal franchise — Occupation list — Objection — Qualifying premises acquired during the qualifying period—"Promotion to an office"—Appointment of Wesleyan minister by the conference of the connexion—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 33 (1).

*The appellant, a Wesleyan minister, was, in August,* 1901, *appointed by the Wesleyan Conference to the ministry of the Gloucester circuit in succession to a previous Wesleyan minister, and the appellant in August,* 1901, *entered as such minister into the occupation of the manse, in the city of Gloucester, vacated by the outgoing minister. The manse, which was vested in trustees, was occupied by each successive minister, rent free, but the minister in occupation was personally liable for the rates. The appellant's name was entered in Division III. of the occupiers' list of voters of the city of Gloucester in respect of the said manse as a dwelling-house, and was objected to, on the ground that the appellant had not in fact occupied the qualifying premises during the whole of the qualifying period. The appellant contended that he had succeeded to the qualifying property by "promotion to an office"—namely, the ministry of the Gloucester circuit, and that the occupancy and rating of the preceding minister was equivalent to the occupancy and rating of himself within section* 33, *sub-section* 1, *of the Municipal Corporations Act*, 1882. *Save as aforesaid, no evidence was produced at the revision court of the terms of the deed of trust under which the qualifying property (the manse) was held. The revising barrister on the authority of* Foster v. Mulhall *held that the appointment to the ministry of the Gloucester circuit was not "promotion to an office" within the section, and accordingly allowed the objection and expunged the appellant's name. The appellant duly appealed, and the revising barrister, in stating a case, appended to the case as an exhibit the deed of trust under which the qualifying property was held, and added a note that this document was not produced in evidence at the revision court.*

*Held that the court could not regard anything which was not in evidence before the revising barrister at the revision court; and that upon the evidence before him there was nothing to show that he had come to a wrong conclusion, and consequently that his decision must be affirmed.*

Foster v. Mulhall (10 *Ir. C. L. Rep.* 532) *discussed and explained.*

This was an appeal by the Rev. John Williams, a minister of the Wesleyan Methodist Connexion, from the decision of the revising barrister for the city of Gloucester.

The case stated that at a court held by the revising barrister on the 17th of September, 1902, for revising the lists of Parliamentary voters and burgesses for the city of Gloucester the name of the appellant appeared in Division III. of the occupiers' list in respect of the occupation of a dwelling-house, 6, Falkner-street, in the city of Gloucester, and that the entry of the appellant's name had been duly objected to on the ground that he had not occupied the dwelling-house in respect of which his name was entered for twelve months immediately preceding the 15th of July, 1902.

The appellant is a minister of the Wesleyan Metho-

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

dist Connexion. Prior to August, 1901, he was a minister of the Teignmouth Circuit, and resided at Teignmouth, Devon. His appointment as a minister of that circuit expired by effluxion of time at the end of August, 1901, on the expiration of three years from the date of his appointment thereto.

The appointment of Wesleyan minister is made nominally for one year, but in practice it is renewed from year to year so as to extend to three years and no longer. The appointments are made by the conference of the connexion at their annual meeting in August.

On or about the 5th of August, 1901, the appellant was appointed by the conference to the Gloucester Circuit in succession to the Rev. E. H. Simpson, whose appointment on the Gloucester Circuit expired by effluxion of time at the end of that month.

On or about the last day of August, 1901, the appellant entered upon the occupation of the qualifying premises in Gloucester, which is the manse provided by the connexion for the accommodation of one of the ministers of that circuit.

The Rev. E. H. Simpson left the house about three days before the appellant's arrival, but this was as a matter of convenience. He was entitled to remain until the appellant's arrival.

The manse, which is vested in trustees, is occupied by the minister, rent free, and is partially furnished by the circuit. The minister, as occupier, is liable for the rates. He is entitled on appointment to a fixed stipend from the circuit, which may be supplemented by further allowances varying according to circumstances.

It was contended before the revising barrister, on behalf of the appellant, that he had succeeded to the qualifying property by "promotion to an office"—namely, the ministry of the Gloucester Circuit; and that the occupancy and rating of his predecessor, Simpson, was equivalent to the occupation and rating of himself under section 33 of the Municipal Corporations Act, 1882 (45 & 46 Vict c. 50).

The revising barrister held that the appointment to the ministry of the Gloucester Circuit was not "promotion to an office" within the section: see *Foster* v. *Mulhall*, 10 Irish Com. Law Rep. 532, cited in Rogers on Elections (16th ed.), vol. 1, p. 12, and accordingly allowed the objection and expunged the entry of the appellant's name in the list.

The appellant gave due notice of appeal, and as the objector declined to be made respondent to the appeal, the revising barrister named the town clerk as respondent.

Appended to the case as an exhibit was a print of the Wesleyan Methodist chapel model deed under the trusts of which the qualifying premises, No. 6, Falkner-street, Gloucester, were now held by the appellant, with a note by the revising barrister that this document was not produced at the registration court, although he expressly desired to be informed of the terms of the trusts under which the manse was held. He could not say, therefore, how far this and other documents which the appellant intended to produce on the appeal might have affected his decision.

*Roskill*, for the appellant.—The sole question raised by the case is whether the appellant can claim by right of succession to his predecessor in the "office" of Wesleyan minister, under the Municipal Corporations Act, 1882, section 33 (1) of which provides that "where a person succeeds to qualifying property by . . . promotion to a benefice or office, then for the purpose of qualification the occupancy of the property by a predecessor in title and the rating of the predecessor in respect thereof shall be equivalent to the occupancy and rating of the successor." There is no case bearing at all on the question but that of *Foster* v. *Mulhall*, 10 Ir. C L. Rep. 532, and in that case the court expressly said it offered no opinion on the question whether the position held by a Wesleyan minister was "an office" within the meaning of the section, and all it decided was that on the facts the appellant had not proved that the qualifying property there had come to him by virtue of his appointment as minister. [Lord ALVERSTONE, L.C.J.—We all agree that *Foster* v. *Mulhall* does not establish the proposition that an appointment of a Wesleyan minister is not a promotion to an office within the statute; and you may take it that the qualifying premises in the present case came to the appellant by virtue of his appointment to the ministry of the Gloucester circuit; but can you cite us any authority as to the meaning of the word "office" in the section?] I am unable to do so. It would seem from some text-books, however, that the office must be a freehold one; but that is certainly not the case, and if it were, then I could not contend for a moment that this is an appointment to a freehold office. I desire to argue that, having regard to the deed under which the manse here is held by a minister of the connexion and having regard to the Wesleyan chapel model deed—which evidence was not before the revising barrister—this court would be entitled to hold that the appointment by the conference is a promotion to an office, which would by the statute enable the minister to claim occupancy for the previous part of the twelve months by reason of his succession. [Lord ALVERSTONE, L.C.J.—We cannot decide that point here. All we can do is to decide whether on the evidence before the revising barrister he was right in holding as he did. If you desire to rely on evidence not before him, you must raise the point again in another case.]

The respondent was not represented.

Lord ALVERSTONE, L.C.J.—The question raised is of importance, as we are told it affects a very great number of Wesleyan ministers all over the country, who hitherto have lost their vote for the year because the appointments on the circuit take place in August, so that they are unable to claim residence for twelve months preceding the 15th of July, on which date the lists are made up. I do not wish to be thought to decide any question that is not really raised by the facts before us. The sole question here is simply, Was the revising barrister right in this instance on the evidence before him in holding that the appellant had not proved that the appointment of Wesleyan minister was a "promotion to an office" within the meaning of the statute? Certainly, even if the appointment was a "promotion," it must be established on other evidence than had been offered, that the position of Wesleyan minister was "an office" within the meaning of the statute. If a man made his claim without having the proper materials to support it, he could not, on appeal, ask the court to weigh fresh evidence which he did not bring forward before the revising barrister. There is nothing in the evidence that was offered to the revising barrister that would enable us to say that the revising barrister was wrong, and that the appellant's name should not have been removed.

WILLS and CHANNELL, JJ., gave judgment to the same effect.

*Appeal dismissed.*

Solicitors for the appellant, *Monro, Slack, & Atkinson*.

## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — July 14, 15, 1902.

ATTORNEY-GENERAL *v.* MAYOR, &c., OF BOURNEMOUTH. (*a.*)

*Tramway—"Substantial commencement" of works—Notice in* London Gazette*—"Conclusive evidence"—Tramways Act,* 1870 (33 & 34 *Vict. c.* 78), *s.* 18.

*A notice purporting to be published by the Board of Trade in the* London Gazette *to the effect that the works of a tramway have not been substantially commenced, though made conclusive evidence of such non-commencement by section* 18 *of the Tramways Act,* 1870, *is not the only admissible evidence of such non-commencement.*

*"Substantial commencement" in the same section means the execution of physical works. Such preliminary steps as the buying of land for the erection of buildings and the entering into contracts for the supply of machinery and cars do not amount to a substantial commencement within the section.*

In re Dudley and Kingswinford Tramways, 42 *W. R.* 126, *disapproved.*

*Decision of* Swinfen Eady, J., *reversed.*

This was an appeal from a decision of Swinfen Eady, J.

The facts were as follows:

On the 6th of August, 1900, two Acts of Parliament were passed relating to tramways within and near the borough of Bournemouth. The one Act confirmed a provisional order empowering the corporation of Bournemouth to construct (among others) a tramway called Number 6, and the other Act empowered the Poole and District Electric Traction Co. to construct a tramway on the same site. The company's Act, however, provided that the company should not commence to construct its tramway till the 1st of August, 1902, and should not construct it at all if the corporation had in the meantime constructed their tramway. The corporation's provisional order incorporated the Tramways Act, 1870, section 18 of which is as follows: "If the promoters empowered by any provisional order under this Act to make a tramway do not, within two years from the date of the same or within any shorter period prescribed therein, complete the tramway and open it for public traffic, or if within one year from the date of the provisional order, or within such shorter time as is prescribed in the same, the works are not substantially commenced; or if the works having been commenced are suspended without a reason sufficient in the opinion of the Board of Trade to warrant such suspension; the powers given by the provisional order to the promoters for constructing such tramway, executing such works, or otherwise in relation thereto shall cease to be exercised, except as to so much of the same as is then completed, unless the time be prolonged by the special direction of the Board of Trade . . . A notice purporting to be published by the Board of Trade in the *London Gazette* to the effect that a tramway has not been completed and opened for public traffic, or that the works have not been substantially commenced, or that they have been suspended without sufficient reason, shall be conclusive evidence for the purposes of this section of such non-completion, non-commencement, or suspension." There had in this case been no prolongation of the time for commencement by the Board of Trade, though after the commencement of these proceedings the corporation had applied for a prolongation of the time for completion and opening, which the board had granted without prejudice to the litigation. The corporation's provisional order also contained a provision that the tramway should not be opened for public traffic till it had been inspected and certified by the Board of Trade.

These proceedings were an information by the Attorney-General on the relation of the company, and an action by the company claiming an injunction to restrain the corporation from proceeding with the construction of their tramway on the ground that their powers had expired, since they had not substantially commenced the tramway within one year. The corporation claimed that they had substantially commenced the tramway within that period. It was admitted that no works had been commenced on the actual line of tramway, and no roads had been broken up for the purpose, nor had any buildings in connection with the tramway been commenced, but the corporation, in particulars delivered by them, adduced as acts amounting to a "substantial commencement" certain steps towards the construction of the tramway taken by them within the year. These were, the purchase of a leasehold piece of ground as a site for a generating station and other buildings; two contracts for the supply of dynamos and machinery and tramcars, into which the corporation had entered with substantial firms on the 18th of April and the 16th of May, 1901, which contracts provided that the firms should put the work in hand at once, and making of plans of buildings, and the taking steps to procure a loan. It was also contended on behalf of the corporation that the notice of the board in the *Gazette* was not only conclusive evidence, but the only admissible evidence, of non-commencement.

On this point Swinfen Eady, J., said he should have followed the decision to that effect of Kekewich, J., in *In re Dudley and Kingswinford Tramways*, 42 W. R. 126, and he further held that the works had been substantially commenced by reason of the above-mentioned steps taken by the corporation.

The plaintiffs appealed.

*Warmington, K.C.*, and *R. J. Parker*, for the appellants.—"Works" means works of a tramway; actual physical work is necessary. Here the roads were not broken up nor the lines laid, and the Board of Trade notice in the *Gazette* is not made the only admissible evidence by the Act.

They referred to the Tramways Act, 1870, ss. 6 (2) and 18, and Schedule B., Part II., and to the Lands Clauses Act, 1845, s. 2.

*Vernon Smith, K.C.*, and *Church*, for the respondents.—The intention of the Act was to make the Board of Trade arbiter in regard to matter under section 18, and the jurisdiction of the High Court is excluded. [They referred to sections 8, 16, 20, 41, 42, and 33 of the Tramways Act, 1870.] As to the second point, the works authorized were substantially begun. Actual physical and manual work is not necessary. The Act cannot mean that we must take up the roads months before it is necessary. It is most in the public interest and convenience to break up the roads last. The Act says "substantially" commenced, not "actually."

*R. J. Parker* in reply.—If the dynamos, &c., were "works," they ought to have been obtained within the year, which they were not. But they are quite subsidiary matters.

VAUGHAN WILLIAMS, L.J.—I am sorry to deliver this judgment, and would use any means of escape

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

from it which I could discover, for the actual result does not, I think, accord with the true needs of the case; but I cannot see my way to construe the Act in any other way. The ground on which it is sought to restrain the corporation from proceeding with their tramway is based on section 18 of the Tramways Act, 1870. [His lordship read it, and continued:] It is said that the works authorized by the provisional order were not substantially commenced within the year, which time it is admitted, was not extended by the Board of Trade, and that it is therefore *ultra vires* of the corporation to continue the works. The first answer made to this is, that the only way of proving the non-commencement of the works is by the production of a notice published by the Board of Trade in the *London Gazette* to the effect that they have not substantially been commenced, and there has been no such notice. It is said that the words "conclusive evidence" in section 18 mean that the notice is to be the only evidence. I cannot agree in this. On this point Swinfen Eady, J., has not given any judgment upon his own reasoning, but says he would have followed the decision of Kekewich, J., in *In re Dudley and Kingswinford Tramways*, to the effect that the notice in the *Gazette* was the only evidence which the court would receive. We have, however, to determine the question, and I think it is not right to construe "conclusive evidence" as meaning the only evidence. It is said that if you look at the alternatives at the beginning of section 18 you will find that the board is to determine whether the events have occurred, and that therefore the evidence of their determination must be the only evidence. But in fact the board is only made arbiter, if at all, in the third case, that of suspension without some reason that satisfies the board; there is no such provision as to the other alternatives, and I think the decision of Kekewich, J., cannot be supported.

We have, therefore, to decide the other question, whether the works were substantially commenced within one year after the provisional order. Swinfen Eady, J., has held that they were, by reason of the meaning he places on the word "works" in the Act, which word he thinks is used in such sense as to include not only physical works actually executed, but the taking of any substantial step towards carrying out the undertaking—*e.g.*, by giving orders for the execution of certain parts of the work and the buying of land for a generating station. I cannot agree to this. I think "substantial commencement" means the execution of physical works. Here no actual evidence was given, but particulars of the "substantial commencement" were asked for by the plaintiffs, among which are mentioned the contract of the 18th of April for the supply of dynamos, and that of the 16th of May for the supply of electric cars. It is admitted that no works were actually executed, nothing actually done as part of the works before the year had run out, but it is said that the giving of the orders in these two contracts amounts to a commencement. I cannot persuade myself that this is so. Giving an order is, after all, only an attempt to get something done by someone else; it is no more than evidence of an intention to execute works, and it would be doing violence to language to say that it is an actual and substantial commencement. Therefore the second alternative in section 18 comes into operation, and from that time the powers of the provisional order ceased, and the time was not prolonged by the board. There has since been made to the board an application to extend the time for completion, but this is based on the hypothesis that the time for commencement has been observed, and if Swinfen Eady, J., was wrong, the order for extension, made without prejudice to this litigation, goes for nothing, and subsequent completion cannot alter the case. Therefore there is nothing for it but to reverse the decision of Swinfen Eady, J., on the plain ground that there has been no substantial commencement within the year. I should have been glad if the Board of Trade could have put the matter right, and rectified what seems a mere slip, and it is said that the corporation, which probably knows best the wants of the town, cannot carry out works on which it has probably incurred considerable liabilities. Without, however, actually deciding the point, I cannot see how the board can help the corporation. The appeal must be allowed, with costs, and the order for an injunction must go, with the necessary declaration.

ROMER, L.J.—I agree. It is said that the allowing of the appeal will inflict great hardship on the respondents, but we cannot allow this to affect our judgment, and, indeed, provisions like those of section 18 ought to be strictly enforced in the public interest. The short question is, Have the corporation substantially begun works within one year? They say, in the first place, that section 18 deals with the powers of promoters ceasing in three cases, and that with reference to these three cases the notice by the Board of Trade in the *Gazette* is made conclusive evidence, and that this, on the construction of the whole Act, means that it is the only admissible evidence. In other words, it is said that in determining whether the powers of the promoters have ceased the opinion of the board alone is to be looked at, and the High Court has no jurisdiction to consider the question. I think this contention is wrong. If Parliament had so intended it could have said this in clear language, and there is nothing in the Act providing for a determination of the question by the board. In the absence of express provision you can only infer it if it is a necessary inference from the rest of the Act, and I think it is not so here. It is certainly not to be inferred from the fact that in other parts of the Act special matters are confided to the decision of the board alone; on the contrary, the fact that such express provisions are made is an argument for the view that the board's decision was not intended to be final in other cases. But apart from this, the argument amounts to the insertion of the words "in the opinion of the board" in the first two alternatives of section 18 as well as in the third. But it is an almost inevitable inference that Parliament did not intend to imply those words in the first two alternatives, because they are really in contrast to the third. The first alternative also refers to the completion of the tramway, but the section goes on "and opened for public traffic." Here the provisional order said that the tramway was not to be opened for public traffic till inspected and certified fit by the Board of Trade; and this duty was thus thrown on the board by a special Act. As to the second question, the provision that the works must be substantially commenced within the year follows immediately after the provision as to completion and opening, and secures another provision in the public interest against delay on the part of promoters. Light is also thrown on the meaning of "works" by the following provision, that the power to construct or execute the works shall cease—which I think refers to works substantially commenced. The words must have their ordinary meaning given to them, and point to physical acts of the corporation or its agents. This interpretation is also supported by the definition of "works" in section 2 of the Lands Clauses Act, 1845, as works authorized to be executed. All these considerations point to the words being used in their popular and natural sense. The corporation say

they have substantially commenced the works by buying some leasehold land on which they have done nothing. This cannot be a commencement. Besides this there are only the two contracts for the delivery of chattels or perhaps for the construction of works. Nothing has been done under these contracts, they have merely been entered into. The corporation have not even given a written order to the contractors to commence the work. Their contention wholly fails, and the appeal must be allowed, however hard it may be on them.

STIRLING, L.J.—I am of the same opinion, and have little to add. I think to satisfy section 18 some substantial portion of the works must physically be set about. Here there were only negotiations, plans, estimates, contracts, and the purchase of leaseholds, and these are not enough. And it must be observed, as to the possibility of remedial action by the Board of Trade, that the time for making applications is fixed by the board's own rules made under the Act, which have the force of an Act.

*Appeal allowed.*

Solicitor for appellants, *S. Morse.*

Solicitors for respondents, *Lovell, Son, & Pitfield*, for *J. & W. H. Druitt*, Bournemouth.

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## High Court of Justice.

Chan. Div. } March 18, 20, 1902.
Byrne, J. }

WALTER *v.* ASHTON. (*a.*)

*Misrepresentation—Unauthorized use of name of another—Untrue representation that another person is connected in business with person making representation—Consequent liability of person about whom representation is made—Probability of injury—Interim injunction.*

*An injunction will be granted to restrain a person untruly representing that another is his principal, or partner, or connected with him in business when there is reasonable probability of injury arising to that other from the misrepresentation.*

*The defendant, by circulars, advertisements, and the general conduct of his business as a dealer in cycles, was held by the court to have intended the public to believe that the proprietors of a newspaper were either his principals or responsibly connected with him in the sale of his cycles. There was a reasonable probability of the proprietors of the newspaper being exposed to litigation, and perhaps made responsible, if they had not taken steps to disconnect themselves from the defendant.*

*Held, that the proprietors were entitled to an interim injunction to restrain the defendant until the trial or further order from holding himself out in this manner.*

Motion.

This was a motion in an action brought on behalf of the proprietors of the *Times* newspaper against H. A. Ashton, for an injunction to restrain the defendant, his manager, servants, and agents, "from publishing advertisements, and issuing or distributing advertisements, circulars, or letters containing statements asserting or suggesting that cycles offered by him for sale are in fact offered for sale by the proprietors of the *Times* newspaper, or representing that he is carrying on business as a department of, or in connection with the *Times* newspaper, or in any way holding out the *Times* newspaper, or the proprietors thereof, to be the owners of his business"; and the present application was for an interim injunction to the same effect.

The facts relied on were as follows:

Some time previously the *Times* newspaper had published an edition of the Encyclopædia Britannica, the Century Dictionary, and other works, and had sent out circulars with regard to their sale on thin paper printed in violet ink.

These circulars were headed "The *Times* Reprint of the Encyclopædia Britannica," and showed a system of deferred payments for the purchase of the work; and the words "*The Times*" were in the same old English type as that of the heading of the *Times* newspaper.

With these circulars were sent out green envelopes for replies, addressed, "The Manager, The *Times*, Printing House-square, London, E.C."

The defendant Ashton had, as it appeared, before the action devised a scheme for selling bicycles by instalments in a similar way to that in which the *Times* sold the Encyclopædia Britannica.

Subsequently he proposed to sell a fresh kind of cycle, by the name of "Times" bicycles, having upon them a clock face similar to that which appears in the *Times* newspaper over its theatrical advertisements. It was also brought to the knowledge of the manager of the *Times* newspaper that circulars with return envelopes similar in colour and appearance to those used by the *Times* newspaper had been issued. They were headed "59 and 60, Chancery-lane, W.C.," and stated that cheques were to be made in favour of "The Manager," and the statements in the circular were signed "The Manager." The name of the vendor was not given. The defendant also advertised his cycles in various newspapers as "The Times" cycles, and had upon the windows of his office at Chancery-lane the words "The Times" and underneath the word "Cycles." He had also at his business a man in uniform with the word "Times" on his cap. There was, however, no direct evidence of anyone having been actually deceived into thinking that the cycles advertised were those of the *Times* newspaper. Two persons, however, wrote to the *Times* newspaper office to inquire about the matter; and from the defendant's evidence it appeared that two or three persons had made similar inquiries at his office. The defendant also gave callers at his office documents with the "Times cycle" and the royal arms upon them, and speaking of "The Times" system of monthly payments.

The defendant denied that he had any intention of holding out to the public that he was connected in the cycle business with the *Times* newspaper.

*Levett, K.C.*, and *MacSwinney*, for the plaintiff.—The plaintiff does not claim the exclusive use of the name "Times" in connection with the sale of cycles, or with any particular method of payment for articles sold, but he is entitled to prevent the defendant holding the *Times* newspaper out as being connected with his business: *Burchell* v. *Wilde*, 48 W. R. 491, [1900] 1 Ch. 551.

They also referred to *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 593, 45 W. R. Dig. 164, and *Slazenger & Sons* v. *Feltham & Co.*, 6 Rep. Pat. Cas. 531.

*Norton, K.C.*, and *Edward Ford*, for the defendant.—The defendant has a right to use the name "Times" in his business. He has not held himself out as a partner with the *Times* newspaper, and the plaintiffs have not shown that they are in any way injured by what he has done. In the case of *Burchell* v. *Wilde* the court refused the injunction asked for, and what the plaintiffs rely on in that case are observations in

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

the judgments upon the rights of partners after a dissolution of the partnership.

They also referred to *Edwards* v. *Dennis*, 30 Ch. D. 454, 34 W. R. Dig. 197; *In re Hudson's Trade-Marks*, 34 W. R. 616, 32 Ch. D. 311; *Hart* v. *Colley*, 38 W. R. 440, 44 Ch. D. 193; *Eno* v. *Dunn*. 15 App. Cas. 252, 38 W. R. Dig. 200; *In re John Batt & Co.'s Trade-Marks*, 46 W R. 459, [1898] 2 Ch. 432; *John Batt & Co.* v. *Dunnett*, [1899] A. C. 428.

*Cur. adv vult.*

March 20.—BYRNE, J.—It is no part of the general business of a newspaper to carry on a cycle business, and this is not a question arising between rivals in trade. It appears to me that to entitle the proprietors of the *Times* to an interlocutory injunction they have to establish, first, that the defendant has represented the proprietors as his principals or partners, or, at least, as responsibly connected with his venture, and, secondly, that there is tangible probability of injury to their property in consequence of such representations. Mere annoyance is not enough, nor libel, not being trade libel; nor is a shadowy possibility of actions being brought enough. The case has to be considered apart from those cases turning on trade competition, infringement of trade rights, trade names, trade-mark, or the ordinary passing off equity. The plaintiff has, I think, founded his notice of motion on the only ground upon which, if at all, he is entitled to succeed upon the present application. [His lordship then stated the facts, and continued:] Taking all these matters together, having regard to the circulars, the advertisements, and the general conduct of the business carried on by the defendant in reference to these cycles, I have come to the conclusion on the present materials that he has intended to induce people to think that the proprietors of the *Times* newspaper are either the vendors, for whom the person in Chancery-lane, whoever he may be, is the manager of the department, or that they are partners, or in some way pecuniarily and with responsibility connected with the sale of these articles. Now how do the authorities stand with reference to this matter? In *Routh* v. *Webster*, 10 Beav. 561, where the defendants had published the name of the plaintiff as a director of the company without his authority, Lord Langdale says, at p. 562: "The name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee; his name was also used at the bankers; and though he may not be subjected to the duties of trustee, yet it is plain that he is exposed to some risk by the unauthorized act of the defendants in using his name. . . . I am of opinion that the plaintiff is entitled to an injunction." That case was referred to with approval by Lord Cairns in the *Prudential Assurance Co.* v. *Knott*, 23 W. R. 249, at p. 250, L. R. 10 Ch. App. 142, at p. 146. The case of *Clark* v. *Freeman*, 11 Beav. 112, when the court declined to restrain the sale of a quack medicine under the name of "Dr. Clark's Consumption Pills" has been frequently observed upon by judges, as by Lord Cairns in *Maxwell* v. *Hogg*, 15 W. R. 467, L. R. 2 Ch. App. 307, at p. 311, and by Lord Selborne who says *In re Riviere's Trade-Mark*, 32 W. R. 390, 26 Ch. D. 48, at p. 53, that *Clark* v. *Freeman* has seldom been cited but to be disapproved of; and Kekewich, J., in a recent case refused to follow it. I will refer to one other case which was cited to me in argument, *Burchell* v. *Wilde*. In that case the plaintiff and defendant had been in partnership and there was a dispute as to the right to use the old firm name; and Lord Lindley, 48 W. R, at p. 493, [1900] 1 Ch., at p. 563, says: "Apart from some express stipulation, a man has no right to hold out his late partner, or, indeed, anyone else, as his partner in business, and, if it could be shown that the defendants were holding out the plaintiffs as their partners, I should think (subject to what the defendants, whom we have not heard, might say) that the plaintiffs would be entitled to an injunction." And again: "As to the goodwill of the business and the use of the firm name, apart from any liability to which they may be exposing the plaintiffs, the defendants are in the right, and to my mind that liability is so shadowy that the appeal might to be dismissed." So that, in considering what kind of liability will justify interference, I think the court will be careful to see that the suggested liability was not something merely visionary or shadowy. The Partnership Act of 1890, s. 14 (1), provides: "Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation, or suffering it to be made" This really is only a carrying out of a branch of the law really turning upon estoppel by conduct. If a man allows his name to be held out to the public as being the person responsible for the transaction in question, he may be held liable in consequence of such holding out, or in consequence of his conduct, because he has not taken steps which he should take to stop the unauthorized use of his name. I apprehend that would apply as well in the case of allowing a name to be held out by a man representing himself as agent or as principal in a particular transaction, all forming part, as I have said, of the general principle of estoppel by acts. Now in the present case the defence is chiefly founded on this. "I," said the defendant, "have done nothing that the law has not entitled me to do"; and, taking the single acts and matters complained of, he says, to begin with: "I am entitled to call my cycle 'Times Cycle' or 'The Times Cycle.' I am entitled to adopt for a mark upon it a similar clock to the clock used by the *Times* newspaper. I am entitled to have the hands of the clock pointing to the same hour." And he is perfectly right in what he says. Again, he says: "I am perfectly entitled to advertise my cycles as 'The Times Cycles' if that is the proper name of the cycle. I am entitled to advertise that payment is according to the *Times* system (meaning the *Times* newspaper system), the system inaugurated by the proprietors of the *Times*." So he is, and, thus taking each item one by one, he says: "I am entitled to do this, that, and the other." But the real question I have to consider is whether by what he has done he has in fact held out the proprietors of the *Times* as either being principals, or responsibly connected with him, or partners with him in the sale of these cycles. I have come to the conclusion that he has made such representation, and I have further come to the conclusion that there is such reasonable probability of the *Times* being exposed to litigation, and possibly, or even probably (though not so probably), being made responsible had they not taken the steps to disconnect their names from the advertisements and circulars that are issued by the defendant, that, although I have hesitated for some time as to whether I ought to do this upon an interlocutory motion, now that the action will come on so quickly for trial, when the matter might finally be disposed of upon further evidence still, I think that it is so clear upon the documents and the facts that I have mentioned that this case really falls within the line of authorities commencing with that which I cited before Lord Langdale, that I propose to grant an injunction.

I may make one other observation. Since the writ was issued the defendant has put out another advertisement in the *Daily Mail* in which he does state fairly conspicuously, though not so conspicuously as I should have wished, that it had no connection with any newspaper whatever. That will not do. The injunction I propose to grant is as follows: To restrain the defendant, his managers, servants, and agents, until the trial or further order, from representing that the cycles offered by him for sale are in fact offered for sale by the proprietors of the *Times* newspaper, or representing that he is carrying on business as a department of, or in connection with, the *Times* newspaper, or in any way holding out the *Times* newspaper, or the proprietors thereof, to be the owners of his business. The costs will be costs in the action.

*Injunction granted.*

Solicitors, *Soames, Edwardes, & Jones; Bate & Co.*

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Chan. Div.
Swinfen Eady, J. } July 29, 1902.

TORBOCK *v.* LORD WESTBURY. (*a.*)

*Company—Special resolution—Amendment thereof—Validity—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

*Notice was given to the shareholders of a company convening an extraordinary general meeting at which a special resolution, of which a copy was given, was to be considered. At the meeting an amendment to the special resolution was proposed and carried. The amendment did not affect the form, but made a slight difference in the terms of the original resolution.*

*Held, that the alteration occasioned by the amendment did not invalidate the resolution.*

This was an action brought by a shareholder in the Northern Nigeria Exploration Syndicate (Limited) to impeach the validity of a special resolution passed by the company, and to restrain the said defendant company from holding a meeting to confirm such resolution, and from giving effect to the same.

The company was incorporated on the 18th of October, 1901.

Article 79 of the articles of association provided that "The directors shall be paid out of the funds of the company by way of annual remuneration such a sum as shall be fixed by the five subscribers hereto in the memorandum which they shall sign appointing the first directors."

On the 24th of February, 1902, notice was given to the shareholders convening an extraordinary general meeting on the 4th of March for the purpose of considering and, if thought fit, passing the following resolution, that the articles of association be altered by substituting the following article for article 79: "Remuneration of directors.—After the shareholders shall have received dividends amounting in the aggregate to 100 per cent., there shall be paid to the directors, as remuneration for their services, a sum equal to 40 per cent. of all further profits of the syndicate, whether such profits arise from the sale of properties and assets of the syndicate or otherwise, and such 40 per cent. of the profits shall be divided amongst the directors in the proportion of 20 per cent. thereof to George Macdonald as managing director and the balance thereof between the remaining directors in such proportion as they may decide."

Previous to this meeting two new directors had been appointed.

At the meeting on the 4th of March, 1902, an amendment to the resolution was proposed and adopted, substituting 30 per cent. for 40 per cent. and 15 per cent. for 20 per cent., and the resolution as so amended was duly passed, the plaintiff being the only shareholder who voted against it.

A notice was subsequently issued convening a general meeting for the 20th of March, 1902, to confirm the special resolution which, as amended, was set forth fully in such notice.

On the 17th of March the plaintiff started this action.

*Martelli*, for the plaintiff.—The resolution is bad on two grounds: it does not disclose to the shareholders that the payment to the managing director was a voluntary payment, and the notice of the 24th of February did not give notice of the resolution actually passed. It is not competent to propose an amendment to a special resolution by section 51 of the Companies Act, 1862.

Counsel referred to the cases of *Kaye* v. *Croydon Tramways Co.*, 46 W. R. 405, [1898] 1 Ch. 358; *Tiessen* v. *Henderson*, 47 W. R. 459, [1899] 1 Ch. 861.

*Eve, K.C.*, and *Coldridge*, for defendants.

*Martelli*, in reply, referred to *In re Trench Tubeless Tyre Co., Bethell* v. *Trench Tubeless Tyre Co.*, 48 W. R. 310, [1900] 1 Ch. 408.

SWINFEN EADY, J.—In my opinion the original notice was sufficient under the Act. The case differs wholly from *Kaye* v. *Croydon Tramways Co.*, where there were in reality two proposals, one for the sale of the undertaking, and the other for the payment of a substantial sum to the directors as compensation for loss of office, and the latter was undisclosed. In the present case full notice was given of what was intended to be done. It is contended, however, that owing to the amendment no notice has been given of the resolution actually passed and that it is therefore invalid as a special resolution. This contention is not well founded. The resolution confirmed at the second meeting must no doubt be in the same form as that passed at the first meeting. In other words, the second meeting can only say aye or no to the resolution passed at the first meeting. But it is not necessary that the resolution passed at the first meeting should be in the identical terms of the resolution specified in the notice. Section 51 requires a special resolution to be passed "at any general meeting of which notice specifying the intention to propose such resolution has been duly given." If, therefore, proper and sufficient notice of the intention to propose the resolution is given, nothing more is required, and the resolution is not invalidated if, owing to an amendment at the first meeting, the resolution passed is not identical with that of the notice.

In the present case full notice was given of the intention to fix the directors' remuneration; and the only difference between the resolutions notified and passed is that the remuneration is reduced from 40 to 30 per cent., the proportion allocated to the general manager being unaltered.

I hold that the alteration did not invalidate the resolution, and I therefore dismiss the action with costs.

Solicitor for plaintiff, *H. H. Sherriff.*

Solicitors for defendants, *Allen & Tennant.*

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(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) June 18, 1902.

BUDD-SCOTT v. DANIELL. (a.)

*Landlord and tenant—Agreement to let—Implied covenant for quiet enjoyment.*

*By a memorandum of agreement not under seal the landlord agreed to let and the tenant agreed to take a furnished house for a year.*

*Held, that, from the mere relation of landlord and tenant, there was an implied undertaking by the landlord for quiet enjoyment.*

Bandy v. Cartwright, 1 *W. R.* 415, 8 *Exch.* 913, *and* Hall v. City of London Brewery Co., 2 *B. & S.* 737, 11 *W. R. C. L. Dig.* 86, *followed.*

Dicta *of* Kay, L.J., *in* Baynes & Co. v. Lloyd & Sons, 44 *W. R.* 328, [1895] 2 *Q. B.* 610, *dissented from.*

*In all such cases as above it is a question of fact whether there has been a breach of such undertaking.*

Appeal from county court.

This was an appeal by the defendant from the decision of his Honour Judge Martineau at the Brighton County Court.

The plaintiff was the owner of a house, No. 25, Brunswick-terrace, Brighton, which he let furnished to the defendant for the period of one year.

The letting of the house was by a memorandum not under seal in which the words used were "the lessor agrees to let." It did not contain the word "demise" or "grant," and there was no express covenant for quiet enjoyment.

It appeared from the evidence that under a private Act applying to Brunswick-terrace the owners were bound to paint the outsides of the houses on certain years. In default the commissioners under the Act were empowered to enter and paint them. The year of the defendant's tenancy was one of those on which the houses were to be painted. This fact, the county court judge found, was forgotten by the plaintiff at the time she let the house to the defendant.

After the defendant had gone into possession of the house, notices were served there, addressed to the plaintiff, requiring the exterior of the house to be painted in accordance with the provisions of the private Act. On these being brought to plaintiff's attention she brought pressure to bear upon the defendant, with the effect that the latter consented to the painting. In consequence of the smell of the paint the defendant was obliged to leave the house for a period of about a fortnight.

At the expiration of his tenancy the plaintiff sued the defendant for dilapidations. The defendant filed a counterclaim for damages for breach by the plaintiff of an implied covenant for quiet enjoyment.

It was contended on behalf of the defendant that a covenant or promise for quiet enjoyment arose out of the relation of landlord and tenant, and that there was no need that any technical words should be used in the agreement in order to imply it. For the plaintiff it was contended that a covenant for quiet enjoyment was implied only when the word "demise" was used.

The learned county court judge, after reviewing the authorities, was of opinion that he was bound by the decision of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons*, 44 W. R. 328, [1895] 2 Q. B. 610, and that as the agreement for tenancy did not contain the word "demise," a covenant for quiet enjoyment could not be implied; and further, that there had therefore been no breach of such a covenant. If, however, the defendant were entitled to recover then he assessed the damages at £15.

The learned judge gave judgment for the plaintiff on the claim and counterclaim.

The defendant now appealed on the ground that the learned judge was wrong in law in holding that there was no implied covenant for quiet enjoyment in the agreement made between the parties, and on which the defendant counterclaimed, and that, upon the evidence, the learned judge should have held that there had been a breach of such implied covenant by the plaintiff and should have entered judgment for the amount at which he provisionally assessed the damages.

*E. E. Humphrys*, for the appellant.—A covenant or contract for quiet enjoyment is implied from the mere fact of the relationship of landlord and tenant. It is not necessary to employ any particular word in the lease to establish such covenant, *Bandy* v. *Cartwright*, 1 W. R. 415, 8 Exch. 913; *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737, 11 W. R. C. L. Dig. 86. The word "let" in a lease not under seal implies a contract for quiet enjoyment against the lessor and all that come in under him by title: see Shep. Touchstone, 165, 167, and per Parke, B., in *Hart* v. *Windsor*, 12 M. & W. 68, at p. 85; *Mostyn* v. *West Mostyn Coal and Iron Co.*, 24 W. R. 401, 1 C. P. D. 145, at p. 152; *Robinson* v. *Kilvert*, 37 W. R. 545, 41 Ch. D. 88, at p. 96; *Baynes & Co.* v. *Lloyd & Sons*, 44 W. R. 328, [1895] 1 Q. B. 820, at pp. 825, 826 It is true that in *Baynes & Co.* v. *Lloyd & Sons* Kay, L.J., expressed the opinion that a covenant for quiet enjoyment can only be implied when the word "demise" is used in the lease, but the authorities (passages from Sheppard's Touchstone and from Bacon's and Viner's Abridgments, and *Nokes's case*, 4 Rep. 80b) cited by that learned judge in support of that view do not really support such proposition. Further, as a matter of fact there has been a breach of this implied covenant for quiet enjoyment, for the learned county court judge has found that owing to the smell arising from the painting of the house the defendant was obliged to leave it for a fortnight, and therefore his quiet enjoyment of the premises was interfered with: see per Fry, L.J., in *Sanderson* v. *Berwick-upon-Tweed Corporation*, 33 W. R. 67, 13 Q. B. D. 547; per Lindley, L.J., in *Robinson* v. *Kilvert*.

*H. Jacobs*, for the respondent.—*Bandy* v. *Cartwright* is not an authority on the point now raised. That case merely decided that where a covenant will be implied in a deed it will be implied in an agreement not under seal. *Hall* v. *City of London Brewery Co.* merely followed that case. Those two cases, together with *Hart* v. *Windsor* and *Mostyn* v. *West Mostyn Coal and Iron Co.*, were dealt with by the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons*, where it was held that the word "demise" is necessary to establish an implied covenant for quiet enjoyment, and that the mere relation of landlord and tenant or the use of the words "agree to let" are not sufficient for that purpose: see also *Messent* v. *Reynolds* 3 C. B. 194, and Platt on Covenants, p. 46. Further, even if a covenant for quiet enjoyment can be implied here there has been no breach thereof. In order to constitute a breach of such a covenant, which is a covenant for title, there must be an actual dispossession adverse to the tenant. That is not shown here. The tenant in this case could have remained in the house while the painting was being done: *Manchester, Sheffield, and Lincolnshire*

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

*Railway* v. *Anderson*, [1898] 2 Ch. 394, 47 W. R. Dig. 168.

*E. E. Humphrys*, in reply, cited *Bailey* v. *De Crespigny*, 17 W. R. 494, L. R. 4 Q. B. 180.

Lord ALVERSTONE, L.C.J.—I cannot say that this case is free from difficulty. The difficulty is, which of the principles put forward by the one side or the other should decide the matter. In many cases, no doubt, the law attributes a certain effect to certain terms, and to produce that effect those terms and no others must be used. It is contended for the plaintiff in this case that the common law has given a particular effect and meaning to the word "demise," and to that word only. On the other hand it is said that the covenant or contract for quiet enjoyment does not result from the use of any special word in the agreement of letting, but from the relation of landlord and tenant itself. Considering the question apart from authority, it seems common sense that when one person agrees to give another possession of his house for a time that ought to imply that the landlord and anyone claiming under him will not during that time dispossess the tenant. This, I say, seems good sense, and, unless driven to do so by authority, I should hesitate to draw any distinction between the contract to be implied from the use of the word "demise" and that to be implied from the use of the words "agrees to let." It is true that in *Baynes & Co* v. *Lloyd & Sons* Kay, L.J., did say: "The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease." Speaking for myself, I should certainly not have come to that conclusion, although it cannot be said that the authorities do not differ on the point. In *Line* v. *Stephenson*, 5 Bing. N. C. 183, it was held that a covenant for quiet enjoyment was implied by the use of the word "demise," but I do not think that Lord Denman intended that his judgment should be based solely on the use of that word. Then there is the case of *Bandy* v. *Cartwright*. Apart from the criticism of Kay, L.J., that the court had assumed that the word "demise" had been used in the letting, I think that the judgment proceeded on the principle that it was the relationship of landlord and tenant which created the covenant or contract for quiet enjoyment. Pollock, C.B., said: "In this case the plaintiff sued upon what he described in his declaration to be a covenant for quiet enjoyment and for good title. It appeared that the defendant had demised the land in question to the plaintiff at a given rent by parol, but there was no actual covenant, and therefore there was only that covenant which the law would imply. We are of opinion that that is not a covenant for good title, but for quiet enjoyment during the term." It may be that the word "demise" was used in the parol agreement, and that it was to this that Pollock, C.B. referred, but there is nothing to this effect in the report. The decision was not understood in this sense in *Hall* v. *City of London Brewery Co.*, because there Cockburn, C. J., said: "We cannot overrule *Bandy* v. *Cartwright*, and it is inconsistent with common sense that, when a man is let into possession for a year, a promise by the lessor for quiet enjoyment against himself and all that claim by title under him should not be implied." With these expressions before me, I must come to the conclusion that the Lord Chief Justice's judgment did not turn on the use of the word "demise," but that it was based on the principle that the condition for quiet enjoyment arose out of the relation of landlord and tenant. In this case, too, all the authorities were cited and considered. Further, he said in giving judgment: "*Bandy* v. *Cartwright* is a direct authority that a contract for quiet enjoyment is implied in a contract of demise, and I think that case is good law." Of course the expression "contract of demise" is much wider than the phrase "a contract in which the word 'demise' is used."

The principle laid down in *Hart* v. *Windsor* is to the same effect. In *Mostyn* v. *West Mostyn Coal and Iron Co.* Lord Esher (then Brett, J.) says: "I think the case of *Line* v. *Stephenson* is an authority to show that where an indenture of lease contains the word 'demise,' then if there be no express covenant for title or quiet enjoyment, there is an implied covenant that the lessor has a good title and that the lessee shall have quiet enjoyment. . . . *Hart* v. *Windsor* is an authority that the word 'let' has the same effect in this respect as the word 'demise' and that any other equivalent word would have the same effect." Again, in *Robinson* v. *Kilvert* Lindley, L.J., says that *Bandy* v. *Cartwright* shows that under a demise by parol there is an implied covenant for quiet enjoyment. As against these authorities there is the *dictum* of Kay, L.J., in the case of *Baynes & Co.* v. *Lloyd & Sons* that the weight of authority is in favour of the proposition that a covenant for quiet enjoyment is only implied from the use of the word "demise" I am not of opinion that we are bound to treat the case of *Baynes & Co.* v. *Lloyd & Sons* as an authority binding upon us on this point, as the county court judge has done. It seems to me that there are authorities to the contrary of the view expressed by Kay, L.J., and I myself come to the conclusion that, where there is a letting, a covenant or contract for quiet enjoyment arises out of the relationship of landlord and tenant, and does not depend on the use in the letting of the word "demise." That, I think, is the true basis on which this case is to be decided.

As to the other point—namely, whether or not there has been any breach of the implied covenant—I entertain some doubt. The finding of the county court judge is that the plaintiff, being under a statutory obligation to paint the house subject to the right of the commissioners under the private Act to do so if she made default, insisted on doing the painting herself, and thus by her act rendered it necessary for the defendant and her family to leave the house for a fortnight. I think this must be taken as a finding that the act of the plaintiff deprived the defendant of the possession of the house for that term. That being so, I am of opinion that the statutory duty which was in existence before the plaintiff let her house is no defence to the counterclaim. The plaintiff when letting could have made it a condition that she was to be permitted to do the painting during the tenancy. I think, therefore, that the defendant is entitled to judgment for the £15 at which the county court judge assessed the damages. I think I should add, as to the first point, that it is clear that the learned judge would have decided it as we are doing had he not felt himself bound by the opinion of the Court of Appeal as expressed in the judgment of Kay, L.J., in *Baynes & Co.* v. *Lloyd & Sons*.

DARLING, J.—I am of the same opinion. There is no doubt that the use of the word "demise" in a lease implies a covenant for quiet enjoyment, but I think the authorities enable us to hold that the use of any other word equivalent to "demise" has the same effect. It seems not to be questioned that, apart from 8 & 9 Vict. c. 106, a similar covenant would be implied by the use of the word "grant." The use either of "let" or "grant," it is expressly stated in Shep. Touchstone, implied a covenant for quiet enjoyment. It is clear that nothing more

passes under a lease using the word "demise" or "grant" than would pass under one using the words "agree to let"; but it is contended that, while either of the former would imply a covenant for quiet enjoyment, the latter would not. No reason is given for the distinction, but there is said to be authority for it, and the words of Kay, L.J., in *Baynes & Co.* v. *Lloyd & Sons* are relied upon. I do not think that the authorities the Lord Justice refers to in support of his observations really prove his proposition or are inconsistent with the view that the covenant may be implied from the mere relationship of landlord and tenant. He says: "At pp. 271, 272 of the Touchstone it is said that the most usual and proper words for making a lease are 'demise, grant, and to ferme let,' but that other words—'whatsoever word will amount to a grant'—such as 'give, betake, or the like,' will make the lease; but it is not said that there is any implication of a covenant from any of those other words." But the question of covenants was not being dealt with there; implication of covenants is treated of in quite another place. The passage to which Kay, L.J., is here referring occurs in chapter 14 of the Touchstone—at p. 272—and is as follows: "Albeit the most usual and proper making of a lease is by the words 'demise,' 'grant,' and 'to ferme let' "—which I take to mean to securely let—"and with an habendum for life or years, yet a lease may be made by other words; for whatsoever word will amount to a grant will amount to a lease. And therefore a lease may be made by the word 'give,' 'betake,' or the like. The word 'locavit' also is a good word. And the use in the Exchequer is to make leases by the word 'committimus,' which is a good word to make a lease. And if A. do let, grant, and covenant with B. that B. shall enjoy such a piece of land for twenty years; this is a good lease for twenty years. So if A. promise to B. to suffer him to enjoy such a piece of land for twenty years; this is a good lease for twenty years. So if A. license B. to enjoy such a piece of land for twenty years; this is a good lease for twenty years. And therefore it is the common course, if a man make a feoffment in fee, or other estate, upon condition, that if such a thing be, or be not, done at such a time, that the feoffer, &c., shall re-enter, to the end that in this case the feoffer, &c., may have the land and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make a good lease for that time, if the uncertainty of the time (whereunto care must be had) do not make it void." Now, nothing here is said about the implication of covenants, but at the same time nothing is said about any distinction in the operation or effect of leases made in these different ways. The discussion of the implication of covenants occurs before, in chapter 7, where at p. 165 it is said that a covenant for quiet enjoyment is implied by the use of the word "demise" or "grant." But the author nowhere says that the use of the word "let" does not imply such a covenant, while he does say that the word "let" is equally proper to create a lease as the word "demise" or "grant" in the passage which I have just read. So far as the words of the Touchstone go, they are in no way inconsistent with the view that the covenant for quiet enjoyment may be implied from any words establishing the relation of landlord and tenant. Another citation relied upon by Kay, L.J., is from Viner's Abridgment, Covenant F: "Action of covenant lies upon the words 'demise' and 'grant' in an indenture of lease, though there are no words comprehending a warranty in them." This, however, is far from saying that no other words than "demise" or "grant" will imply the covenant. The Lord Justice then cites a passage from Bacon's Abridgment, Covenant B, where it is said that a covenant is implied without other words in the lease by the words "*concessi*" and "*demisi*." But it is not said that no other words will have that effect. It seems to me, therefore, that the *dictum* of Kay, L.J., in *Baynes & Co.* v. *Lloyd & Sons* is not established by the authorities cited in its support, while it is contrary to the decisions in *Bandy* v. *Cartwright* and *Hall* v. *City of London Brewery Co.*, which are direct authorities on the point, and for these reasons I think we should not follow it. Upon the second point I agree, and have nothing to add.

CHANNELL, J.—I am of the same opinion. I must confess that, until I read the judgment of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons*, I always thought it was settled law that from the mere fact of letting there arose some undertaking on the part of the landlord that he should not disturb the tenant's enjoyment. The only possible question was, I thought, as to the extent of the undertaking, which was, I thought, limited to the duration of the lessor's interest.

If limited in this way, the undertaking would seem, as was pointed out by Cockburn, C.J., in *Hall* v. *City of London Brewery Co.*, to be nothing more than that which common sense would import into the act of agreeing to give possession of land for a certain time. Surely if a man lets a house for a year he must be held to undertake that he himself will not interfere with the possession of his tenant during that time, and it seems only reasonable that his undertaking should be held to extend to those claiming under him.

If you attempt to extend that undertaking so as to make the landlord responsible for the acts of a person having a legal right to interfere with the tenant's possession—then you introduce something which is certainly not necessarily implied by the relationship of landlord and tenant. This I understood was settled law as shown by the decisions in *Bandy* v. *Cartwright* and *Hall* v. *City of London Brewery Co.* Then we come to the case of *Baynes & Co.* v. *Lloyd & Sons*. All that case decides is that the covenant, if any, which arose from the letting there would determine on the expiration of the lessor's interest, and that consequently ejectment of the tenant by a person claiming by title paramount would be no breach of it. But while that case is no decision on the present point, yet there is an expression of opinion by Kay, L.J., to the effect that a covenant for quiet enjoyment does not arise out of the mere relationship of landlord and tenant. This opinion is certainly opposed to that held by all writers of text-books up to that time, and also to the decisions in *Bandy* v. *Cartwright* and *Hall* v. *City of London Brewery Co.* Under the circumstances I think we are entitled to decide the matter for ourselves on our own view of the law. I am not surprised that the county court judge felt himself bound by the *dicta* of Kay, L.J., in the judgment of the Court of Appeal in *Baynes & Co* v. *Lloyd & Sons*, but we are not so bound, and we can, I think, follow our own judgment.

On the second point in the case I entertain considerable doubt. It is not at all clear to me that there was such an interference by the plaintiff with the possession of the defendant as to amount to a breach of the undertaking for quiet enjoyment. In all cases, however, this is a question of fact, and in this case I think that in substance the county court judge has found that, if there was an implied under-

taking for quiet enjoyment, there was a breach of that undertaking. Therefore, although the question is, I think, a doubtful one, I agree that it is concluded by the finding of the county court judge.

*Appeal allowed; leave to appeal.*

Solicitors for the defendant, *Rowcliffes, Rawle, & Co.*, for *F. S. Champion, Sons, & Hart*, Brighton.

Solicitors for plaintiff, *Biggs, Roche, & Co.*, for *Buckwell & Berkeley*, Brighton.

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C. C. R.
(Lord Alverstone, L.C.J., and Wright, Bruce, Darling, and Jelf, JJ.) — May 10; June 14, 1902.

REX *v.* PLUMMER. (a.)

*Criminal law—Conspiracy—Joint indictment of three persons—Plea of "Guilty" by one—Verdict of "Not guilty" in respect of the others—Withdrawal of plea before sentence—Jurisdiction to allow withdrawal—Crown Cases Act*, 1848 (11 & 12 *Vict. c.* 78), *s.* 1.

*The appellant and two other persons were jointly charged on an indictment which contained five counts for obtaining money by false pretences, and a sixth count for conspiring to defraud the Thames Conservators. The sixth count did not allege that there were any other or unknown parties to the conspiracy. All three defendants were indicted in one arraignment. All pleaded "Not guilty" to the first five counts. The appellant pleaded "Guilty" to the sixth count; the other defendants pleaded "Not guilty" to the sixth count as well as to the first five counts. The jury returned a verdict of "Not guilty" in favour of the appellant on the first five counts, and the trial of the other defendants proceeded, and the appellant was called as a witness on behalf of the prosecution. The jury found the two defendants "Not guilty" on all the six counts. The appellant thereupon requested to be allowed to withdraw his plea of "Guilty" on the sixth count. The court of quarter sessions held they had no jurisdiction to allow the withdrawal, and convicted him.*

*Held, on appeal, that the judgment passed against the appellant was bad, and could not stand.*

*Held, further, that the court of quarter sessions had jurisdiction to allow the appellant to withdraw the plea of "Guilty" and plead "Not guilty" before passing sentence upon him.*

*Held, further, that a question arising on a plea of "Guilty" is a question arising "on the trial," within the meaning of section* 1 *of the Crown Cases Act*, 1848, *and that, therefore, the Court for Crown Cases had power under section* 2 *of that Act to entertain a case reserving that question, and in the exercise of such power to make such order as justice may require.*

Reg. *v.* Brown, 38 *W. R.* 95, 24 *Q. B. D.* 357, *followed.*

Reg. *v.* Clark, 15 *W. R.* 48, *L. R.* 1 *C. C.* 54, *disapproved.*

Case stated for the opinion of the Court for Crown Cases Reserved by the chairman of the Berkshire Quarter Sessions.

At the Easter quarter sessions held in and for the county of Berks on the 7th of April, 1902, William Fenton, Robert Edwin Plummer, and Charles Wheeler were indicted for obtaining money by false pretences, and for conspiring to defraud the Thames Conservators.

Counts 1 to 5 of the indictment referred to false pretences, and are not material to the present case.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The sixth count was one for conspiring, and the following is a copy of it:

"And the jurors aforesaid upon their oath aforesaid do further present that the said Robert Edwin Plummer, Charles Wheeler and William Fenton on the 1st day of April in the year of our Lord 1893 and on divers days between that day and the 1st day of February, 1902, unlawfully, fraudulently, and deceitfully did amongst themselves conspire, combine, confederate and agree together by divers false pretences and unlawful and subtle ways, means, stratagems and devices to obtain and acquire to themselves of and from the Conservators of the River Thames divers large sums of money of the said Conservators of the River Thames and to cheat and defraud them thereof to the evil example of all others in like manner offending and against the peace of our said Lord the King, his Crown and Dignity."

At the trial the present appellant (Plummer) pleaded guilty to the conspiracy count above set out, and a verdict of not guilty was returned in his favour upon the other counts in the indictment. He was subsequently called as a witness for the prosecution against the prisoners William Fenton and Charles Wheeler.

The other two prisoners, William Fenton and Charles Wheeler, were, by the jury, found not guilty upon the whole indictment.

Immediately after the verdict of not guilty was recorded in favour of the prisoners William Fenton and Charles Wheeler, counsel for the prisoner Robert Edwin Plummer submitted to the court that the prisoner Robert Edwin Plummer could not be convicted and punished, and that no further step could be taken upon the indictment, and claimed that he should be acquitted.

The chairman considered the contention in the last paragraph untenable and so intimated, whereupon counsel for the said Robert Edwin Plummer asked for leave to withdraw the plea of guilty which had already been entered for him and in place thereof to enter a plea of not guilty.

This the chairman considered he had no power to do and refused to grant the application.

On application by counsel for the prisoner Robert Edwin Plummer, the chairman consented to state a case for the opinion of the Court for Crown Cases Reserved as to whether, after the verdict returned in favour of the prisoners William Fenton and Charles Wheeler, any conviction could be established and recorded on the sixth count of the indictment against the prisoner Robert Edwin Plummer, and as to whether the court of quarter sessions had jurisdiction to allow the prisoner Robert Edwin Plummer to withdraw his plea and enter a plea of not guilty. After hearing the said arguments and giving his decision thereon the chairman proceeded to pass sentences upon the said Robert Edwin Plummer, but respited this and admitted the said prisoner to bail pending the hearing of this case.

The points for the consideration of the court were: First, whether in the aforesaid circumstances a conviction could be recorded and judgment passed upon the prisoner Robert Edwin Plummer.

Secondly, whether the court of quarter sessions had jurisdiction to permit the prisoner Robert Edwin Plummer to withdraw his plea and enter a plea of "not guilty."

Thirdly, if the court of quarter sessions was wrong in giving judgment and passing sentence, then what course ought to have been taken.

*Dickens, K.C.* (*A. J. David* with him), for the appellant.—The ruling of the chairman of quarter sessions was wrong, and judgment ought not to have been passed upon the appellant. Where several

persons are tried on a joint indictment for conspiracy, one being convicted and the others acquitted, the conviction of the one is bad and judgment should not be passed upon him: *Harrison* v. *Errington*, Popham 302; *Rex* v *Sudbury*, 12 Mod. 262; 2 Hawk. P. C. (8th ed.), c. 47, pp. 621, 622; *Reg.* v. *Manning*, 32 W. R. 720, 12 Q. B. D. 241; Chitty's Criminal Law, vol. 3, 1141. It is true that where several persons are jointly indicted for conspiracy and one of them is tried alone and convicted sentence may be passed upon him (*Rex* v. *Cooke*, 5 B. & C. 538; *Reg.* v. *Ahearne*, 6 Cox Cr. Cas. 6), but if the others be subsequently tried and acquitted such acquittal avoids the conviction of the first. The result must be the same if the first one instead of being found guilty pleads guilty. It is immaterial whether the conviction follows from a verdict of guilty or a plea of guilty. At the time when the appellant was sentenced it appeared upon the record that the other prisoners had been acquitted, and there was therefore inconsistency on the records upon which the judgment proceeded. The chairman was wrong in holding that he had no jurisdiction to allow the appellant to withdraw his plea of guilty: *Reg.* v. *Sell*, 9 C. & P. 346; *Reg.* v. *Clouter and Heath*, 8 Cox Cr. Cas. 237. For these reasons the conviction ought to be quashed.

Counsel also referred to *Reg.* v. *Brown*, 38 W. R. 95, 24 Q. B. D. 357, as distinguishing *Reg.* v. *Clark*, 15 W. R. 48, L. R. 1 C. C. R. 54; also *Rex* v. *Waddington*, 1 East 143.

*Frampton* (*Biron* with him), appeared for the prosecution, but were not instructed to argue.

*Cur. adv. vult.*

June 14.—WRIGHT, J., delivered the following written judgment: The appellant and two other persons were indicted together upon an indictment which contained five counts, charging the obtaining of money by false pretences, and also a sixth count alleging a conspiracy between the three defendants to defraud the prosecutors. The sixth count did not allege that there was any other or unknown party to the conspiracy. All three defendants were included in one arraignment. All pleaded not guilty to the five counts; the appellant pleaded guilty to the sixth count, the other defendants pleading not guilty. Thereupon it is stated in the case a verdict of not guilty was returned in favour of the appellant on the first five counts, and the trial of the other defendants proceeded, and the appellant was called as a witness against them. The court must infer that the appellant was given in charge to the jury upon the five counts in order that the jury might find a verdict in his favour upon them. The jury acquitted the other defendants upon all the six counts. Counsel for the appellant thereupon claimed that no judgment could be passed upon the appellant in respect of his plea of guilty to the count for conspiracy, inasmuch as the jury by their verdict in favour of the only other alleged parties to the conspiracy had negatived any conspiracy.

So far as we have been able to discover there is no reported precedent which on the facts is exactly in point. There is much authority to the effect that, if the appellant had pleaded not guilty to the charge of conspiracy, and the trial of all three defendants together had proceeded on that charge and had resulted in the conviction of the appellant and the acquittal of the only alleged co-conspirators, no judgment could have been passed on the appellant, because the verdict must have been regarded as repugnant in finding that there was a criminal agreement between the appellant and the others and none between them and him: see *Harrison* v. *Errington*, where upon an indictment of three for riot, two were found not guilty, and one guilty, and upon error brought it was held a void verdict. So in *Rex* v. *Sudbury*, where only two out of three were found guilty of riot the judgment was arrested. So in Chitty's Criminal Law, vol. 3, p. 1141, on the authority of these cases it is stated: "And it is holden, that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid and no judgment can be passed upon him." So in *Reg* v. *Thompson*, 16 Q. B. 832, at p. 844, Lord Campbell, L.C.J.: "Where the indictment is that three defendants conspired, the acquittal of two involves the acquittal of the third." In *Reg.* v. *Manning* this doctrine was perhaps somewhat extended. There two persons were put on their trial together at *nisi prius* for a conspiracy, no other parties being alleged. The jury convicted one with sanction of the judge, although they were unable to agree and were discharged as to the other, and upon a rule moved for a new trial it was held by Lord Coleridge, L.C.J., and Mathew and Stephen, JJ., that there had been a misdirection. The issue, Mathew, J., said, was whether both were guilty, and the jury had not agreed on that issue. It is true that the judgments in *Reg.* v. *Manning* purport to be based mainly on an opinion of the judges in *O'Connell and Others* v. *Reg.*, 11 Cl. & F. 155, which does not seem to us to affect the present question, but the decision itself is in accordance with the previous authorities, which appear to establish that the mere possibility of the one defendant having been acquitted by reason of evidence not being forthcoming or admissible against him, which was forthcoming or admissible against the other who has been tried with him, is not enough to cure the inconsistency apparent on the record. It is equally clear, on the other hand, that if the appellant had been arraigned and tried alone for the conspiracy, and had been convicted, his conviction would have been good at the time, and judgment could have been pronounced against him, although the other persons included in the indictment had not appeared, or were dead, or the trial of them had been postponed: see *Rex* v. *Nichols*, 13 East 412*n*; *Rex* v. *Scott*, 3 Burr. 1262; *Rex* v. *Cooke*; and *Reg.* v. *Ahearne*, in which case, however, it is difficult to see how this question really arose at all since the indictment was not for a mere conspiracy to murder, but for an actual murder, though laid with an averment of conspiracy, as appears from the sentence of death as reported in 2 Ir. C. L. Rep. 381. It is, however, not clearly settled whether in such a case of separate trials a subsequent acquittal of the other would not make void the previous conviction of the appellant. So if in the present case the appellant had been sentenced—as he might have been—immediately upon his pleading guilty to the charge of conspiracy, the sentence would have been right when passed; but it is not certain whether upon the acquittal of the other defendants the sentence upon him must not have been vacated or treated as erroneous, just as judgment against an accessory passed during the attainder of the principal was good during the attainder, but was *ipso facto* avoided when the attainder was removed: 1 Hale P. C. 625; *Lord Sanchar's case*, 9 Rep. 114*a*. In *Rex* v. *Cooke* Littledale, J., suggested that a similar consequence might follow from the acquittal of the alleged co-conspirator at his own separate trial, and the same suggestion is made in the head-note to *Reg.* v. *Ahearne*, though not so distinctly in the judgments. This suggestion is questioned by Mr. Greaves in Russell on Crimes (4th ed.), vol. 3, p. 146, but on grounds which would be to a large extent applicable to the case of a joint trial, and are therefore in-

sufficient upon the authorities which have been cited. The present case may be regarded as an intermediate between the case of a wholly joint trial and the case of separate trials of the alleged co-conspirators. The appellant and his co-defendants were jointly indicted, they were arraigned together, they all pleaded not guilty to the five principal counts, there was only one *venire*, they were all apparently given in charge, as I have pointed out, to the same jury. If error had been brought one record would have been made up, as in *Lord Sanchar's case*, where the plea of guilty by one prisoner and the verdict of the jury as to the other are set out, and the same record would have shown the inconsistent plea and verdict.

We think that under these circumstances the trial ought to be regarded as in substance joint, and that the plea of guilty ought not to be followed by judgment. There is an authority to this effect which, although not a decision, cannot be disregarded; the very case is put in *Robinson* v. *Robinson*, 1 Sw. & Tr. 362, where Cockburn, L.C.J., says: "The case of an indictment against two persons for conspiracy suggested an apparent analogy, and as in such a case a plea of guilty by the one, if followed by the acquittal of the other, would not have supported a judgment of guilty against the delinquent confessing and pleading guilty. . . ." This passage is treated by one of the judges in *Reg.* v. *Manning* as a mere *dictum*, but in truth it was this very analogy which the court in *Robinson* v. *Robinson* had to consider and reject or adopt, and it forms part of a considered judgment of Cockburn, L.C.J., Wightman, J., and Sir C. Cresswell, no mean authorities on criminal law. It seems also to be supported by the language of Lee, C.J., in *Rex* v. *Nichols*, who said: ". . . One being acquitted on record the conviction of his companion on the same record must be directly repugnant and contradictory to the other"; and there is nothing in the context to exclude the application of this language to a conviction on a plea of guilty. Even apart from the conclusion of strict law at which we have arrived we think that the unfettered power which the statute 11 & 12 Vict. c. 78 (the Crown Cases Reserved Act) confers upon this court to make such order as justice may require might in this case be exercised in favour of the appellant, who has been acquitted of the more serious charges alleged in the indictment, and who in pleading guilty to the minor charge may have done so under misapprehensions of various kinds, and who certainly did not plead guilty to any separate offence. And so, before the statute, in *Rex.* v. *Waddington*, it was said that, even where a convicted prisoner waived his motion in arrest of judgment, the court would not pass sentence if they could see that no crime was shown.

A second point raised in the case is whether the court had power to allow the defendant to withdraw his plea of guilty. There cannot be any doubt that the court had such power at any time before, though not after, judgment, see *Reg.* v. *Clouter and Heath* and *Reg.* v. *Sell*, and as we infer that but for the erroneous opinion that there was no such power the withdrawal would have been allowed, this might of itself be a ground for a *venire de novo* (*Reg.* v. *Yeadon*, 10 W. R. 64, 31 L. J. M. C. 70), the indictment being for a misdemeanour. Lastly, it is necessary to observe that, in entertaining this case, notwithstanding that the appellant pleaded guilty, we adopt the construction of the Act which recommended itself to the court in *Reg.* v. *Brown* in preference to the decision in *Reg.* v. *Clark*, where it was held that a question arising upon a plea of guilty was not a question arising upon a trial.

BRUCE, J., read the following judgment: I agree with the judgment of Wright, J., and with the reasons he has given. I do not propose to go through the authorities cited by him, but I wish to make a few observations of my own tending to the same conclusion on somewhat different grounds. I think the statement in Chitty's Criminal Law (2nd ed.), vol. 3, p. 1141, is correct and is fully supported by the authorities. The statement is as follows: "And it is holden that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid and no judgment can be passed upon him." That passage seems to me to apply exactly to the present case. The point of the passage turns upon the circumstance that the defendants are included in the same indictment, and I think it logically follows from the nature of the offence of conspiracy that, when two or more persons are charged in the same indictment with conspiracy with one another, and the indictment contains no charge of their conspiracy with other persons not named in the indictment, then, if all but one of the prisoners named in the indictment are acquitted, no valid judgment can be passed upon the one remaining person, whether he has been convicted by the verdict of a jury or upon his own confession, because, as the record of the conviction can only be made up in the terms of the indictment, it would be inconsistent and contradictory and so bad on the face of it. The gist of the crime of conspiracy is that two or more persons did combine, confederate and agree together to carry out the object of the conspiracy. To quote from Sir William Erle on Trade Unions, p. 31: "With respect to the crimes classed under the term 'conspiracy' the external act of the crime is concert, by which mutual consent to a common purpose is exchanged." Where the indictment charges that A., B., and C. combined, confederated, and agreed together to do a certain thing, and A. and B. are acquitted by the verdict of a jury from the charge, it is inconsistent with that finding that there could have been any combination, confederation, and agreement between them and C., and unless they combined, confederated, and agreed with C., C. cannot be found guilty of the charge. It seems to me it matters not whether the trial of A., B., and C. took place at the same time or not, so long as they are charged upon one indictment. Only one record can be drawn up based upon that indictment; if the proceedings have taken such a course as to negative mutual consent to a common purpose by all but one of the parties who are alleged to have conspired together, no valid record of a conviction against that one can be drawn up. If the record finds that A. and B. are acquitted on a charge of agreeing together with C. the same record cannot without inconsistency find that C. agreed together with A. and B. As to the note in Russell on Crimes, vol. 3, p. 146 (4th ed.), referred to in the judgment of Wright, J., where it is suggested that a verdict of not guilty is not to be taken as establishing the innocence of the person acquitted because the verdict may have been arrived at simply in consequence of the absence of evidence to prove his guilt, I think it is a very dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates. If it is to be applied at all it would apply to persons tried at the same time, and yet it is perfectly clear upon the authorities that if two persons are tried together upon a charge of conspiring with one another, and one is acquitted by the jury and the other convicted, the conviction cannot stand, although it is perfectly clear that the verdict of acquittal may have been obtained simply

upon the ground that there was a failure of evidence to establish the charge against the person who was acquitted.

There is another point in the case. It is clear that the court had power to allow the appellant to withdraw his plea of guilty. The court, no doubt, had a discretion in the matter, and if the court had exercised its discretion it may be that that would be final, and we should have no power to interfere with the exercise of its discretion. But the court, acting upon the erroneous opinion that it had no power to allow the withdrawal of the plea, never did exercise its discretion. If it had exercised its discretion it is quite possible that it might have allowed the withdrawal of the plea, and if it had allowed the withdrawal of the plea of guilty and allowed the appellant to plead not guilty, and he had been tried by the same jury who acquitted the other defendants or by another jury, it is quite possible that he would have been acquitted. The appellant has been deprived of this chance of acquittal by reason of a mistake of the court. I think every intendment should be made in favour of an accused person, and as the court by reason of a mistake as to the extent of its powers did not exercise a discretion which it might have exercised in favour of the appellant, the appellant is, I think, entitled on that ground alone to have the conviction set aside.

DARLING, J.—I agree with the judgment delivered by Wright, J. I only wish to add a word agreeing with what he has said as to the power of this court acting under the statute 11 & 12 Vict. c. 78 to make such order as justice may require.

Lord ALVERSTONE, L.C.J.—As regards the first point my brother Jelf and I had considerable doubts, but we are unable to answer the very able judgments of Wright and Bruce, JJ., and therefore we concur in these judgments because we are not able to give satisfactory reasons for not doing so. In so concurring we place great weight on the fact that it was a joint indictment and a joint trial. Upon the second point we entirely concur without any hesitation, and I entirely agree that *Reg.* v. *Brown* ought to be followed in preference to *Reg.* v. *Clark.*

*Conviction quashed.*

Solicitor for the prosecution, *W. S. Bunting*, Solicitor for the Thames Conservancy.

Solicitors for the defence, *Rooke & Sons*, for *Brain & Brain*, Reading.

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## House of Lords.

From C. A. (England). } Aug. 1, 1902.

NEALE v. GORDON-LENNOX. (*a.*)

*Practice—Compromise—Authority of counsel—Reference of action—Limitation of authority to agree to terms.*

*When restrictions are placed by a client upon his counsel's authority to compromise or to agree to certain terms, and consent is given by counsel, disregarding those restrictions, such consent is not binding on the client, even in the case of the other side being unaware of them.*

*Where, therefore, counsel agreed to a reference, without providing for a special condition imposed by his client and unknown to the opposite party, the order for reference was set aside and a new trial ordered.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

*Decision of the* Court of Appeal, 50 *W. R.* 487, [1902] 1 *K. B.* 838, *reversed.*

Appeal from an order of the Court of Appeal, 50 W. R. 487, [1902] 1 K. B. 838 (Collins, M.R., and Romer and Mathew, L.JJ.).

In this case an application was made to Lord Alverstone, L.C.J., to rescind an order made by him referring, by consent, the action, which was brought to recover damages for slander. Prior to the consent given by counsel to the reference, the plaintiff signed a document giving authority to her counsel to consent to a reference on certain terms mentioned in the Lord Chancellor's judgment. The restrictions on the authority of her counsel were not communicated to the other side.

After the action had been referred, but before the order was drawn up, the plaintiff communicated with her solicitor, that her terms had not been complied with, as counsel had exceeded her authority, and after argument the Lord Chief Justice ordered the case to be restored to the jury list.

The Court of Appeal, however, considered the agreement to refer binding on the client.

*Sir R. Reid, K.C.*, and *R. J. Drake*, for the appellant.

*Isaac, K.C.*, and *Norman Craig*, for the respondent.

Earl of HALSBURY, L.C.—I am of opinion that the judgment of the Court of Appeal ought to be reversed. I do not propose to go through the different cases which have been cited before your lordships, because I think that there is a higher and much more important principle at stake than that which is involved in discussing whether a particular part of a bargain has or has not been within the exact authority given to the learned counsel.

The undisputed facts in this case are these: The learned counsel who was employed for the plaintiff was desirous, for reasons which I appreciate and entirely share, of sparing his client the necessity of wading through by a public trial such a cause of action as is involved in the trial of this cause. I myself was desirous of giving the parties an opportunity, even at this late hour, of preventing that which would, I should think, be injurious and certainly exceedingly painful to them both. But when the parties have resolved that their rights are to be determined by a regular tribunal, and that they will not agree to those courses which others may think more advantageous and more pleasant for them, the court has no authority to insist upon their abstaining from the exercise of their legal rights; they must be permitted to conduct their litigation as they will.

Sir Edward Clarke, being moved by the desire to which I have referred, obtained in writing from his client a distinct consent upon certain terms to refer this cause. It is important to look at the terms with reference to an observation that I will make presently. The terms are these—that the defendant, who was sued upon an allegation of having spoken certain grave and slanderous words of the plaintiff, should publicly at the time of the reference of the cause state by her counsel that no imputation had been made, that no imputation was intended to be made, and that the defendant was satisfied that there was no ground for any imputation upon the plaintiff's moral character. Can anybody doubt that this condition was one of supreme importance to the party who insisted upon it? It seems to me that a great many people would share the view of the plaintiff—I do not care whether they would be right or wrong in that view—but they would say, "If I am to go before a tribunal which has not, as Sir Robert Reid said, the weight and authority of a

public trial, I must have it perfectly understood, before I go before that private tribunal, that every imputation of any sort or kind upon my private character is withdrawn." The learned counsel who has last addressed us suggests that this does not involve the negative. I entirely disagree with him. I think that insisting upon such a preliminary to entering into a reference at all does involve in the most emphatic form the negative: "Unless that is done I absolutely decline to have it tried otherwise than by a public tribunal." And that authority is in in writing. We are not dealing here with an uncertain recollection of conversations. That is a written authority given, and, nevertheless, it is sought to refer the cause by the agreement of counsel without any such public statement, although the court has before it the fact that such was the authority given, and that the preliminary statement about the plaintiff's character was an essential condition of the bargain by which the case was referred.

As I said, I will not go through the cases, because to my mind there is a higher and much more important principle involved. The court is asked for its assistance—and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done—the court is asked for its assistance when it is asked to make and enforce this order that the trial of the cause should not go on; and to suggest to me that a court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard. That condition of things seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle. Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract from being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer—to take it from the jurisdiction of the ordinary tribunal—shall only be on certain terms—to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the court itself, is a proposition to which I certainly will never assent.

That appears to me to be decisive of this case. A great many cases have been quoted, but it seems to me that of every one of those cases it would be true to say that no court has suggested that the court had not the power to do such a thing. It has been said, "If you allow this, everybody will be making similar applications." That is policy. It has been said that in such and such a case the parties were present in court and did not immediately repudiate the transaction, and therefore I must assume that they did consent. Those are all examples of what, in the exercise of its discretion, a court might or might not do because it was or was not satisfied that the circumstances of the case did not justify the undoing of a bargain which had been made. And I can well adopt, and feel that I could safely affirm, every one of the decisions referred to. But when I come to this case, and consider the question of what should be the position of the other party who has acted upon the apparent authority of counsel, there are cases in which the court undoubtedly, in the exercise of its discretion (and that is the observation which I intended to make), might well say, "If it is only a question of money, if it is only a question which costs will rectify, this matter can be put right by the payment of costs." That is one example. Or the position of the other party might have been altered and changed—for instance, I could imagine the case to be so delayed that it made the Statute of Limitations to run so that there was no possibility of trying the action again; and other cases might be put which would raise the question of the other party being put into such a position by the unauthorized act of counsel that one might well say, "This is a case in which one of two innocent parties must suffer; then the person by the act of whose counsel (the counsel whom he is responsible for employing) the difficulty has been created must suffer; the position of the parties has been totally altered by what has taken place, and therefore we cannot interfere." That would be because, upon its general jurisdiction of doing justice between the parties, the court would think that it was not a case in which it ought to interfere. This was in effect the language of Lord Lyndhurst, C.B., in one of he cases which have been quoted, *Wright* v. *Sorely*, 2 Cr. & M. 671.

But, turning to the present case, I can hardly conceive a case in which there is a more important principle involved than a case in which a person is coming to vindicate her character in public. What is the argument on the other side? What injustice is done to the other side by the action being tried now instead of its being tried then? Nobody can suggest any. It is said, "Your counsel made a bargain, and we will not let you off the bargain which he made." It seems to me that it is unarguable to say, if it is a matter of discretion at all, that that is a matter which would prevent the court exercising its discretion. The effort to put this right by an application made to the court was attended with certain costs. The Lord Chief Justice has, with great propriety, I think, said that the party by the act of whose counsel the difficulty has arisen must pay the costs of that proceeding; but now that that is out of the way, what injustice or what impropriety is there in the cause being restored to the list and being tried in due course? I can see none.

On the other hand, to tell me that the person whose character is alleged to have been attacked—I am not saying whether it is true or not—is to be deprived by this unauthorized act of the opportunity of vindicating her character in public, seems so gross an injustice that, upon the general jurisdiction that every court has over its own procedure, this court ought to refuse to allow that injustice to be committed. I therefore move your lordships that this appeal be allowed, and that the order of the Court of Appeal be reversed.

Lord MACNAGHTEN.—I am of the same opinion. I agree entirely in the two propositions which Sir Robert Reid laid down in his reply. I do not think that the court is entirely in the hands of the counsel, and bound to give the seal of its authority to any arrangement that counsel may make when the arrangement itself is not in its opinion a proper one. In the next place, I do not think that counsel has authority to compel his client against his will to refer an action which he desires to try in open court.

Lord BRAMPTON.—I am also of opinion that this decision ought to be reversed, and that the parties ought to be remitted to try the case in the ordinary course. I have rarely heard anything more preposterous than the notion that a suitor can impose no effective veto upon a course proposed to be taken by his or her own counsel which, rightly or wrongly, in

his or her judgment, will operate most prejudicially to his or her interests in an action, and possibly to the ruin of his or her character. I quite agree, therefore, that this appeal ought to be allowed and the case restored to the paper.

Lord LINDLEY.—I am of the same opinion. It appears to me that the Court of Appeal inadvertently, or for some reason which I do not understand, omitted to take into account the duty and function of a court in a matter of this kind. The judgment of the Court of Appeal proceeds upon the ordinary doctrines of agency; but the ordinary doctrines of agency are only half of what is to be considered in a matter of this kind. The real facts are extremely simple. The court which originally made the order made an order referring an action of libel and slander to a gentleman for trial. It made that order by the consent of the parties—it had no jurisdiction and no right to make that order except on the footing that the parties consented. The order is good on the face of it, and the learned judge who made it was perfectly justified in making it, having regard to the evidence before him. But before that order is drawn up one of the parties interested discovers that it is made without her consent at all, and not only without her consent, but in spite of her express instructions. Now, I venture to say that if that had happened in the Chancery Division, with the practice of which I am familiar, it would have been a matter of course for the learned judge who made that order to stay the drawing of it up if he had been informed that the court had inadvertently made the order upon the assumption that the parties were consenting when in fact they did not consent. I cannot imagine that it would cross his mind for a moment that anything ought to be done except to stay the drawing up of that order. Unfortunately the plaintiff here, wishing to get rid of the order, drew it up with the view of getting it set aside; and in form this is an application, not to defer the drawing up of the order, but to have it set aside; but that is mere form—mere machinery. It would be absolutely wrong, to my mind, for the court to allow that order to be acted on and to take effect the moment it is judicially ascertained and brought to its attention that it is an order which the court never would have dreamt of making if the court had known the facts. That point of view seems to me to have been overlooked by the Court of Appeal, and to be fatal to the validity of the order. The order made by the Lord Chief Justice was, as I understand it, that the order for reference should be set aside and the action set down for trial, the costs of the application to set it aside being the defendant's in any event; and that, to my mind, ought to stand. The appeal ought to be allowed with costs—that is to say, the decision appealed from ought to be reversed with costs.

*Order of Court of Appeal reversed, with costs here and in the Court of Appeal.*

Solicitors, *W. H. Jamieson; Lewis & Lewis.*

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From C. A. (England). } Aug. 5, 1902.

JANSON v. DRIEFONTEIN CONSOLIDATED MINES (LIMITED). (a.)

*Insurance—Bullion—Seizure of gold by foreign government—Subsequent declaration of war—Insurance of enemy's property.*

*An insurance by a British subject of an alien's goods effected before war actually breaks out between this country and the foreign government to whom the alien owes allegiance, is a binding agreement which may be enforced on the resumption of peace, and this is so though the goods were seized by the foreign government when hostilities were imminent and for the purpose of carrying on the war.*

*Decision of the* Court of Appeal (49 *W. R.* 660, [1901] 2 *K. B.* 419) *affirmed.*

Appeal from order of Court of Appeal (A. L. Smith, M.R., and Romer, L.J., Vaughan Williams, L.J., dissenting), 49 W. R. 660, [1901] 2 K. B. 419, affirming a judgment of Mathew, J., 48 W. R. 619, [1900] 2 Q. B. 339.

The respondents were a limited company, which for the convenience of carrying on its business was incorporated and registered in the Transvaal according to the laws of the late South African Republic.

The shareholders were almost entirely resident outside the Transvaal and in Europe, and were not subjects of the South African Republic.

Gold bullion, the property of the company, was insured at Lloyds during transit from the Transvaal to the United Kingdom by a policy dated the 1st of August, 1899, which covered the risk of capture and detention.

When the policy was effected, the question of possibility of war between this country and the Transvaal was in the contemplation of the parties.

While in transit the gold was seized on the 2nd of October, 1899, by order of the government of the Transvaal against the will of the respondents when at a railway station in that country.

At that date negotiations were proceeding between this country and the Transvaal which might result in war; and war did eventually break out on the 12th of October.

The respondent company brought this action before the resumption of peace, on the policy to recover the amount of loss insured against. At the trial of the action no objection was raised by the defendants that the war was still continuing, but they contended that it was contrary to public policy to allow the insurance to be enforced.

Mathew, J., gave judgment in favour of the plaintiffs, and his judgment was affirmed by the Court of Appeal. The defendants, the underwriters, appealed.

*Lord Robert Cecil, K.C.*, and *J. A. Hamilton, K.C.*, for the appellants.

*J. Lawson Walton, K.C.*, and *Carver, K.C.* (*Scrutton, K.C.*, with them), for respondents.

Aug. 5.—Earl of HALSBURY, L.C.—In this case the plaintiffs, who had effected a policy at Lloyds on a large quantity of gold which was being consigned from South Africa to London, sue on this policy, dated the 1st of August, 1899, in respect of a seizure by the Transvaal Government of the gold in question on the 2nd of October of the same year. There is no doubt that the loss of the gold is covered by the express words of the policy in question, and

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the defence to the action rests upon the proposition that the policy was an unlawful contract.

It may be that for some purposes, or it might be the subject of debate whether I am correct in assuming what I do assume for the purposes of my judgment, but for the sake of clearness I do assume that the plaintiff company was an alien, a subject of the Transvaal Government. I also assume, though this also might be the subject of debate, that both parties to the contract had in their minds, on the 1st of August, the possibility of war, and even the probability of war, on the 1st of August. The making of the policy and the loss under it both accrued before the breaking out of war, which it is agreed between the parties occurred at 5 o'clock on the 11th of October.

All the judges, with the exception of Vaughan Williams, L.J., have held that the plaintiffs are entitled to recover upon the policy; and if I rightly understood the reasoning of the learned Lord Justice, he thinks the policy was in its inception illegal, and would have been equally illegal even if no war had intervened. He does indeed say that there could have been no claim if war had not occurred; but he is mistaken, since the assumed imminence of the war and the seizure of the Transvaal Government might have occurred even if war had finally been averted.

The difficulty I have in dealing with the learned judge's judgment is that I do not trace any definite proposition as to what interest of the state, or what public injury, is supposed by him to be involved; but at all events, in whatever sense the learned judge uses this phrase, it is upon this general ground alone that he decides against the plaintiffs. Now, as I have said, I understand the judgment of Vaughan Williams, L.J., is put upon the sole ground that this policy is against public policy. He puts it at various parts of his judgment in different ways. He calls it a contravention of public interest, injurious to the country, inconsistent with public duty, repugnant to the interests of the state, and no doubt there are equivalent phrases to be found in many judgments where their application is expounded; but the learned judge, beyond using these phrases, does not go on to explain in what sense they are used, and how and on what principles of law the policy in question was unlawful.

I do not think that the phrase "against public policy" is one which in a court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. If such a principle were admitted, I should very much concur with what Serjeant Marshall said in the first edition of his work on marine insurance a century ago: "To show or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws or suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day; or to apply the same decisions to different, or different decisions to the same circumstances, as his notions of expedience might dictate."

But I do not think the law of England does leave the matter so much at large as seems to be assumed. In treating of various branches of the law learned persons have analyzed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any court can invent a new head of public policy; so a contract for marriage, brokerage, the creation of a perpetuity contract, in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the king's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must decided by a judge; he must find the facts, and he must decide whether the facts so found do or not come within the principles which I have endeavoured to describe—that is, a principle of public policy, recognized by the law, which the suggested contract is infringing, or is supposed to infringe.

If this is the true view, it is not difficult to solve the question whether a contract of insurance made before a war and sought to be enforced in respect of a loss incurred before the war is illegal, either in its inception or at the date when the loss was incurred. However stated it amounts to this—that the thing done must be in its nature an assistance to the public enemy, and if there be no public enemy there can be no aid given to him. Nor is this a mere question of words: the importance of the whole region of public policy involved makes the existence of war actually existing at the time of the creation of the contract or its fulfilment necessary. I will assume for my present purpose (though I think it might well be debated) that the Transvaal Co. did, to quote the language of Vaughan Williams, L.J., "enter into this contract with a view to the imminent war which might or might not break out with Great Britain." I note that the Lord Justice uses the phrase "imminent," and one is disposed to ask, Does that word represent a principle capable of logical application to the propositions ultimately arrived at? It is notorious that for many years the Transvaal Government had been purchasing and storing up arms and ammunition to an enormous extent which could have no other object than war with this country. Were all the contracts made with British subjects illegal? or with foreigners, breaches of neutrality on the part of countries of which such subjects were supplying arms and ammunition to the expected enemy of the British Government? No such principle has ever been affirmed by any lawyer yet, and the principles upon which commercial intercourse must cease between nations at war with each other can only be where the heads of the state have created the state of war.

Bynkershoek propounds the principle: [His lordship read a passage from Quæst. Juris Publici, lib. 1, cap. 22, beginning "Præmisi quem admodum," and ending "prohibendum est."] Throughout this the actual existence of the public enemy is assumed, and it is, as I have said, no mere technical phrase. It must be the enemy made so by the public authority.

In order to produce the effect, either nationally or municipally, it must be a war between the two

nations. No contract or other transactions with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the courts of either is restored.

The earlier writers on international law used to contend that some public declaration of war was essential, and Valin, writing in 1770, does not hesitate to describe Admiral Boscawen's operations in the Mediterranean in 1754 as acts of piracy, because no actual declaration of war had been made; but though it cannot be said that that view is now the existing international understanding, it is essential that the hostility must be the act of the nation which makes the war, and no amount of "strained relations" can affect the subjects of either country in their commercial or other transactions: "Quand le conducteur de l'état, le Souverain, déclare la guerre à un autre Souverain on entend que la nation entière la guerre à une autre nation. Car le Souverain représente la nation, et agit au nom de la société entière, et les nations n'ont à faire, les unes aux autres, qu'en corps dans leur qualité de nations. Ces deux nations sont donc ennemis; et tous les sujets de l'une sont ennemis de tous les sujets de l'autre. L'usage est ici conforme aux principes" (Vattel, liv. 3, c. 5. n. 70).

In *Muller* v. *Thompson*, 2 Camp. 610, Lord Ellenborough held that the voyage to Konigsberg in 1810, though the relations were very strained between this country and Prussia, British ships being actually excluded from Prussia, and it being objected that this was an enemy's port, was lawful inasmuch as no war was declared and no act of hostility committed—we could not be said to be at war, which alone could render the voyage unlawful.

Trading with the king's enemies is, of course, illegal. Undertaking by contract to indemnify the king's enemies against loss inflicted by the king's forces is also illegal. Such things are manifestly unlawful; but the words "king's enemies" are a necessary feature of the last proposition.

Substituting the word "aliens," who may possibly or even probably become the king's enemies—and in this case the loss and the policy were both before there were any persons who could answer to that description—it would be, to my mind, to introduce a new principle into our law to hold that the probability of a war should have the same operation as war itself. It is war and war alone that makes trading illegal.

I think no more striking example of the mischief which might result from so loose a mode of applying the principle of public policy in courts of justice could be found than the example which elicited Serjeant Marshall's protest, which I have quoted above. Lord Mansfield had expressed the opinion that it was good policy to permit an insurance by British underwriters of enemies' goods, because we might obtain more in premiums than we should lose by capture; but this, in my view, was plainly wrong, and Valin, followed by Pothier and Emergon, denounced such insurance, and said that by the English practice one part of the nation was restoring them by insurance what another part took from them by arms.

If it were competent to a court of law to consider the question which Vaughan Williams, L.J., propounds, whether upon principles of public policy, apart from the known and ascertained rule that intercourse between nations at war is forbidden (which, for the reasons I have given, I think it is not), I should answer the question in a different way from that at which he arrives. Instead of a known and ascertained rule which makes it clear whether a contract is unlawful or not each of the contending parties to a contract must look all round the political horizon, and form a judgment whether in some one or more contingencies the fulfilment of it may be injurious to his own country in the event of war; and I note here again the word "imminent" finds a place in the learned judge's question. It seems to me that the hindrance done to the free commercial intercourse between nations would be far more injurious to the interests of both than the injury the learned judge suggests.

But further, as the learned judge himself points out, the question depends, not on what afterwards takes place, but on whether the supposed contract is illegal in its inception. The learned judge says, "The accident of no war occurring would merely prevent any claim arising, but would not affect the legality of the contract or its construction." I think the learned judge is mistaken here, because the Transvaal Government might have seized the gold although no war had taken place; but the proposition is one which discloses the impolitic nature of such a principle. The courts would have to consider whether war was probable or "imminent," and the contract would have to be regarded as illegal, not because war occurred, but because war was likely to occur. I cannot imagine worse public policy than this.

For these reasons I think this appeal should be dismissed, and I only desire to add that the authorities referred to in the argument do not justify the proposition that expected wars render a contract illegal between citizens of the two nations between whom war is anticipated, to lay down such a rule would be to establish an entirely new code for which there is no authority in the law.

I conclude by reading the words of Parke, B., on this subject when advising your lordships' House in *Egerton* v. *Lord Brownlow and Others*, 4 H. L. Cas. 1, at p. 123. "To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only, the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

It is not necessary to go through all the principles of law which may make a contract altogether illegal. As a wagering contract is illegal, so wills creating a perpetuity have no operation in that respect, but it is enough for the purpose I have in hand. They are defined legal principles, known to and absolutely fixed as part of our law, and a judge is called upon to bring the instrument he has to construe to the test—whether it is or is not within such principles; but I do not think he has any jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy. To permit such a discussion to arise it must be a question of some public policy recognized by the law.

To apply what I have said to this case, I do not deny that a judge has a right to consider whether the thing incriminated is an adherence to the king's enemies, or something calculated to assist them; but I do not think we are at liberty to consider whether the contract might be against public policy because one of the parties to it might become an alien enemy afterwards.

For these reasons I move your lordships that this appeal be dismissed and the judgment of the Court of Appeal affirmed with costs.

Lord MACNAGHTEN (read by Lord Davey).—I assume that the corporation, which was plaintiff in the action and is now respondent here, was to all intents and purposes in the position of a natural-born subject of the late South African Republic. I do not think it can be entitled to any exceptional favour or to any peculiar indulgence by reason of the fact, if it be the fact, that the bulk of its shareholders were of European nationality. If all its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien.

I assume, further, that the seizure which has given rise to the claim on which the action is founded was made by the government of the South African Republic in immediate contemplation of war with this country, which that government was then determined at all hazards to bring about unless this country would 'submit to conditions which no sovereign state with a particle of self-respect could entertain.

Notwithstanding these assumptions, and notwithstanding the very able argument of the learned counsel for the appellants, it seems to me to be perfectly clear that there is no defence to the action.

I think the learned counsel for the respondent was right in saying that the law recognizes a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war. In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war. It is not, I think, for private individuals to pronounce upon the foreign relations of their sovereign or their country and to measure their own responsibilities arising out of civil contracts with foreigners by a standard of public policy which they set up for themselves, even though their views may be right in the abstract and might possibly find acceptance with a jury of their countrymen if such a question were within the competence of such a tribunal. Public policy, in my opinion, requires a good citizen in matters of this sort to conform to the rule and guidance of the state. However critical may be the condition of affairs, however imminent war may be, if and so long as the government of the state abstains from declaring or making war or accepting a hostile challenge there is peace—peace with all attendant consequences for all its subjects.

The result, therefore, in the present case is that, however hostile the intentions of the South African Republic may have been at the moment when this gold was seized, the seizure must be treated as a seizure in time of peace between the republic and this country.

The event which happened was within the terms of the policy, and there is no ground on which the underwriters can dispute their liability.

The appeal, I think, must be dismissed with costs.

My noble and learned friend Lord Shand concurs in this opinion.

Lord DAVEY.—I do not think it necessary to state the facts of this case, or to discuss in any detail the numerous cases which were cited in the course of the argument. I should, if I were to do so, be only troubling your lordships with a repetition of what has been said, and I believe will be said, by my noble and learned friends. I will content myself by stating concisely how the case presents itself to my mind and the conclusion to which I have arrived.

I think it must be taken that the respondent company was technically an alien, and became, on the breaking out of hostilities between this country and the South African Republic, an alien enemy. I also assume, in accordance with the decision in *Aubert* v. *Gray*, 3 B. & S. 163, that the loss occasioned by the embargo placed on the goods by the assured's own government might, in ordinary circumstances, be recovered on the policy.

There are three rules which are established in our common law. The first is that the king's subjects cannot trade with an alien enemy—*i.e.*, a person owing allegiance to a government at war with the king, without the king's licence. Every contract made in violation of this principle is void, and goods which are the subject of such a contract are liable to confiscation. The second principle is a corollary from the first, but is also rested on distinct grounds of public policy. It is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government. One of the most effectual instruments of war is the crippling of the enemy's commerce, and to permit such an insurance would be to relieve enemies from the loss they incur by the action of British arms, and would, therefore, be detrimental to the interests of the insurer's own country. The principle equally applies where the insurance is made previously to the commencement of hostilities, and was, therefore, legal in its inception, and whether the person claiming on the policy be a neutral or even a British subject if the insurance be effected on behalf of an alien enemy. The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace.

In the present case the third rule would have constituted a defence in the present action; but the parties, being desirous to obtain a decision on the merits of the case, waived the objection. I have some doubt whether it was competent for the parties to take this course, for it humbly appears to me that, the objection being one based on considerations of public policy affecting the sovereign, his courts should be held bound to take notice of the plaintiff's inability to sue, and I do not think that this observation is inconsistent with *Flindt* v. *Waters*, 15 East, 260. But the point is now happily academic, and I do not desire to make it a ground of judgment.

Your lordships will have observed that, in each of the rules on this subject which I have endeavoured to formulate, the actual commencement of hostilities is made the time when and the occasion on which the rules come into operation. The learned counsel for the appellant has endeavoured to persuade your lordships to extend their operation to a period when the relations between two governments are strained and war is imminent, though the peace has not been broken and negotiations are still continued, on the grounds that the same principles of public policy are as applicable to such a state of things as to a time of actual hostility. In the case before us he says that the seizure of the gold by the government of the South African Republic was in contemplation of and with a view to the eventuality of war. The seizure

of the gold, however, was not in itself an act of hostility against this country.

I am not disposed to agree to such an extension of the law, which it appears to me is unsupported by any authority. Public policy appears to me to be always unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline. On the one hand, such an extension of the law as your lordships are invited to lay down would certainly lead to interference with the lawful contracts and commercial pursuits of the king's subjects. It might conceivably precipitate a state of war which it was the object of statesmen to avert; and I think there is great force in the observation made by Romer, L.J., as to the difficulty of determining the intention of a foreign government, and the embarrassment which might ensue from our courts being obliged to decide a question of that kind as one of fact. I quote the following passage from the judgment of the learned Lord Justice: "I think the intention of a foreign government at any given time ought by these courts, for such a purpose as that which I am now considering, to be treated as conclusively determined by the way in which our government chooses or has chosen to deal with that foreign government, and that where our government has not treated the foreign government as being hostile at a particular time, our courts not to try and ascertain what was then in the minds of the king, president, or responsible ministers, or authorities of the foreign government."

Against these considerations is to be set only the possible but somewhat remote advantage to our government which might accrue from the enforcement of the rule contended for by the appellant.

I prefer to abide by the limits of the law as laid down in the decided cases and by the text-writers, and I therefore think that the decision of Mathew, J., and the Court of Appeal should be affirmed.

Lord BRAMPTON (read by Lord Lindley).—I am of opinion that the respondent is entitled to your lordship's judgment. At first sight the case may appear to be fraught with difficulty; but when the material facts, which are few and simple, are ascertained and understood, the difficulty will, as I think, be found to be more apparent than real.

The plaintiff is a company incorporated under the laws of the South African Republic for the purpose of working gold mines therein. The majority of its shareholders are subjects of the United Kingdom. The company has an office and a committee of management in England, and it was a custom of the company to transmit to this country gold bullion for sale and distribution of the profits among its shareholders. The company clearly must be treated as a subject of the republic, notwithstanding the nationality of its shareholders.

In the early autumn of 1899 the company was, in the ordinary course of business, about to send to the United Kingdom a large amount of such bullion, and on the 1st of August it effected a policy of insurance on its transit from the mines to England with underwriters at Lloyds, the defendant, a British subject, being one. On the 2nd of October the bullion was placed in the mail train at Johannesburg for conveyance to Cape Town en route for its destination. It reached Vereeniging, the frontier station of the republic, in safety; but on its arrival there it was seized and appropriated by the then government of the republic, and became totally lost to the plaintiff. When the bullion was so seized there can be no doubt that the friendly relations between this country and the South African Republic were much strained; but both countries were negotiating for a settlement of their differences, and it was not until the afternoon of the 11th of October that war was declared between them, from which date they continued in open hostility until the end of May, 1902. The action was commenced on the 30th of January, 1900, the crucial issue between the parties being whether war had been commenced, or a state of hostility equivalent to a state of war, so far as the insurance was affected, was in existence between the two countries when the seizure was made on the 2nd of October, 1899. If the answer was in the affirmative, the plaintiff, as a subject of the republic, could not recover upon his policy against the defendant, an English subject and an alien enemy of the plaintiffs' country; for, although covered by the words of the policy, it would have been a loss happening during the existence of hostilities, and within the proviso which, according to the language of Lord Ellenborough in *Brandon* v. *Curling*, 4 East, 410, at p. 417, is in all cases considered as engrafted in every insurance—namely, "that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer." The reason he assigns for this is, "because, during the existence of such hostilities, the subjects of one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other." The law is in other words also explained by Willes, J., in delivering the judgment of the Exchequer Chamber in *Esposito* v. *Bowden*, 5 W. R. 732, 7 E. & B. 763, at p. 779: "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal." If, however, the answer to the issue between the parties ought to be, as I think it was rightly found by Mathew, L.J., in the negative, the plaintiff company was clearly entitled (subject to a point which was waived) to recover its loss from the defendant for both the making of the contract of indemnity and insurance and the loss by seizure—which was simply an outrage by the republic upon its own subject—occurred before the declaration of war. By way of defence it was urged that the seizure of the bullion by the government of the republic was incidental to actual or expected hostilities against her Majesty Queen Victoria, and for the purpose of supplying the republic with funds to levy war upon her Majesty, and that, coupled with the actual declaration of war which followed, created a state of hostility against her Majesty, and rendered the plaintiff's claim for indemnity contrary to public policy and irrecoverable.

This contention, though very ingenious and exceedingly well argued by his learned counsel, affords, in my opinion, no bar to this action. It was an endeavour to extend the well-established principle described by Lord Ellenborough so as to meet the circumstances of this case, in which undoubtedly hostile intentions were made manifest by word and by action during the time negotiations for peace were being carried on, though no declaration or act of war was made or done until after the British Government had signified by silence, on the 11th of October, the non-acceptance of the ultimatum of the republic received on the previous day. No decided authority supporting this contention was cited to your lordships, while, in my opinion, reason and good sense are against it.

Every prudent government naturally endeavours and takes steps to place itself in a condition to uphold its own country in the possible event of a state of hostility arising with any other power, and it would indeed be strange that a declaration of war should be held to have relation back to an indefinite period of time during which both the hostile countries believed themselves to be and conducted themselves towards each other as in a condition of amity, and were negotiating with a view to avoid any rupture of a then existing state of peace. I do not think it necessary to say more.

In my opinion the judgments of Mathew, L.J., and of the majority of the Court of Appeal ought to be upheld, and this appeal dismissed with costs.

Lord ROBERTSON.—The fulness with which this very interesting case is being discussed by some of my noble and learned friends may absolve me from saying more than a few words. I agree that the appeal ought to be dismissed, but I wish to rest my concurrence on one definite ground—namely, that at the date of the seizure the South African Republic was not at war with Queen Victoria; that this company was a Transvaal subject, and that the nationality of its shareholders is immaterial; that the gold was seized as sinews of a war against Great Britain intended by the seizers and morally inevitable: these propositions I accept as the conditions of the argument; and it is obvious that the circumstance that this gold was insured lessened *pro tanto* the pressure of the war once it broke out.

But then the question is, Does this state of facts bring the case within any prohibition of the common law? Now, after very careful consideration of this question and with a high appreciation of the judgment of Vaughan Williams, L.J., I am satisfied that, near as in every sense the state of things at the time of the seizure was to war, it is yet separated from it by a line of the sharpest and most definite kind. It cannot be affirmed that at the moment in question there was a state of war between this country and the Transvaal. That the Transvaal was a future enemy, an intending enemy, that she was arming, and that this seizure was an act of arming—all this I assume and I believe; and if the principle of the cases about actual war really involved cases of impending war, I should not be deterred by the absence of any former decision from applying it. But for the purposes of the present question there are, as it seems to me, but two categories—war and not war; and the difference between the two things is essential. The present case is perhaps as strong a case as can occur, but in it war was still a contingency or futurity. To extend the law's prohibition of trading with the king's enemies to future or contingent enemies would be subversive of the broad and palpable distinction between peace and war, would be unworkable in practice, and productive of endless uncertainty and loss. I mention these considerations, not as if we were here as legislators, or had to decide upon a balance of general considerations. But the question whether it is workable or salutary is one of the tests of any legal doctrine, and I am satisfied that the law against trade with enemies is inapplicable to the events now in question.

Lord LINDLEY.—I will not detain your lordships by recapitulating the facts of this case. I will only ask your lordships to bear in mind that the policy was effected and the loss of the goods insured took place before war was declared or broke out. These facts are of cardinal importance.

Before considering the legality or illegality of the policy, it is desirable to consider the legal position of the company assured by it. The company was incorporated and registered according to the laws of the Transvaal, and it carried on business there. It had gold mines there and extracted gold from them, and sent such gold to England or Europe for sale and division of profits amongst its shareholders there. It had also a London office and London committee of management. For all purposes material for the determination of the present appeal the company must, in my opinion, be regarded as a company resident and carrying on business in the Transvaal although not exclusively there. It was subject to the laws of that country. When war broke out the company became an alien enemy of this country: see the American case of *Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gall. 104. If it becomes material to attribute nationality to the company it would, in my opinion, be correct to say that the company was a Transvaal company and a subject of the Transvaal Government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries. But when considering questions arising with alien enemies, it is not the nationality of a person, but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts: *M'Connell* v. *Hector*, 3 Bos. & P. 113. Again, the subject of a state at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses: *Wells* v. *Williams*, 1 Salk. 46. As observed by Sir William Scott in *The Jonge Klassina*, 5 C. Rob. 297, at p. 302, "a man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both with regard to the transactions originating, respectively, in those countries. That he has no fixed counting-house in the enemy's country will not be decisive": see also *The Portland*, 3 C. Rob. 41.

I pass now to consider the seizure and its effect on the rights of the assured against the underwriters.

The risk of loss by seizure by a foreign government was clearly insured against in the sense that the general words of the policy covered such a risk. But even if this particular risk is one which cannot be lawfully insured against, the fact that the general words cover it does not render the policy illegal *ab initio*: the only consequence is that the general words must be read as subject to an implied proviso that they are not intended to cover and do not cover any risk against which it is unlawful to insure. Therefore, if the seizure in question could not be lawfully insured against, the general words ought not to be held to cover it. This rule for dealing with general words in policies of insurance was formulated and acted upon in *Furtado* v. *Rodgers*, 3 Bos. & P. 191, and *Kellner* v. *Le Mesurier*, 4 East, 396, and has been recognized ever since. In those cases it was held that general words did not cover loss by capture by British forces of an enemy's goods insured before war broke out.

This policy being effected before war broke out, it is not invalid upon the ground that it was when made a contract with a then alien enemy; nor can it be treated as an invalid contract *ab initio* by reason of the generality of its terms. This was in fact conceded by the counsel for the appellants in his reply. The question then is reduced to this: Is the seizure in question one which it is unlawful to insure against?

One ground, and one ground only, is invoked to

show that it is, and that ground is the ground of public policy. A contract or other transaction which is against public policy—*i.e.*, the general interest of this country, is illegal; but public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your lordships of the weighty observations of Alderson, B., and Parke, B., in *Egerton* v. *Brownlow*.

The seizure of the gold in the present case was a distinct gain to the captors. To indemnify the owner of the gold against the loss of such gold is clearly a benefit to the owner, and such an indemnity is a benefit to a person who is regarded as an enemy as soon as war breaks out. But he was not an enemy when the policy was effected nor when the gold was seized, and how it can be against the policy of this country to keep faith with him when the war is over I fail to see. He cannot, of course, sue in this country during the war if the defendants raise that objection; but they do not. The contention is that if the war were over this action could not be maintained.

Reference was made in the argument to such cases as *The Jan Frederick*, 5 C. Rob. 128, and *The Bœdes Lust*, 5 C. Rob. 233, to show that contracts made before war broke out, but in contemplation of it, for the protection of enemy's property against British capture, will not be recognized in this country. This is intelligible enough; for to recognize such contracts would be to defeat the object of this country in effecting the capture. It would be to undo by means of British tribunals the work done for the British nation by its naval or military forces. Anything which would produce or be calculated to produce such an effect as that would be clearly against public policy, and be judicially dealt with accordingly.

I am unable myself to bring the present case within this principle.

The view that public policy requires an extension of rules already recognized so as to meet the present case has been very clearly presented by Vaughan Williams, L.J., in his judgment.

I am unable, however, to arrive at the same conclusion. His view appears to me to be based on the doctrine which identifies every subject of a state with its own government.

This doctrine was no doubt laid down in *Conway* v. *Gray*, 10 East, 536, and so long as that case stood there was authority for the proposition that an ordinary policy of insurance does not cover a loss occasioned by the seizure of the assured property by the government of the country of the assured. But even before 1861 this doctrine can hardly be said to have been regarded as settled law; it has never been accepted in America. The subject was carefully examined in the second edition of Arnould on Insurance, vol. 2, pp. 803, *et seq.*, and in 3 Kent's Commentaries, vol. 3, pp. 292, *et seq.* In 1861, *Aubert* v. *Gray* finally repudiated any such general doctrine in this country. It was, however, unnecessary in that case to decide whether such a seizure would be covered by a policy if the seizure occurred during or in contemplation of war with this country. The court left this point open; but *Conway* v. *Gray* does not cover it, for the embargo there in question was not an act of hostility.

A seizure after war has broken out is very different from a seizure before war has been declared or has actually commenced.

It appears to be settled that a British subject cannot even before war insure a person against any loss sustained by him after the war began and whilst he is an enemy of this country: see *Furtado* v. *Rodgers*, and *Brandon* v. *Curling*. Those were cases of capture after war, by the British forces in the first case, and by our allies in the second case; and these authorities go far to show that if the seizure here had been after war had broken out the policy would not have covered such a loss.

But, apart from *Conway* v. *Gray*, 10 East, 536, and others based upon the doctrine there laid down and now exploded, there is no authority for saying that an insurance effected before war does not cover a seizure of the insured property by the government of the assured in time of peace, even if war with this country is imminent and shortly afterwards breaks out between that government and our own.

In Arnould on Insurance, vol. 1, p. 102 (2nd ed.), it is stated generally: "When the party intended to be insured by the policy does not become an alien enemy until after the loss and cause of action have arisen, his right to sue on the policy is only suspended during the continuance of hostilities and revives on the restoration of peace." For this is cited *Flindt* v. *Waters*, which warrants the author's statement.

That case is also useful as showing that, where the insurance is legal in its inception and the loss occurs before war, an action on the policy may be successfully brought even during war if the underwriter does not put on the record a special dilatory plea. The case is an authority for the course taken in this case of obtaining a decision of the controversy between the parties on its merits without waiting for the termination of the war.

The general rule laid down in Arnould is a sound intelligible working rule, and covers the present case.

I agree with Vaughan Williams, L.J., in thinking that *Aubert* v. *Gray* does not quite cover this case; but I cannot agree with him in thinking that public policy requires that this action should be decided in favour of the underwriters. War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the royal licence, and dissolves all contracts which involve such trading: see *Esposito* v. *Bowden* But threatened war or anticipated war or imminent war is peace, which may not after all result in war; and to apply the rules of war to insurances against loss before war breaks out would paralyze commerce, and often without any real necessity. Is it for the interest of this country to dislocate trade because international relations are strained and war appears probable to the public, who do not know and cannot know the real views and resolutions of the governments concerned? It must be remembered that contracts of insurance are not by any means the only contracts which have to be considered in this connection; what affects them affects contracts of sale and contracts of carriage both by land and sea, and in fact affects the whole external commerce of the country. Romer, L.J., saw this, as is apparent from his judgment.

Where a policy of insurance is not void *ab initio* and a loss from one of the perils insured against happens before war is declared or breaks out, what defence can be offered to an action upon it? I know of none except where the loss is occasioned by British capture followed by war Of course, if war breaks out before the action is brought or before it is over, the war suspends its prosecution, for an alien enemy cannot sue in this country: *Le Bret* v. *Papillon*, 4 East, 502. Your lordships are asked to invent a new defence unheard of before, and to say that every policy on a foreigner's property abroad is subject to the implied condition that it shall not be seized by his own government in order to be used against this country if war breaks out. Such a doctrine, I venture to think, would paralyze legitimate trade and be entirely against the interests of this country.

In my opinion the order and judgment appealed from should be affirmed and the appeal be dismissed with costs.

*Order of the Court of Appeal affirmed and appeal dismissed with cost.*

Solicitors, *Waltons, Johnson, Bubb, & Whatton; Wm. A. Crump & Son.*

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## Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Nov. 28.

WRIGHT *v.* LEFEVER. (*a.*)

*Negligence—Premises in dangerous state of repair—Key to view given by house agent—Invitation—Owner's liability for accident.*

*Landlord held liable for injury caused to a stranger through the front doorsteps giving way, who had obtained a key to look over the premises, which were to let, from the house agent.*

Application by the defendant for judgment or new trial in an action tried before Walton, J., and a common jury.

The plaintiff sued to recover damages for personal injuries under the following circumstances:

The plaintiff seeing a house belonging to the defendant with the usual notice in the window that it was to be let, applied to the house agents for the key.

After going over the house and inspecting it, he again on the same day saw the house agents and told them it was very much out of repair, and said the steps leading to the basement were positively dangerous, and he asked whether the landlord would put it in repair.

He did not return the key, saying he would like to look at the house again, and two or three days later he went over the house with a builder in order to have an opinion as to what repairs he should require the landlord to do if he made an offer to take the house.

On the following day he again went to the house, this time being accompanied by his wife, and as he was going up the steps leading to the hall door one of the steps fell in and the plaintiff received the injuries of which he complained.

At the trial the plaintiff's case was that, as he was on the premises by the defendant's invitation, the defendant was liable to him in damages, if he sustained injury in consequence of the premises being in a dangerous condition.

The jury found that the plaintiff when the accident happened was going up the steps for the purpose of going over the house; that he was doing so at the house agents' request; that the steps were dangerous; that the danger was not known to the plaintiff before the accident; that he could not by reasonable care have ascertained the danger; that it was not known to the defendant or his agents; but that if the defendant had taken reasonable care in the management of the house he would have known it.

The jury explained their answer to the last question as meaning that as the defendant knew that the steps leading to the basement were said to be dangerous, he ought to have known that the steps leading to the front door might also be in the same condition.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Judgment having been entered on the findings for the plaintiff with £36 15s., the damages awarded him by the jury, the defendant appealed.

*Montague Lush, K.C.*, and *H. C. Davenport*, for the defendant.—There was no contractual relationship here between the plaintiff and the defendant, who went on the premises as a mere licensee at any rate after the first visit, and therefore the defendant owed no duty to the plaintiff to guard him against possible harm: *Le Lievre* v. *Gould*, 41 W. R. 468, [1893] 1 Q. B. 491; *Lane* v. *Cox*, 45 W. R. 261, [1897] 1 Q. B. 415; *The Moorcock*, 37 W. R. 439, 14 P. D. 64; *Ivay* v. *Hedges*, 9 Q. B. D. 80, 31 W. R. Dig. 134. Moreover, the defendant had no more knowledge that the premises were dangerous than the plaintiff himself: *Indermaur* v. *Dames*, 14 W. R. 586, L. R. 1 C. P. 274. The only duty on the part of the defendant was to take care that there was no concealed danger, and of this there is no evidence: *Burchell* v. *Hickisson*, 50 L. J. C. L. 101, 29 W. R. Dig. 144.

*Kemp, K.C.*, and *W. de B. Herbert*, for the plaintiff, were not heard.

COLLINS, M.R.—This application must be dismissed. In my opinion on the findings of the jury, the learned judge had no alternative but to enter judgment for the plaintiff. What the jury substantially found was that the plaintiff went to the house by the invitation of the defendant. The defendant complains of that finding on several grounds and says that when the plaintiff went to the house after the first time he went there at his own risk and was in the position of a mere licensee. It was sought to put him among the class of persons towards whom the duty of the owner of the premises is less than it is towards persons who come on the premises by his invitation, and that he could only be liable for that which constituted a trap. In the case of *Indermaur* v. *Dames*, Willes, J., said that the owner is liable if he knows or ought to know of the danger, and, therefore, that disposes of the finding of the jury that in fact neither the defendant nor his agents knew that the steps were dangerous. Then it was said that the plaintiff was not on the premises on the day when the accident happened by the invitation of the defendant. The key had been lent to him on the previous occasion and he had failed to return it. The jury, however, came to the conclusion that the subsequent visits to the house was an incident of the arrangement between the parties, and that was a question of fact to be considered and determined by the jury. It cannot reasonably be urged that the invitation of the defendant to the plaintiff to look over the house was limited to the first looking at the matter from a commonsense view. It follows therefore, that the plaintiff was in the same position on the second visit as he was on the first. The only other finding questioned by the defendant was the last—namely, that if reasonable care had been taken in the management of the house the defendant would have known of the danger. Mr. Lush said that the only means which the evidence showed that the defendant possessed for learning the dangerous condition of the steps was what he had learnt about them from the plaintiff. He argued, therefore, that as the only evidence of the defendant's or his agent's knowledge was that which his agent had been told by the plaintiff himself about the condition of the basement steps, any inference which they ought to have drawn therefrom pointing to the probable dangerous condition of the door steps the plaintiff was in quite as good a position to draw as they were. It was clearly open to the jury to take into consideration other possible sources of information, and the question

of knowledge was not one of law but one of fact for the jury. As the findings stood there was ample authority for holding that the defendant was under an obligation to take steps to guard the plaintiff against any danger on his premises which he knew or ought to have known, and which the plaintiff did not know. There being evidence to justify the findings of the jury their judgment must stand.

ROMER and MATHEW, L.JJ., gave judgment to the same effect.

*Appeal dismissed.*

Solicitors, *Procter & Grimes; Carthew & Wheeler.*

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From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) And Chan. Div. (Joyce, J.). — Oct. 29.

*In re* LAWLEY.
ZAISER *v.* LAWLEY. (*a.*)

*Power—Appointment—General power to appoint by will—Security for loan—Covenant to appoint—Priority—General debts—Liability of appointed fund.*

*Where there is a general power to appoint by will only, an appointment by will made in favour of a creditor in pursuance of a covenant in a mortgage in consideration of money lent to the donee of the power during his lifetime will not give that creditor priority over the other creditors of the donee's estate.*

Lady Wenlock, by her will, gave to her son, the Hon. F. C. Lawley, a general power to appoint a sum of £10,000 by will. In default of appointment this sum was to form part of her residuary estate.

By a mortgage, dated the 7th of April, 1892, Mr. Lawley covenanted with Mr. G. F. Perkins, in consideration of a loan to him of £1,000 bearing interest at 8 per cent., that he would immediately sign his will, which was already prepared and bore even date with the mortgage, whereby, in exercise of the testamentary power of appointment under his mother's will, he appointed that the trustees of the will should stand possessed of the sum of £10,000 and the investments representing the same upon trust to pay to the mortgagee thereout in preference and priority to all other payments the said sum of £1,000 and all interest thereon; and that he would not revoke or alter his will without the consent in writing of the mortgagee. This will was signed on the same day as the mortgage.

Lawley died on the 18th of September, 1901, without having changed or altered his will except by certain codicils changing his executors. The whole of the said sum of £1,000, together with arrears of interest, was then due.

Shortly after Mr. Lawley's death this action was commenced by creditors for the administration of his estate. The trustees of Lady Wenlock's will paid into court to the credit of the action certain bonds of the nominal value of £3,200, which represented a part of the £10,000 over where Mr. Lawley had a testamentary power of appointment. Mr. Perkins having died, his executors took out a summons in the action asking for payment of the sum due to them from the sum in court, or in the alternative that they might rank as creditors of the estate.

*Badcock, K.C.*, and *E. Ford*, for the applicants.—This sum of £10,000 can only become general assets of the estate by the act of the appointor in exercising his power, but the other creditors cannot take it against the other acts of the appointor: *In re Newnham's Estate*, W. N., 1881, 69. The rule as to sums becoming general assets only applies where the appointment was to volunteers: *In re Roper*, 36 W. R. 750, 39 Ch. D. 482. Where the appointment is for value there is no rule that a general testamentary provision should not so hold as to give an appointee a preferential right over other creditors.

*H. Wace*, for the respondents.—Where a general power of appointment is exercised by will, such property becomes subject to the debts of the testator, and the appointee is trustee of the creditors: Farwell on Powers (2nd ed.), pp. 254-5; *Jenny* v. *Andrews*, 6 Madd. 264; *Williams* v. *Lomas*, 16 Beav. 1; *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; *In re Hodgson*, 47 W. R. 443, [1899] 1 Ch. 666. *In re Newnham's Estate* is distinguishable.

*Badcock, K.C.*, replied.

July 29.—JOYCE, J.—The Honourable Francis Charles Lawley, under the will of his mother, Lady Wenlock, had a general power to appoint by will a sum of £10,000, which, in default of appointment, was to go as part of the residuary estate. He borrowed a sum of money, and as part of the security covenanted forthwith to make a will exercising this power of appointment, so that the loan should be a first charge upon the fund, and not to revoke such a will. He made a will accordingly and died. The question now is, whether the applicants, who are the legal personal representatives of the lender, have as against the appointed fund any priority over other creditors.

In *Fleming* v. *Buchanan*, 3 De G. M. & G. 976, at p. 980, the law is thus laid down by Knight-Bruce, L.J.: "On whatever ground it was originally so held, it is and has for a long time been the settled law of the country, that if a man having a power, and a power only, over personal estate to appoint it as he will, exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts whatever may be the intention or absence of intention upon his part." The order there mentioned is the order in which assets generally are applied in payment of debts according to the table set out in Jarman on Wills (5th ed.), vol. 2, p. 1430. This statement of the law is not confined to the case of a power to appoint by will, but extends also to a power to appoint by deed or will when the appointment is made by will. The earliest case I have found upon this subject is one of *Thompson* v. *Towne*, Prec. Ch. 52, 2 Eq. Ca. Abr. 466. There a testator, at the time of his death having a power of appointment by will over a sum of £500, exercised such power by his will in favour of legatees. The Lord Keeper Somers decreed this £500 to be assets to pay the debts of the plaintiff, a creditor; and it is stated in the reports that on appeal to the House of Lords this decree was affirmed, but upon what precise grounds does not appear.

When the power is to appoint by deed or will, the appointee under an appointment by deed for good consideration takes in priority to creditors. Thus, for example, in *Lassells* v. *Lord Cornwallis*, 2 Vern. 465, Prec. Ch. 232, and 2 Eq. Ca. Abr. 467, Lord Cornwallis in the settlement on his marriage reserved a power to charge an estate with any sum not exceeding £3,000 for such purposes as he should think fit. Upon a sale he by deed appointed this £3,000 to the purchaser as a collateral security for the enjoyment of his purchase, and if no incumbrance

(*a.*) Reported by J. I. STIRLING and C. W. MEAD, Esqrs., Barristers-at-Law.

arose the appointment was to be void. No incumbrance having arisen, by his will he bequeathed the £3,000. The Lord Keeper Wright, following *Thompson* v. *Towne*, decreed the £3,000 to be assets of Lord Cornwallis and subject to the collateral security to be applicable in payment of debts. In *Daubeny* v. *Cockburn*, 1 Mer. 626, at p. 639, Sir William Grant speaks of the general equity of creditors to have what is appointed to a volunteer considered as assets if wanted for the payment of debts: see also in *Ewart* v. *Ewart*, 1 W. R. 466, 11 Hare 276, at p. 285, per Lord Hatherley when Vice-Chancellor. It is contended in the present case that the creditor who lent money upon the faith of the covenant is not a volunteer as against the appointed fund. But although in the case of a general power to appoint by deed, or to appoint by deed or will, a contract to execute the power is aided as a defective execution, this is not so when the only power to appoint is by will. The granting of relief against the defective execution of a power is subject to the general rule that equity will not assist in defeating the intention of the person creating the power that no appointment should be made but by a revocable instrument: *Reid* v. *Shergold*, 10 Ves. 370, and *Cooper* v. *Martin*, per Rolt, L.J., 15 W. R. 5, L. R 3 Ch. App. 47, at p. 58. If the applicants were to succeed in the present case the result would practically be that a donee of a general power to appoint by will could always make an effectual appointment by an instrument *inter vivos*. The court will not decree specific performance of a covenant to execute a power where it is only a power to appoint by will. Such a covenant creates no specific charge, and a breach of it merely affords ground for a claim to damages: *In re Parkin, Hill* v. *Schwarz*, 41 W. R. 120, (1892) 3 Ch. 510, an authority which is, I think, really decisive of the present case. Much reliance was placed by the applicants upon the statement or *dictum* of Kay, L.J., then Kay, J., in *In re Roper*, 39 Ch. D. at p. 487, where it is said: "There is no doubt that, in case of a man who has a general power of appointment, and exercises it by will in favour of volunteers, the property so appointed will be considered as assets for the payment of his debts." I do not think, however, that it was intended there to make any distinction—in the case of an appointment by will—between an appointment to volunteers and one to other persons. If it was, I think the statement is inaccurate or misleading.

The truth is that everyone taking under an appointment by will, though a creditor, is merely a volunteer as between himself and the creditors. The books no doubt speak of a legacy for good consideration—*e.g.*, a legacy to a widow in lieu of dower or to a creditor in satisfaction of his debt, and when the other creditors have been paid such legatees as between themselves and other legatees may be entitled to priority. Still they are only legatees, and in respect of the legacy volunteers as between themselves and the general body of creditors.

The result, if I am right, is that the applicants have no priority as against the appointed fund over other creditors, and there must be a declaration accordingly.

The applicants appealed.

*Badcock, K.C.*, and *E. Ford*, for the appellants.

*Hughes, K.C.*, and *Wace*, for the respondents.

*Badcock, K.C.*, replied.

The following authorities were referred to in addition to those cited in the court below: *Robinson* v. *Ommanney*, 31 W. R. 525, 23 Ch. D. 285; *Townshend* v. *Windham*, 2 Ves. sen. 1; *Vaughan* v. *Vandersteegen*, 2 W. R. 293, 2 Drew. 165; *Bainton* v. *Ward*, 2 Atk. 172; *In re Harvey's Estate, Godfrey* v. *Harben*, 28 W. R. 73; *In re Parkin, Hill* v. *Schwarz*, 41 W. R. 120, [1892] 3 Ch. 510; *Goylmer* v. *Paddiston*, 2 Vent. 353, s.c. *sub. nom. Goilmere* v. *Battison*, 1 Vern. 48; *George* v. *Milbanke*, 9 Ves. 190.

VAUGHAN WILLIAMS, L.J.—I think that the judgment of Joyce, J., is right and must be affirmed. In this case Mr. Lawley, who under the will of his mother had a general power to appoint by will a sum of £10,000, which in default of appointment was to go as part of her residuary estate, borrowed £1,000, and as part of the security covenanted forthwith to make a will exercising the power of appointment for the purpose of securing the payment to the lender of the said £1,000 and interest. He exercised the power of appointment by his will and died. The question which we have to decide is whether the applicants, who are the legal personal representatives of the lender, have as against the appointed fund any charge or any priority over the other creditors. There can be no doubt but that both real and personal estate subject to general powers of appointment become assets for the payment of the appointor's debts if the power is exercised in favour of volunteers. The power must, of course, be exercised, but provided the general power is exercised the estate becomes assets. It is said, however, that this proposition is only good as against volunteers. Mr. Badcock has argued before us that the representatives of the mortgagee in the present case are not volunteers, the mortgagee having purchased the exercise of the appointment by the loan of £1,000.

Now in *Fleming* v. *Buchanan* Knight-Bruce, L.J., in the passage cited by Joyce, J., in his judgment, says: [His lordship read the passage, and continued:] Our attention was called to the fact that Knight-Bruce, L.J., in this passage does not use the word volunteer at all, and it is suggested that the rule as laid down by the Lord Justice applies equally whether the person in whose favour the general power is exercised is a creditor or a volunteer. I somewhat doubt myself whether the Lord Justice did intend to lay down the rule as widely as this, and I am not sure that it would have been right so to do. It will be observed that the Lord Justice was dealing with a case in which a general power was exercised by testamentary appointment, and in which there was no suggestion of an antecedent charge or of a covenant to exercise the power, and in which there is nothing to show that there was any power exercisable by deed as well as by will. Now, if one applies the rule laid down by the Lord Justice to a case of the exercise by testamentary appointment of a power only exercisable by will it does not seem to matter one bit whether one limits the rule, that the exercise of a general power of appointment makes the subject of it assets for the appointor's debts to volunteers or does not do so, because in my opinion in such a case everyone who takes under the will exercising the power necessarily is a volunteer. The judgment of Stirling, L.J., then Stirling, J., in *In re Parkin* makes it clear that a contract to leave by will on the part of one who is merely donee of a testamentary power of appointment cannot be enforced by a judgment or decree for specific performance, and it is equally clear that the revocation of a will made in pursuance of such a contract cannot be restrained. The basis of this judgment is that the donor of a power exercisable by will only does not intend that the power should be exercised until death. The donor means the power to remain capable of execution till the death of the donee of the power, and the court will not assist to defeat the intention of the donor. This being so, all that the lender of the money got by the covenant in the mortgage deed was the

covenant and the right to damages for breach of it. He did not under the deed get any priority or charge whatsoever. The exercise of the power makes the fund assets at the moment of death, and cannot do so before. It follows that the position of the lender in whose favour the power was exercised is that of a legatee taking by the bounty of the testator; he could not at any time before the death of the testator have asserted any title to or charge on this personal estate. In truth, everyone taking under a will is a volunteer even though the testator may have been under some contractual obligation to make the appointment. I prefer to base my judgment on my conclusion that the lender, the mortgagee, Mr. Perkins, was in fact a volunteer, because I have no doubt myself that this rule making real and personal estate subject to general powers of appointment assets for the payment of the appointor's debts was a rule laid down in favour of creditors against volunteers, and I doubt very much whether the original rule had any reference to the priority of secured over unsecured creditors.

STIRLING, L.J.—I am unable to differ from the reasoning of Joyce, J., and after what has been said by him, and said in this court, I have very few observations to make. It is important, in my opinion, to bear in mind in dealing with this case that the mortgagor had no power of appointment by deed, and consequently the mortgage which was executed by him was ineffectual to create a charge on the fund, which was the subject of the power of appointment, or to bind that fund in any way. I think that the case of *Reid* v. *Shergold*, and what is there laid down by Lord Eldon, is a clear authority for that proposition. For the reasons which were given in the case which I myself decided of *In re Parkin*, and to which I adhere, I think that the covenant on the part of the mortgagor contained in the mortgage deed to execute the power of appointment by will was incapable of being enforced by way of specific performance, and for the same reasons I think that the covenant not to revoke the will, when made, could not be enforced by injunction. Now, that being so, it seems to me that the mortgage deed amounted to personal security and nothing more. What the mortgagees got by virtue of that deed consisted simply of the personal covenant of the mortgagor, and as regards the fund itself the mortgagees were content to accept such a title as the will of the mortgagor could confer upon them—that is to say, a title which depended on the bounty of the testator. Now that title is subject to various infirmities, and amongst others to this, that the law has said, with respect to testamentary dispositions, that the testator must be just before he is generous—that is to say, that those dispositions can take effect only subject to the payment of the general creditors of the testator. I cannot see myself that the mortgagees in this case have, as regards the fund, any priority over other creditors so far as they claim under the will, and it is only by virtue of the will, as I have already said, that they can claim the fund. They are, as between themselves and the other creditors, volunteers. I should like to say one word as to the only direct authority which was cited in favour of the appellants, that is the case of *In re Newnham's Estate* before Hall, V.C., which is reported very briefly in the Weekly Notes for 1881, at p. 69. That, in my opinion, was a different case. In that case the testatrix having a power of appointment by will had induced the trustees of the will to pay over a portion of the fund to her in her lifetime, and she made a will by which she exercised the testamentary power of appointment by directing that the trustees should hold the fund upon trust to pay and indemnify themselves against advances which had been made to her and subject thereto upon trust for certain beneficiaries. After the death of the testatrix who had so exercised the power by will general creditors contended that by appointing the fund the law made it available for payment of her debts, and that the trustees must make good the portions of the fund which they had misapplied before they could prove against the estate for advances. The Vice-Chancellor rejected that contention, saying that as the creditors of the donee of the power could not get at the property subject thereto except through the act of appointment he could not take it against the other acts of the appointor. That report is a very short one, and the grounds for the decision are not clearly stated, but I apprehend that to mean this: Supposing that the executors of the testator had asked for payment to themselves of the whole fund the trustees who had made the advance would have a right to say "We paid that portion to your testatrix and it is already a part of her assets. You cannot call upon us to replace the fund." I think that the creditors would not stand in any better position than the executors through whom they claimed title, and that the act of the appointor which was referred to by Hall, V.C., is her act in taking possession in her lifetime of part of the fund which was subject to the power. In my judgment that does not apply to the present case at all, which is an appointment for special reasons, and therefore I think the present case is not governed by it and that the decision of Joyce, J., ought to be affirmed.

COZENS-HARDY, L.J.—I am of the same opinion. In the language of James, L.J., in *In re Hoskin's Trusts*, 25 W. R. 779, 6 Ch. D. 281, "I hold it to be established beyond all question that when a feme covert, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund."

The executors here were entitled to receive and have received the appointed fund. The question then arises, what are they to do with it? As a matter of construction this is a demonstrative legacy, and as such it is subject to the payment of the testator's debts. It is said, however, that this is not so, because the will was made in pursuance of a covenant in the mortgage and was not a voluntary transaction. But the applicants take nothing under the mortgage. They take solely under the will. The doctrine of specific performance has no application to a case like the present. The testator covenanted that he would give a legacy, and he has given a legacy. Such a legacy must be taken with all its incidents. There are some legacies which have priority over other legacies, such as legacies to a widow in satisfaction of her dower, or to a creditor in satisfaction of a debt. But it has never been held that such a preferential legacy can be paid until after all debts are satisfied: see *Blower* v. *Morret*, 2 Ves. sen. 420, and *Davies* v. *Bush*, Younge, 341. It may be, though I express no opinion on the point, that the applicants might claim priority over any ordinary legatees of other parts of the £10,000, but I am clearly of opinion that they cannot claim a penny in their character of legatees as against the testator's creditors.

Solicitors, *Beyfus & Beyfus; Dangerfield, Blythe, & Hodgson.*

## High Court of Justice.

Chan. Div. Byrne, J. — Oct. 29.

*In re* HOOPER.
HOOPER *v.* WARNER. (*a.*)

*Will—Ambiguity—Legatee—Construction.*

*A testatrix by her will gave a legacy to Percy H., son of C. A. H. C. A. H. had no son Percy; but he had a son Herbert who was generally called "Bertie." Two persons, not sons of C. A. H., but who stood to the testatrix in the same degree of relationship as the sons of the said C. A. H., bore the name of Percy, but they did not claim the legacy.*

*Held, that Herbert, son of C. A. H., was entitled to the legacy, the solicitor taking testatrix's instructions having probably mistaken the word Bertie for the word Percy.*

Summons.

This was a summons on the part of Herbert William Hooper to determine what person upon the true construction was entitled to a legacy of £200 given under the will of Anne Hooper, deceased.

The facts of the case were as follows: By her will bearing date the 13th of December, 1881, the testatrix appointed E. F. Good and J. Warner executors thereof and devised and bequeathed to them all her estate and effects upon trust for sale and conversion, and after payment thereof upon trust to pay a number of legacies, and among others a legacy to "Percy Hooper, son of Charles Adams Hooper, £200." The rest of the estate was thereby given to testatrix's executors for their own use and benefit. The said testatrix died on the 14th day of January, 1895, without having altered or revoked her said will, and probate thereof was duly granted to the said executors named in the will.

At the time of the testatrix's death the said Charles Adams Hooper, who was a nephew of the testatrix's husband, had three sons: Charles Bennett Hooper, Archibald Frank Hooper, and Herbert William Hooper. Another nephew of the testatrix's husband, Leonard Hooper, had a son named Leonard Percy Hooper, and a third nephew of the same gentleman had a son named Percy Frank William Hooper. The plaintiff claimed the legacy on the ground that he was a son of Charles Adams Hooper, that he was usually called "Bertie" (facts verified by affidavit), and that the testatrix in giving instructions for her will must have said "Bertie, son of Charles Adams Hooper," and that the solicitor preparing the same mistook the word Bertie for the word Percy and accordingly wrote "Percy, son of Charles Adams Hooper," instead of "Bertie, son of Charles Adams Hooper."

*Church*, for the plaintiff.—It is clear that there was a mistake by the solicitor in preparing the will. The testatrix no doubt used the word Bertie which he mistook for Percy. This is a case where the description "son of Charles Adams Hooper" may reasonably be held to prevail against the name Percy.

He referred to Theobald on Wills (5th ed.), pp. 240-247; *Pitcairne* v. *Brase*, Finch, 403.

*Druce*, for the executors.—In view of the fact that there are sons of other nephews of the testatrix whose names are Percy, the intention of the testatrix to benefit the plaintiff is doubtful and the gift fails for ambiguity.

*Adams* v. *Jones*, 9 Hare 485, was also referred to.

BYRNE, J. (after stating the facts).—Charles Adams Hooper, a nephew of the testatrix's husband, had three sons, one of whom, the plaintiff, was called Bertie. Besides there are two other sons of the nephews of the testatrix's husband called Percy—Leonard Percy Hooper and Percy Frank William Hooper. Neither of these, however, claims the legacy. If the bequest is ambiguous, of course the legacy must fail. But I think that the legatee is sufficiently identified as the son of Charles Adams Hooper. And it was not at all unnatural that the solicitor in taking the testatrix's instructions should have mistaken the word Bertie for Percy. I therefore hold that Herbert William Hooper is entitled to the legacy.

Solicitors, *Prior, Church, & Adams; W. H. Osgood.*

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

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Chan. Div. Byrne, J. — June 24, 25; July 1, 1902.

*In re* APPLEBY.
WALKER *v.* LEVER.
*In re* APPLEBY.
WALKER *v.* NISBET. (*a.*)

*Trustee—Income from unauthorized investment—Excess income—Capital or income—Tenant for life—Invalid trust for sale—Rule against perpetuities—Class ascertainable within prescribed limit.*

*A trustee who has paid the whole of the income arising from unauthorized investments of a trust fund to the tenant for life cannot, where no loss has resulted to the fund, be called upon to repay to the estate, as part of the capital of the fund, so much of the income as exceeded the amount which would have arisen if the fund had been properly invested.*

Stroud *v.* Gwyer, 28 *Beav.* 130, 8 *W. R. Ch. Dig.* 85, *followed.*

*A testator directed his trustees to sell his real estate at a time beyond the period allowed by the rule against perpetuities, and to hold the proceeds of sale upon trust for persons and classes of persons ascertainable within the period.*

*Held, that the trust for sale was mere machinery, and that the equitable interests in the property went to the persons who would have taken them under the trust for sale if it had been valid; but that these equitable interests passed as real and not as personal estate.*

Dictum *of* Stirling, J., *in* Goodier *v.* Edmunds, [1893] 3 *Ch.* 455, *followed.*

Originating summons.

This was the further consideration of one summons and the hearing of another, both being upon the same will and heard together.

So far as the questions upon which the case is reported are concerned the facts were as follows:

R. Appleby, by his will in 1848, having given his personalty, other than leaseholds, to trustees for sale and conversion and for investment as therein mentioned, and having given and devised his real and leasehold estates to his trustees, directed them to hold his real and leasehold estates and residuary personalty and the stocks, funds, and securities of which the same might consist, upon certain trusts for his daughter Ann Skinner, the wife of J. H. Skinner (after the death of his wife, who died in his lifetime), during her life. And after her death, in case she should leave J. H. Skinner or any future husband

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

surviving her, to pay the rents and profits, interest, dividends, and income to J. H. Skinner or such future husband during his life; and subject to these trusts the real and residuary personal estates were after the death of Mrs. Skinner to be held upon certain trusts for her children. And in default of children (which happened), after the decease of Mrs. Skinner and of any husband of hers, and of such failure of her children as aforesaid, the trustees were to sell the real and leasehold estates and hold the moneys to arise from the sale, and also the residuary personal estate, upon trust for certain persons and their children as therein mentioned, all of whom were ascertainable within the period allowed by law.

The testator died in 1854. In the same year J. H. Skinner was appointed a trustee of the will together with the two trustees named in the will who had accepted the trusts.

In 1873 these other two trustees died, leaving J. H. Skinner the sole trustee.

In 1875 two new trustees were appointed—namely, the plaintiffs in the first summons.

At the date of the deed next mentioned the trust property consisted in part of various securities included in a schedule to the deed which were not authorized as investments by the will of the testator.

By deed in November, 1876, reciting that the greater part of the investments in the schedule thereto were unauthorized, but that J. H. Skinner desired that the trust property should remain undisturbed in its then state of investment, he covenanted to indemnify the plaintiffs in respect of the same. The income from the unauthorized investments continued to be paid to Ann Skinner. She died in October, 1882. After her death the income of the investments was received and retained by J. H. Skinner as tenant for life until their sale, which took place in the course of the year 1885, when they were sold at a profit.

In July, 1899, J. H. Skinner died.

In February, 1900, the surviving trustees took out the first summons against the beneficiaries and persons claiming from them asking for an inquiry who were the persons then entitled, and in what shares, to the residuary estate. Shortly afterwards one trustee, who was the legal personal representative of Mrs. Skinner, the sole next-of-kin of the testator, took out the second summons against the other trustee, who was appointed to represent the heir-at-law of the testator, and against the persons claiming under the trust for sale, to have it declared that all the limitations after the death of J. H. Skinner were void for remoteness. An inquiry having been directed under the first summons as to what (if anything) the estate of J. H. Skinner was liable for in respect of over-payments of income arising from the unauthorized securities, the master certified that the income from this source made or retained by J. H. Skinner and the other trustees from one year from the death of the testator amounted to £16,456 12s. 8d., and that if the trust moneys had been invested in Consols they would have produced £9,927 15s. 5d., showing a difference of £6,528 17s. 3d. The case now came on for further consideration. Any claim in respect of income made during the life of Mrs. Skinner was not pressed, and the question argued was confined to the income received from the unauthorized investments by J. H. Skinner after his wife's death from 1882 to 1885.

*Mulligan, K.C.*, and *T. A. Herbert*, for the trustees of the will of the testator.—The plaintiffs are not bound to account for the income received by J. H. Skinner. There has been no loss to the estate from the investment of the trust moneys upon the securities from which this income proceeded. J. H. Skinner as tenant for life was entitled to the whole income, and he is not liable either as tenant for life or as trustee to refund any part of it: *Stroud* v. *Gwyer*, 28 Beav. 130, 8 W. R. Ch. Dig. 85.

*Carson, K.C.*, and *Beddall*, for one of the beneficiaries under the trust for sale.—The trustees and the estate of Skinner must account for the income received over what would have been received if the trust fund had been invested in Consols: *Dimes* v. *Scott*, 4 Russ. 195. The case of *Stroud* v. *Gwyer* was wrongly decided, and was disapproved of by Hall, V.C., in *In re Hill*, 50 L. J. Ch. 551, 29 W. R. Dig. 196 The distinction made by Romilly, M.R., in *Stroud* v. *Gwyer*, between that case and *Dimes* v. *Scott* is unsound.

*Norton, K.C.*, and *C. W. Turner*, *Rowden, K.C.*, and *R. Hughes*, *Levett, K.C.*, and *J. D. Davenport*, *MacSwinney*, *T. Douglas*, and *E. P. Hewitt*, for other beneficiaries or assignees.

BYRNE, J., held that the estate of J. H. Skinner was not liable to repay the money claimed, in his capacity of tenant for life; the claim against J. H. Skinner was barred by the Statute of Limitations; and as regards his capacity of trustee the case was covered by *Stroud* v. *Gwyer*, by which his lordship considered bound.

The next question was as to the validity of the trusts of the proceeds of sale of the real and leasehold estates, and arose upon the second summons.

*Norton, K.C.*, and *T. A. Herbert*, for the trustees.—The trust for sale is clearly void, as it is to take effect after the death of any future husband of Mrs. Skinner, and he might not be born until after the death of the testator. That being so, all the trusts of the proceeds of the sale are void also, and the property passes to the heir-at-law: *London and South-Western Railway* v. *Gomm*, 30 W. R. 321, 620, 20 Ch. D. 562. *Goodier* v. *Johnson*, 30 W. R. 449, 18 Ch. D. 441, was a different case, as there there was a gift of the income until the sale. *Goodier* v. *Edmunds*, [1893] 3 Ch. 455, on the same will, only decided that the beneficiaries took the shares as real estate. *In re Daveron*, 42 W. R. 24, [1893] 3 Ch. 421, was decided upon the ground of election.

They also referred to *In re Warren's Trusts*, 32 W. R. 641, 26 Ch. D. 208; *Wollaston* v. *King*, 17 W. R. 641, L. R. 8 Eq. 165; *In re Hancock*, 23 L. R. Ir. 34, 37 W. R. Dig. 205.

*Rowden, K.C.*, and *R. Hughes*, for some of the beneficiaries under the trust for sale.—The trust for sale is mere machinery, and directed only for the purposes of division: *In re Daveron*. The classes of beneficiaries are all ascertainable within the prescribed period. *In re Wood*, [1894] 2 Ch. 310, was a different case, as there the class was not to be ascertained within the period named.

They also referred to *Wood* v. *Drew*, 33 Beav. 610.

*Norton, K.C.*, and *C. W. Turner*, *Levett, K.C.*, and *J. D. Davenport*, *MacSwinney*, *T. Douglas*, and *E. P. Hewett*, for other beneficiaries or mortgagees, supported this view.

*Cur. adv. vult.*

July 1.—BYRNE, J.—I propose to follow the view of the law as expressed by Stirling, J., in *Goodier* v. *Edmunds*. That case came before the Court of Appeal as *Goodier* v. *Johnson* upon a question of construction, but Jessel, M.R., at the end of his judgment, says: "The result is that there is a gift to a class who must be ascertainable within the pre-

scribed period subject to gifts over of shares in certain events, and if any of these gifts over are invalid, the original gift of those shares remains unaffected. It seems to me, however, that the trust for sale is bad, as it is not limited to take effect within the period of a life in being and twenty-one years after. But there is a trust of the property, and the rents and profits thereof, until sale, for the persons to whom the proceeds of sale are bequeathed, and if the trust for sale is bad, still that trust is good, and will carry the property to them. It therefore appears to me that the whole *corpus* is effectually disposed of." In the will in that case there was in terms a gift of the income of the property until the sale in favour of the persons who would take the proceeds of the sale if the trusts for sale had been good. In the present case I have no such gift in terms. When that case came again before Stirling, J., he says, with reference to the view of Jessel, M.R.: "Sir George Jessel, however, does not say (though his language may seem to imply) that the beneficial interests would have failed but for the trust of the rents and profits until sale. . . . As at present advised I should not be prepared to hold that the interests of the beneficiaries would fail notwithstanding the invalidity of the trust for sale. To hold, for example, that a trust to sell at a period beyond the perpetuity limits, is entirely invalid; but that a trust to divide at the same period between the members of the same class, accompanied by a power to sell for the purposes of division, is good as regards the equitable interests, would, in my judgment, be to sacrifice substance to form. Cases may possibly occur where the trust for sale and the beneficial interests thereunder are so inextricably mixed up that both must stand or fall together; but where it can be seen that the trust for sale is mere machinery for facilitating a division between the persons for whom the property is destined, I think that effect ought to be given to the equitable interests, even though the instrument by means of which the division is intended to be carried out may prove to be unavailing. In the present case I should have thought that, in the absence of the trust of rents and profits until sale, the beneficiaries ought to be held entitled, but that the beneficial interests would devolve as real estate; for I apprehend that nothing short of an absolute and effective trust for sale can in equity create a conversion of realty into personalty": see *Hyett* v. *Mekin*, 32 W. R. 513, 25 Ch. D. 735. As regards the will in the case before me, I come to the conclusion that the trust for sale is mere machinery for the purpose of division, and that the equitable interests go to the persons who would have taken under the trust for sale, but that they pass as real estate.

Solicitors, *S. J. Daw; Walter Turner; Iliffe, Henley, & Sweet; Stuart & Tull.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) Nov. 7.

MARSH (*Appellant*) *v.* BANTOFF (*Respondent*). (a.)

*Election law—Registration—Parliamentary franchise—Occupation claim—Disabilities—Volunteer absent on military service in South Africa—"During the continuance of the present war"—Declaration of peace—Electoral Disabilities (Military Service) Removal Act,* 1900 (63 *Vict. c.* 8), *ss* 1, 3—*Electoral Disabilities Removal Act,* 1891 (54 *Vict. c.* 11), *s.* 2.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*The appellant, who claimed to be placed on the occupiers' list of electors for the parish of St. Clement's, Ipswich, had volunteered and was absent on military service in South Africa during the whole of the twelve months preceding the 15th of July,* 1902. *The claim was objected to. The revising barrister decided that, as peace was proclaimed in June,* 1902, *the appellant's case was not covered by section* 1 (*i.*) *of the Electoral Disabilities (Military Service) Removal Act,* 1900, *inasmuch as section* 3 *provided that the Act should apply only to absence during the continuance of the present war in South Africa; and he accordingly disallowed the claim.*

*Held, on appeal, reversing the revising barrister's decision, that whether or not the benefit of the Electoral Disabilities (Military Service) Removal Act,* 1900, *terminated immediately upon the proclamation of peace, the interval between the declaration of peace and the end of the qualifying period was covered by section* 2 *of the Electoral Disabilities Act,* 1891.

Per Lord Alverstone, L.C.J.—*That the whole of the qualifying period was covered by the Act of* 1900, *s.* 1 (*i.*), *as the word "during" in section* 3 *referred less to the mere continuance of the war than to the continuance of military service rendered necessary by the war.*

Case stated by the revising barrister, for the borough of Ipswich.

The appellant, who claimed to be placed on the occupiers' list of electors for the parish of St. Clement's, Ipswich, had volunteered for military service in the recent war in South Africa, and he was absent from this country on military service on behalf of the Crown in South Africa during the whole of the twelve months preceding the 15th of July, 1902.

On objection being made to the claim, it was argued that the claim was good under the Electoral Disabilities (Military Service) Removal Act, 1900, notwithstanding the claimant's absence.

The revising barrister decided that as peace was proclaimed in June, 1902, the claim was bad, inasmuch as the war had come to an end on the declaration of peace, and the absence of the claimant during the whole of the qualifying period was consequently not an "absence during the continuance of the present war" within the meaning of section 3 of the said Act; and he disallowed the claim of the appellant Marsh and of two other persons who claimed on the same grounds.

From this decision the claimant Marsh appealed.

Section 1 (i.) of the Electoral Disabilities (Military Service) Removal Act, 1900, provides that "a person shall not be disqualified for being registered for voting . . . in respect of a qualification for which any residency or inhabitancy is required, by reason only that during the whole or any part of the qualifying period he has as a member of the Reserve, Militia, Yeomanry, or Volunteer Forces, or otherwise as a volunteer been absent on actual military service on behalf of the Crown, whether beyond the seas or not." By section 3, "this Act shall apply only to absence during the continuance of the present war in South Africa."

Section 2 of the Disabilities Removal Act, 1891, enacts that "a person shall not be disqualified from being registered" as a parliamentary or local government elector "by reason only that during part of the qualifying period not exceeding four months during any one term, he has in the performance of any duty arising from or incidental to any office, service, or employment held or undertaken by him, been absent from his dwelling-house or lodgings."

*Daldy*, for the appellant.—The revising barrister was wrong in holding that the Act of 1900 only

excused residence up to the date of the "termination of the continuance of the war." The words in section 3, "during the continuance of the present war," must be taken to include a reasonable period after the actual declaration of peace. After the war has ended, so far as actual hostilities are concerned, there are still martial operations and the necessary movements of troops. The object of the Act would be defeated if the narrow construction placed on it by the revising barrister is upheld. Moreover, it would be impossible to get home the whole of the men who volunteered, between the declaration of peace in June and the 15th of July; and if the barrister's view is right, then those volunteers who were not in England by the 15th of July last are disfranchised for the present year. Even if the decision were right on the ground that the war ceased on peace being declared, the interval between the declaration of peace and the 15th of July is covered by the provisions of section 2 of the Act of 1891.

The respondent (the town clerk of Ipswich, who had been made respondent pursuant to section 38 of the Parliamentary and Municipal Registration Act, 1878) did not appear.

Lord ALVERSTONE, L.C.J.—We differ somewhat as to the grounds on which this appeal should be allowed, but are all agreed that the revising barrister ought to have allowed the claims. Speaking for myself, I am content to base my judgment on what I think to be the true construction to be placed on sections 1 and 3 of the Act of 1900. [His lordship having read the sections, continued:] If a strict grammatical construction must be placed by the court on these sections, the line would have to be drawn at the moment of the declaration of peace. Mr. Daldy contended that the intepretation put on the word "during" by the revising barrister was too narrow, and he pointed out that if the revising barrister's decision was right then as peace was declared before the 15th of July all who had volunteered and did not get back before that date lost their vote, whereas if peace had been declared on the 16th of July all who came back would be able to claim the benefit intended to be given them by the Act. In my opinion the word "during" refers less to the continuance of the war than to the services rendered necessary by the war. Happily, in any case the Act of 1891 gets over the difficulty. The words that have raised the difficulty are those in section 3 of the later Act of 1900, and no doubt the Legislature will see that they are not again used if an Act is passed next time England has a foreign war. In my opinion the provisions in the Act of 1891 may reasonably be construed so as to cover this case. There is no evidence on which we are invited to hold the contrary.

WILLS, J.—I agree that the claimant ought to be registered, but I confess I find some difficulty in construing the words of the Act of 1900 as liberally as they have been construed, as it is difficult to get out of the material words more than they actually say. However, as even on the strictest grammatical construction given to the words and taking them in their narrowest sense, the claimant was excused residence up to June; and the remaining few weeks were covered by the Act of 1891; so that whether you give the narrow or the liberal construction to the Act of 1900, the appeal ought to be allowed and the claim admitted.

CHANNELL, J.—I agree. I am content to base my decision on the Act of 1891, which, on the evidence before us, is sufficient to justify the claimant's right to be registered as a voter. As the Act of 1900 refers only to the war now happily over, it appears to me unnecessary to try and decide what is the proper construction to be borne by the words "during the continuance of the present war," as no doubt the Legislature will take care that such a question shall not arise again.

*Appeal allowed.*

Solicitors for the appellant, *Ayrton, Biscoe, & Barclay.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) Nov. 7.

PICKARD (*Appellant*) v. PRESTON (*Respondent*). (a.)

*Election law—Registration—Parliamentary franchise—Borough vote—Occupier's claim—Local Act—Alteration of boundaries of parish—Part of parish added to City of London except for rating purposes—Metropolitan Meat and Poultry Market Act,* 1860 (23 & 24 *Vict. c. cxciii.*), *s.* 11—*Redistribution of Seats Act,* 1885 (48 & 49 *Vict. c.* 23), *6th Schedule.*

*Under the Metropolitan Meat Market Act,* 1860, *the Corporation of the City of London were authorized to take a certain portion of the parish of St. Sepulchre, Middlesex, in connection with the establishment of a meat market, and by section* 11 *of that Act it was provided that, except for the purposes of rating, the premises so taken should be deemed to be in the City of London, but that they should, nevertheless, continue to be rated in and to the parish of St. Sepulchre. By the Redistribution of Seats Act,* 1885, *Schedule VI., the parish of St. Sepulchre, Middlesex, was included in the East Division of the Parliamentary Borough of Finsbury.*

*The appellant, who was the occupier of a stall in the meat market on a portion of the above premises, claimed to have his name inserted in Division I. of the occupiers' list of voters for the East Division of the Parliamentary Borough of Finsbury, and his claim was objected to.*

*The revising barrister disallowed the claim, on the ground that, on the true construction of the Act of* 1860, *the qualifying premises ceased in* 1860 *to form part of the parish of St. Sepulchre, Middlesex, for the purposes of the electoral franchise, and that that was so notwithstanding the provision as to rating contained in section* 11.

THE COURT *affirmed his decision on the same grounds.*

Case stated by the Revising Barrister for the East Division of the Parliamentary Borough of Finsbury.

The appellant claimed as a joint tenant of a stall in the Central Meat Market of the City of London to have his name inserted in Division I. of the occupiers' list of electors for the East Division of the Parliamentary Borough of Finsbury in the parish of St. Sepulchre, Middlesex, as a £10 occupier in respect of the said stall.

The claim was duly objected to.

The revising barrister decided that the area of the qualifying property was not within the parish of St. Sepulchre, Middlesex, mentioned in the Redistribution of Seats Act, 1885, Schedule VI., which defined the boundaries of the Parliamentary borough of Finsbury; that the area of the qualifying property had previously to the Redistribution of Seats Act, 1885, ceased to be part of the parish of St. Sepulchre, and was within the City of London pursuant to the Metropolitan Meat and Poultry Market Act, 1860; and that that was the case notwithstanding the provisions relating to rating in section 11 of that Act; and he accordingly refused to place the claimant's name upon the register.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The facts were as follows:

In connection with the construction of the Central Meat Market, the Corporation of the City of London were authorized by the Metropolitan Meat Market Act, 1860, to purchase and take certain lands and tenements then situate in the parish of St. Sepulchre, Middlesex (which adjoins the city), and the property in respect of which the present claim was made constituted part of the site of the said premises.

By section 11 of the Act of 1860, it was provided that "except for the purposes of rating, as hereinafter mentioned," these lands and tenements by the Act authorized to be purchased and taken "shall as and when purchased and taken be deemed to be and be in the City of London, but they shall nevertheless continue to be rated and assessed as if they had remained in and continued to form a part of the said parish of St. Sepulchre, Middlesex, and shall continue to be rated to . . . poor and other parochial rates of that parish, and the same shall be paid by the corporation of the city (who shall be deemed the occupiers of the premises) in and to the said parish upon the same assessable value as those lands and tenements are now assessed, but the sites of the said lands and tenements, or any other buildings that may at any time be erected thereon, shall not be otherwise rated or assessed to the said parish of St. Sepulchre, Middlesex, or any other parish whatsoever."

By the Redistribution of Seats Act, 1885, Schedule VI., the East Division of the Parliamentary borough of Finsbury includes the parish of St. Sepulchre, Middlesex.

*Soper*, for the appellant.—The appellant and seventeen other persons, who are also appellants, hold stalls on a part of the meat market which was acquired by the City of London and which till then formed part of the parish of St. Sepulchre, Middlesex. Up to last year the claimants had all been on the list of voters for the East Division of Finsbury, but their names were last year taken off, and the revising barrister has now refused to replace them on the ground that the effect of the Meat Market Act, 1860, was to bring the portion of St. Sepulchre parish acquired by the City of London within the city. Inasmuch as section 11 of the Market Act, 1860, expressly provides that the part of the market which was formerly in the parish of St. Sepulchre shall continue to be rated and assessed as if it remained in and continued to form part of that parish, it implies that that part has never been separated from that parish for Parliamentary purposes. Therefore the claimants were entitled to be put upon the list of voters for East Finsbury for that parish to which they are rated.

The respondent was not represented.

Lord ALVERSTONE, L.C.J.—I think that the decision that the revising barrister has come to is a right decision. The facts show that the City of London acquired a part of the parish of St. Sepulchre for the purpose of enlarging their meat market. Under the Act authorizing them to acquire this additional land a provision is made that that part of the market should nevertheless continue to be rated in and to the rates of that parish of which it formerly formed a part. But that provision was inserted only to make good the primary loss to the parish of St. Sepulchre, it did not prevent the land so acquired from becoming part of the City of London for Parliamentary and other purposes. The revising barrister was right in disallowing the claims on the ground that the appellants had no qualifying occupancy in East Finsbury.

WILLS and CHANNELL, JJ., concurred.

*Appeal dismissed.*

Solicitor, *E. H. Goddard.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — Oct. 30.

GUARDIANS OF PLYMOUTH UNION (*Appellants*) v. GIBBS (*Respondent*). (*a.*)

*Bastardy — Poor law — Illegitimate child becoming chargeable—Marriage of mother—Power of guardians to obtain order against putative father—Bastardy Laws Amendment Act* (36 *Vict.* c. 9), *s.* 5.

*It is competent for the magistrates, at the instance of the poor law guardians, to make an order against the putative father of an illegitimate child who has become chargeable to the union, ordering him to contribute to its support, notwithstanding that the mother of the child has a husband who is able to support it.*

Case stated by magistrates.

The special case set out the following facts:

On the 29th of January, 1902, a summons was issued against the respondent calling on him to show cause why he should not contribute to the support of a bastard child of one Florence Payne, formerly Saxey, which it was alleged had become chargeable to the town of Plymouth, and of which he was alleged to be the father.

At the hearing of the summons it was proved that Florence Saxey, then a single woman, on the 16th of December, 1898, gave birth to a bastard child afterward named Charles Henry Gibbs Saxey, of which the defendant was proved to be the father.

On the 16th day of April, 1901, Florence Saxey married one George Payne, a stableman, earning from 21s. to 22s. 9d. per week, and three months after the marriage the home was broken up, and the said Charles Henry Gibbs Saxey was on the 16th of July, 1901, taken to the workhouse in the town of Plymouth, where he was still being maintained.

It was admitted George Payne was of sufficient ability to maintain the said C. H. G. Saxey.

On the 17th of August, 1901, Florence Saxey resumed cohabitation with, and was living with George Payne at the date of the hearing, but he refused to take C. H. G. Saxey out of the workhouse and maintain him.

The contention of the appellants before the magistrate was that they were entitled to an order against the respondent under 36 Vict. c. 9, s. 5, to contribute to the relief of the bastard child, and that it was not obligatory on them to force the husband to maintain him.

The respondent contended that on the marriage of Florence Saxey her husband, George Payne, became permanently legally liable to maintain the bastard child, and as George Payne was of sufficient ability to maintain the child the justices were not at liberty to make an order on the putative father to contribute towards the relief of the child, who had not become properly chargeable to the town of Plymouth.

The justices dismissed the application on the following grounds—viz.: That by statute 4 & 5 Will. 4, c. 76, s. 57, the liability is thrown upon the husband to maintain the illegitimate children of his wife born before marriage while under sixteen years of age, and that the case of *Lang* v. *Spicer*, 1 M. & W. 129, expressly decides that the husband is primarily liable under the statute for such maintenance at least while of ability to maintain; and, further, that having regard to the fact that a woman cannot herself obtain an order against the putative father of an illegitimate child born before marriage, it would seem inconsis-

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

tent that the guardians of the poor should be able to do so in such a case, seeing that there is a person—namely, the husband, who by statute is responsible.

The following cases were cited in the course of the argument or before the magistrates: *Lang* v. *Spicer*; *Stacey* v. *Lintell*, 27 W. R. 551, 4 Q. B. D. 291.

*Gardner*, for the appellants.

*Hawke*, for the respondents.

Lord ALVERSTONE, L.C.J.—This case is not free from difficulty, but it seems to me that we should consider the section and see if there is anything to prevent us from giving effect to the plain words of the section. At the time of the passing of 4 & 5 Will. 4, c. 76, and up till 1872 there was no power on behalf of guardians to obtain a direct order against the putative father of a bastard child, but they could enforce an order obtained by the mother. But by the Act of 1872 (36 Vict. c. 5) they obtained such a power for the first time. The Act of 1873 (36 & 37 Vict. c 9) is practically identical with the previous statute. By section 5 of the last mentioned Act it is provided that "when a bastard child becomes chargeable to a union or parish the guardians may apply to two justices having jurisdiction in the union or parish in petty sessions, and thereupon such justices may summon the man alleged to be the father of the child to appear before them or two justices having the like jurisdiction to show cause why an order should not be made upon him to contribute to the relief of the child." It is contended that this section must be limited to the case of illegitimate children of a mother whose husband is not able to support them. This is practically what the argument on behalf of the respondent comes to. It is contended that the word chargeable in the Act of 1873 must be interpreted to mean ultimately chargeable. I think that if that had been intended other language would have been employed. I am of opinion that the words must be taken in their ordinary sense as meaning "in fact chargeable." Some colour is given to this view of section 5 by the third proviso, which provides that nothing in this section shall be deemed to relieve the mother of a bastard child from liability to maintain her child.

If that is so, the justices can call upon the putative father to show cause why he should not maintain the child. Of course, the fact that the mother's husband has means is one that the justices may and should take into consideration, but I have come to the conclusion that the magistrates may make an order notwithstanding that it has been proved that the mother's husband has means. The difficulty of dual liability has been discussed in several cases, and I would point out that it has been decided that an order can be enforced against the putative father after the marriage of the mother. The Acts of 1872 and 1873 were passed with a full knowledge of the existence of the dual liability, and if they had meant to give an unnatural meaning to the word "chargeable" other language would have been used. The case must go back to the magistrates with the opinion that they may make an order against the putative father, though I do not say they should do so.

WILLS and CHANNELL, JJ., concurred.

*Appeal allowed.*

Solicitors, *Crowders, Vizard, & Oldham*, for *W. Adams*, Plymouth; *Law & Worssam*, for *Bond & Pearce*, Plymouth.

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Prob. Div. & Adm. Div. Admiralty. } July 7; Aug. 6, 1902.

"THE LEITRIM." (*a.*)

*Ship Admiralty—General average loss—General average adjusters—Loss of time freight.*

*The words "all loss" in the well-known passage in Lawrence, J.'s, judgment in* Birkley *v.* Presgrave, 1 *East* 220, *at p.* 228, *relating to a general average sacrifice, ought not to be extended so as to include losses which are the result of accidental circumstances affecting the loser, and are not losses which the other persons interested ought in ordinary course to be treated as concerned with.*

*The practice of general average adjusters of not allowing in general average, loss of time freight which is the result of detention for repair of damage caused by a general average sacrifice is in accordance with legal principles, and is rightly left out of consideration.*

Action.

The question raised in this case was whether a shipowner is entitled to some compensation in general average for the loss of time freight due to the detention of a vessel whilst under repair of damage resulting from a general average loss.

The plaintiff, Ralph Milbanke Hudson, was the registered managing owner of the steamship *Leitrim*, and the defendants were the British and Foreign Marine Insurance Co. (Limited).

*The Leitrim* was a steamship of 4,824 tons gross register, of the port of Sunderland, and was fitted for carrying frozen meat in her No. 2 lower hold.

On the 2nd of February, 1900, the vessel was chartered to Messrs. William Milburn & Co., at the rate of £1,680 per calendar month, the period of hire to expire about the 20th of January, 1901.

By clause 17 of the charter-party it was provided that "in the event of loss of time from deficiency of men and stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four working hours the payment of hire shall cease until she be again in an efficient state to resume her service; and should she in consequence put into any other port than that to which she is bound the port charges and pilotage at such port to be borne by the steamer's owners; but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo such detention or loss of time shall be at the charterers' risk and expense."

By clause 28 the charterers had "liberty to sub-let the steamer for admiralty transport or other service, the charterers to remain responsible for due fulfilment of the conditions of the charter."

Under this latter clause the vessel was sub-let by charter on the 5th of September, 1900, to Messrs. Houlder Bros., for the purpose of carrying a cargo of coals from Barry to Cape Town. Under this charter freight was to be paid at the rate of thirty-five shillings per ton "delivered or on bill of lading quantity less two per cent. at receiver's option, to be declared in writing before cargo is broken."

On the 15th of September, whilst *The Leitrim* was loading coals at Barry, a fire broke out in No. 2. lower hold, and in order to extinguish the fire it was found necessary to pour large quantities of water into both No. 2 hold and into the cross-bunker to which the fire had spread. After the fire was extinguished, the coals from No. 2 hold and from the cross-bunker were landed and sold and were eventually replaced by new shipments. A portion of the insulation in No. 2 hold was damaged

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

by the fire, and parts of the steelwork of that hold and also in the cross-bunker were burned and buckled. In addition to this fire damage to the insulation, the employment of water to extinguish the fire, so damaged the charcoal and paper of the insulation as to necessitate the renewal of nearly all of it, and in order to replace and repair it all the brine pipes in this hold and in the cross-bunker were necessarily removed. The time occupied in extinguishing the fire, discharging the damaged coals, and entirely repairing and refitting the vessel, extended from the 15th of September to the 24th of October, a period of thirty-nine days. The time necessary for the repair of the insulation damaged by water together with the incidental removal and reinstatement of the brine pipes would by itself have been thirty-one days. In respect of the period of thirty-nine days Messrs. Milburn & Co. claimed and were allowed by the plaintiff a deduction from the hire of the vessel of £2,160 under clause 17 of the charter-party of the 2nd of February, 1900. The vessel was insured by the plaintiff (and his co-owners) with the defendant company under a policy of the 18th of June, 1900, for £4,000, and it was on this policy that he claimed.

A statement of general average was prepared and dated the 11th of February, 1901, but the plaintiff objected that it did not allow him the loss of hire, which he contended should be made in general average as a voluntary sacrifice. Accordingly on the 14th of January, 1902, a supplementary general and particular average statement was prepared by average adjusters, and a general average sum of £1,340 2s. 11d. was allowed as "net loss of time freight resulting from detention under repair of general average damage exclusively, after crediting wages and provisions of crew already in general average." The concrete question for the court, therefore, was whether this sum of £1,340 2s. 11d. was rightly included in general average. If the judgment of the court was in the affirmative the plaintiff was to be taken to be entitled to recover £66 18s. 6d., but if in the negative judgment was to be entered for the defendants.

*Carver, K.C.*, and *Cambier*, for the plaintiff.—The loss incurred was the direct consequence of the general average act of pouring the water into the hold to save the ship and cargo from destruction. This loss of hire, therefore, in respect of the time occupied in repairing the water damage, was a general average sacrifice and there is no reason why loss of time freight directly caused by the general average act should not be made good in general average. They relied on the definition of a general average sacrifice as laid down in *Birkley* v. *Presgrave*, 1 East 220, at p. 228—viz., "all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionately by all who are interested." The words "all loss" certainly include the loss of time freight.

They cited *Da Costa* v. *Newnham*, 2 T. R. 407; *Power* v. *Whitmore*, 4 M. & Sel. 141; *Anglo-Argentine &c., Agency* v. *Temperley Shipping Co.*, 48 W. R. 64, [1899] 2 Q. B. 403.

*Scrutton, K.C., Hamilton, K.C.*, and *Mackinnon*, for the defendants.—By the universal practice of average adjusters loss of time freight is not treated as a general average loss. Clause 11 of the voyage charter incorporates the York-Antwerp rules, and as the shipowner gave authority to sublet, and allowed the shipment under those rules, the practice thereunder excludes the claim with adjustment of general average.

*Cur. adv. vult.*

BARNES, J., in giving judgment, stated the facts, and proceeded as follows: The question raised in this case is novel and difficult and has not, so far as I am aware, been considered in the courts. Evidence has been given before me by experienced average adjusters to the effect that according to the practice of average adjusters a loss of time charter freight in such cases is never included in general average. No evidence to the contrary was given, and I think, therefore, it may be taken that the practice of average adjusters is uniform on this matter. The question, therefore, comes to be whether this practice is right, because although it was suggested by counsel for the defendant company that as the sub-charter provided that in case of average the same was to be settled according to the York-Antwerp Rules, 1890, and that under rule 18 of those rules, "Adjustment except as provided in the foregoing rules (which do not apply to the present case): the adjustment shall be drawn up in accordance with the laws and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules." The adjustment should be in accordance with the practice, yet that rule does not, in my opinion, mean that the adjustment is to be in accordance with practice if the practice conflicts with the law. I have, therefore to determine what is the law applicable to this case. The real question appears to me to be whether the shipowner is entitled to some compensation in general average for the delay caused by the sacrifice. I do not think that the question is whether he is entitled to be compensated in general average for the particular consequence of the delay in this case, because that would be to make the rights and liabilities of the cargo owners depend entirely on the contract of time charter to which they are in no way parties. The shipowners' loss of freight is caused by the operation of the cessor clause, No. 17, in the original time charter. If that clause had not been inserted, the time charterers would have remained liable to pay the freight in accordance with the principle upon which the old case of *Ripley* v. *Scaife*, B. & C. 167, was decided, and in my opinion the cargo owners ought not to be affected by the question whether the loss of time falls, by the contract between the shipowner and the time charterers to be borne by the one or the other. If the time charterers had to continue paying freight during the delay, the measure of their loss would appear to be the loss of the benefit which would have accrued to them but for the delay. Counsel for the plaintiff relied upon the well-known passage in Lawrence, J.'s, judgment in *Birkley* v. *Presgrave*, 1 East 220, at p. 228, which is as follows: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo, comes in this general average, and must be borne proportionately by all who are interested." They argue that the hire for thirty-one days was lost by the sacrifice, and that, therefore, it ought to be borne proportionately by all who are interested.

But, in my opinion, the words "all loss" in this and other statements of the principle of general average have not the width of meaning attributed to them by the plaintiff's counsel. They ought not, I think, to be held to extend to include losses which, to use a term which has been employed, are the result of "accidental circumstances" affecting the loser, and are not losses which the other person interested ought in ordinary course

to be treated as concerned with. This term is to be found in the judgment of Lord Esher in *Rodocanachi* v. *Milburn*, 35 W. R. 241, 18 Q. B. D. 67. That was an action by charterers against shipowners for non-delivery of cargo, and the plaintiffs had sold the cargo to arrive. It was held that in estimating the damages the market value at the time when the cargo should have arrived must be looked at and not the price at which the plaintiffs had sold the cargo. Lord Esher said: "But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account, in estimating the damages, anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that if the plaintiffs had sold the goods for more than the market value before their arrival they could not recover on the basis of that price, but would be confined to the market price because the circumstance that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners, but it is said that as they have sold for a price less than the market price, the market price is not to govern, but the contract price. I think that if the law were so it would be very unjust. I adopt the rule laid down in Mayne on Damages which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for the sale of goods. That rule gives the mode of estimating the value which is to be taken for the purpose of arriving at the damages." It is for similar reasons that although when goods have been sold to arrive and have been jettisoned in circumstances giving rise to a general average loss the actual loss to the merchant is the price at which the goods were sold, yet the market value of the goods at the time of the ship's discharge is the basis of compensation. So also in my opinion the reason why, when a ship has been chartered at one rate of freight, and goods have been shipped at a different rate of freight, the chartered freight is left out of consideration in assessing the compensation for freight lost by jettison of goods, is that the chartered freight is a matter with which the owners of cargo are not concerned, and its loss may be termed an "accidental circumstance" peculiar to the shipowner.

These considerations lead me to the conclusion that the cargo-owners have no concern with the contract between the shipowner and the time charterers, that the loss of freight under it caused by the delay is the result of an accidental circumstance peculiar to the shipowner and time charterers and that the question is whether the shipowner is entitled to be compensated in general average on the basis of the ordinary consequences of the delay, as if the ship were carrying the goods simply under the contract under which they were shipped. This is a different question from that which has been discussed in text-books as to the allowance in general average to the owners, of the expenses of maintaining and paying the crew during the delay caused by the execution of repairs rendered necessary by a general average sacrifice. I know it has been thought by some that by common law those expenses are not to be included in general average in such a case, but the cases which are referred to by Mr. Lowndes and criticized by him on on p. 241 of his work do not appear to me to go to this length, and I agree with what Thesiger, L.J., said in *Atwood* v. *Sellar*, 28 W. R. 604, 5 Q. B. D. 286, that "As a matter of fact it is extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our courts as constituting a claim for general average in a case where the ship has put into the port to repair damage itself belonging to general average." The wages and provisions of the crew during the delay in question have been allowed in general average in the present case apparently under the York-Antwerp rules, which are referred to in the sub-charter, and I have not to decide anything about them, though as at present advised there appears to me to be strong reasons for holding that at any rate whenever the delay is to repair damage which is itself the subject of general average, the wages and maintenance of the crew during such delay should be allowed by law in general average. But it does not at all follow that the mere loss of the profitable employment of the vessel as distinguished from actual expenses should in such a case be allowed.

In the first place, so far as I can ascertain, a loss of this character has never been claimed in general average. It is not introduced in the York-Antwerp rules, nor can I find any trace of it being allowed by the laws of any foreign country, though many of them contain provisions as to the allowance in general average of the wages and maintenance of the crew. It may be said, why on principle should not the loss of time be compensated for when that loss is due to the necessity for repairing damage, itself the subject of general average? I think the answer is that, although possibly there may be cases in which the loss of time is not common to all concerned, at any rate in cases like the present, is that the loss of time is common to all the parties interested and all suffer damage by the delay, so that the damages by loss of time may be considered proportionate to the interests and may be left out of consideration. Were this otherwise great inconvenience would arise and enormous difficulty be found in attempting to ascertain what was the proper amount of loss on each of the numerous interests which go to make up a shipping adventure. An average adjuster has a heavy task now when he has to deal with actual losses and values, but if he were also to have to assess speculative and estimated losses his task would be still heavier. Moreover, this inconvenience and difficulty is practically obviated by treating everyone's loss of time as proportionate to his interests and not bringing it into account. This appears to work substantial justice, for reverting to what I have said about accidental circumstances peculiar to a party, it seems clear that if the losses by delay—I am not dealing with expenses—were to be investigated, accidental circumstances would be excluded, with the result that all that could be considered would be the loss of the profitable employment during the delay of the capital invested in each interest concerned; and it would be unreasonable and difficult and involve very speculative inquiries to embark upon an examination of what upon such a basis would be the loss on each interest, so that for all practical purposes the losses may be considered as proportionate to the interest and left out of consideration altogether. Counsel for the plaintiff felt the difficulty there is in allowing claims for delay of a general character to be introduced into a statement of general average, and they endeavoured to distinguish between such claims and that in the present case the former, as they said, being speculative and the latter definitely ascertainable. But as I have already noticed, this definite loss is due to arrangements between the actual owner and the owners *pro hac*

*vice* of the vessel which ought not to affect cargo owners who have no cognizance of such arrangements, and are not parties thereto, and place their goods on board the vessel on the terms that they shall be subjected to the ordinary incidents involved in so doing.

In my opinion, therefore, the practice affecting this matter, proved by the average adjusters who have been called, is in accordance with legal principles and is right, and I answer the question which was agreed should be submitted to the decision of the court—viz., whether the item of £1,340 2s. 11d. for sacrificing time hire was rightly included in the adjustment of general average, in the negative. The consequence is that judgment will be entered for the defendants with costs.

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

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## Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Nov. 26.

JONES *v.* LAVINGTON. (*a.*)

*Landlord and tenant—Covenant—Quiet enjoyment—Implied covenant—"Let"—Unlimited covenant.*

*An unlimited covenant for quiet enjoyment cannot be implied from the use of the word "let" in a contract of letting.*

Application by the plaintiff for judgment or a new trial in an action tried before Grantham, J., and a jury.

The defendant was the holder of a long lease of a house granted in 1893 by the Governors of the Foundling Hospital, which lease contained a covenant by the lessee not to use the house or permit it be used for the purpose of any trade or business, and also contained a proviso for re-entry by the lessors in the event of a breach of the said covenant.

By an agreement in writing, not under seal, dated the 19th of July, 1900, between the defendant as landlord and the plaintiff as tenant, it was agreed as follows: "The landlord lets to the tenant who agrees to take" the lower part of the said house at a yearly rental of £85 for the term of three years. The agreement did not contain any covenant or term corresponding to the covenant contained in the superior lease. The plaintiff, who had no knowledge of the superior lease, entered into possession of the premises let to him and proceeded to carry on therein the trade and business of a metal worker.

In December, 1901, the plaintiff was restrained from carrying on his said trade or business on the said premises by an injunction obtained by the superior landlords.

The plaintiff, by his statement of claim, alleged that prior to the agreement he informed the defendant that he required the premises for the purpose of carrying on his said trade or business therein, and that the defendant verbally warranted and falsely represented to the plaintiff that he had good right and full title to demise and let the premises, and that the plaintiff should have and quietly enjoy the premises for the said purpose. The plaintiff also alleged that it was an implied term of the agreement that he should and might quietly enjoy the premises and carry on his said trade or business therein. The plaintiff claimed damages for breach of covenant, or in the alternative for breach of warranty and for fraudulent misrepresentation.

At the trial the jury in the first instance said that they found a verdict for the plaintiff for £150 damages; but Grantham, J., having subsequently asked them whether they found there had been any fraud on the part of the defendant, they answered that question in the negative. Grantham, J., thereupon gave judgment for the defendant.

The plaintiff applied for judgment or a new trial.

*Witt, K.C.*, and *R. J. Drake*, for the plaintiff.—This agreement of letting carries with it an implied covenant for quiet enjoyment, which extends to eviction by title paramount. Such a covenant for quiet enjoyment is to be implied from the word "let" as much as from the word "demise." The *dicta* contained in the judgment delivered by Kay, L.J., in *Baynes* v. *Lloyd*, 44 W. R. 328, [1895] 2 Q. B. 610, to the effect that a distinction is to be drawn in this respect between the words "let" and "demise" have been disagreed with by the Divisional Court in *Budd-Scott* v. *Daniell*, *ante*, p. 134, [1902] 2 K. B. 351.

They referred to the following cases: *De Lassalle* v. *Guildford*, 49 W. R. 467, [1901] 2 K. B. 215; *Holder* v. *Taylor*, Hob. 12; and *Bandy* v. *Cartwright*, 1 W. R. 415, 8 Exch. 913.

*Trevor F. Lloyd*, for the defendant, was not called upon to argue.

COLLINS, M.R.—In my opinion this appeal fails. The jury have negatived fraud, and it is not seriously contended on the plaintiff's behalf that he can claim for breach of warranty, for the alleged agreement that the plaintiff should have quiet enjoyment, if it existed, was not a collateral agreement. It is, however, argued that out of the terms of the contract of letting a covenant or contract for quiet enjoyment can be implied, and that not merely a limited covenant for quiet enjoyment in respect of acts of the lessor and persons claiming under him, but an unlimited covenant in respect of the acts of all persons. That contention is concluded by the judgment of this court delivered by Kay, L.J., in *Baynes & Co.* v. *Lloyd & Sons*. They there held that, assuming that in the absence of the word "demise" in a contract of letting either a covenant for title or a covenant for quiet enjoyment could be implied, the duration of such covenant was limited by that of the lessor's own estate. That was the point actually decided. But the court in the course of their judgment, dealing with the effect of the word "demise," and with the covenants in law to be implied therefrom, say this: "The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease." They had previously said that "let" was not one of those words. They take exception to a *dictum* of Parke, B., in *Hart* v. *Windsor*, 12 M. & W. 68, at p. 85, that the word "let" or any equivalent words which constitute a lease have, no doubt, the same effect as the word "demise." Our attention was called to the case of *Budd-Scott* v. *Daniell* in the Divisional Court. I think it would be unbecoming in us to call in question the opinion expressed by the Court of Appeal. But it is not necessary for us to decide in this case whether any covenant for quiet enjoyment can be implied from the word "let." The plaintiff's contention is that an unlimited covenant can be implied. In my opinion

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

the authorities show that whether any covenant for quiet enjoyment can be implied from the word "let," at any rate an unlimited covenant for quiet enjoyment cannot be implied.

ROMER and MATHEW, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the plaintiff, *Colyer & Colyer.*

Solicitors for the defendant, *Harratt & Pollock.*

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From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Nov. 24.

BAILEY *v.* THURSTON & CO. (LIMITED). (*a.*)

*Bankruptcy — Property of bankrupt — After-acquired property — Contract of employment — Dismissal after bankruptcy — Action by bankrupt for wrongful dismissal — Right of action vesting in trustee — Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

*The plaintiff entered the employment of the defendants for a term of years as a traveller at a salary. During the period of employment he was adjudicated bankrupt, and subsequently the defendants dismissed him. In an action for wrongful dismissal, he being at the time an undischarged bankrupt,*

*Held, that, the breach of the contract of employment having occurred after the bankruptcy, the cause of action did not vest in the plaintiff's trustee in bankruptcy, who had not intervened in any way, and the plaintiff was therefore entitled to sue in his own name.*

*Judgment of* Phillimore, J. ([1902] 2 *K. B.* 397), *affirmed.*

Appeal from the judgment of Phillimore, J., after the trial of the action with a jury: reported in [1902] 2 K. B. 397.

By an agreement in writing the defendants agreed to employ the plaintiff, and he agreed to serve them, as their traveller for a period of five years from the 17th of April, 1899, at a salary and a commission on all orders procured by him.

Early in June, 1901, the plaintiff was adjudicated bankrupt, and subsequently on the 29th of June, 1901, the defendants dismissed him from their employment.

He thereupon brought this action for wrongful dismissal, being then an undischarged bankrupt.

The defendants pleaded that the plaintiff before action was adjudicated a bankrupt, and remained undischarged when the action was brought, and that the cause of action, if any, vested in the trustee of his estate and effects.

The trustee in bankruptcy had not intervened in any way.

At the trial the jury returned a verdict for the plaintiff for £100 damages, and Phillimore, J., on further consideration held that the plaintiff was entitled to maintain the action. He accordingly gave judgment for the plaintiff.

*Kemp, K.C.*, and *E. W. Hansell*, for the defendants.—The plaintiff being an undischarged bankrupt the cause of action for wrongful dismissal vested in his trustee: *Wadling* v. *Oliphant*, 24 W. R. 246, 1 Q. B. D. 145; *Emden* v. *Carte*, 29 W. R. 600, 17 Ch. D. 169, 768. It was immaterial whether the breach of the contract of employment occurred before or after the adjudication. All a bankrupt's property, present or future, vests in his trustee in bankruptcy, except (1) certain property specially excepted by section 44 of the Bankruptcy Act, 1883; (2) so much of the personal earnings of the bankrupt as are necessary for the support of himself and his family; and (3) damages recoverable for injury to the person or feelings of the bankrupt, whether arising from tort or breach of contract. The bankrupt may sue for property acquired by the bankrupt during his bankruptcy, including his personal earnings, subject to the right of his trustee to intervene, and in the case of personal earnings the trustee can only claim the surplus beyond that which is necessary for the support of bankrupt and his family. Damages for breach of contract to employ are not personal earnings; they are compensation for breach of the contract to employ: *Wadling* v. *Oliphant*. The damages here are not after-acquired property for which the bankrupt can sue in his own name until the trustee intervenes. The contract to employ the bankrupt was before the bankruptcy, and the right to sue for breach of it passed to the plaintiff's trustee in bankruptcy.

They also referred to *Beckham* v. *Drake*, 2 H. L. Cas. 579; *Stanton* v. *Collier*, 2 W. R. 197, 3 E. & B. 274; *In re Byrne, Ex parte Henry*, 9 Morrell 213, 41 W. R. Dig. 13; *Osman* v. *Raphael*, 12 Times L. R. 376.

*Lord Coleridge, K.C.*, and *J. R. Macoun* (*Bovill Smith* with them), for the plaintiff.—The right to claim damages for wrongful dismissal after the bankruptcy is after-acquired property, for which the bankrupt can sue, though his trustee in bankruptcy may intervene: *Herbert* v. *Sayer*, 5 Q. B. 965; *Jameson* v. *Brick and Stone Co.*, 27 W. R. 221, 4 Q. B. D. 208; *Cohen* v. *Mitchell*, 38 W. R. 551, 25 Q. B. D. 262. The cases of *Wadling* v. *Oliphant* and *Emden* v. *Carte* did not decide that the bankrupt could not sue; they only decided that the trustee had the right to intervene. It might be that in the present case the trustee could intervene and claim the money, but that was a matter entirely between the bankrupt and his trustee. In *Beckham* v. *Drake* the wrongful dismissal occurred before the bankruptcy, and that case is not an authority for saying that in a case like the present the bankrupt cannot maintain the action. The old form of declaration for wrongful dismissal was that the plaintiff was ready and willing to go on serving the defendant, and yet the defendant dismissed him. The trustee in bankruptcy could not allege that. This in not such a contract as passed to the trustee in bankruptcy, and therefore, for any breach occurring after the bankruptcy the trustee cannot sue. If the contract passed to the trustee he must take it with its obligations as well as its benefits, and he would be liable to an action for breach of it, though he could not compel the bankrupt to perform it. A contract for mere personal service never passes to the trustee in bankruptcy: per Blackburn, J., in *Wadling* v. *Oliphant*, 1 Q. B. D., at p. 148. The action is therefore maintainable.

They also referred to *Williams* v. *Chambers*, 10 Q. B. 337; *Ex parte Dewhurst*, 20 W. R. 172, L. R 7 Ch. App. 185; *Cook* v. *Whellock*, 38 W. R. 534, 24 Q. B. D. 658; *In re Roberts*, 48 W. R. 132, [1900] 1 Q. B. 122.

*E. W. Hansell* replied.

*Cur. adv. vult.*

Nov. 24.—COLLINS, M.R.—This is an appeal from the judgment of Phillimore, J., and the question is whether the trustee in the bankruptcy of the plaintiff is a necessary party to the action. The contract of employment was made before the bankruptcy, and the dismissal—that is, the breach—occurred after the adjudication. The defendants pleaded the bankruptcy of the plaintiff and that the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

cause of action had passed to his trustee. The question is whether that is a good plea; in other words, whether the action can be maintained by the bankrupt in his own name alone. Phillimore, J., held that the plea failed, and in my opinion that decision is right. A large number of authorities were cited to us, and we desired to look carefully into those authorities before giving our decision, and for that purpose we postponed giving judgment.

The principle applicable to the case has been laid down in *Beckham* v. *Drake* in the House of Lords. This is one of that class of cases in which the bankrupt's own labour is the sole consideration given by him for the contract of the defendants to employ him and to pay him salary. It is not a contract of a mixed nature where something else is given by the bankrupt in addition. In return for his labour the defendants contracted to employ him and pay him a salary. For any breach of that contract, if complete at the date of the bankruptcy, carrying with it the right to a sum of money, there is no doubt that the trustee in bankruptcy would be the proper person to sue. But so far as the contract is *in fieri* and still unperformed at the date of the bankruptcy, it is clear from *Beckham* v. *Drake* that the right of action for any breach of it occurring after the bankruptcy would not pass to the trustee. The trustee could only intervene and intercept, if he could, such sum as might be recovered by the bankrupt. He could not put in suit the contract which was still *in fieri*, and allege readiness and willingness to carry it out. That proposition seems to me to be clear from *Beckham* v. *Drake*. The contract in that case was also a contract of employment and the action was brought for a breach of that contract by reason of the wrongful dismissal of the plaintiff before his bankruptcy. The House of Lords held that the right of action passed to the assignees of the insolvent. I will take a passage from the opinion delivered by Cresswell, J., when advising the House of Lords, which seems to me to put in a short and concise form what the majority of the judges said. Cresswell, J., said (2 H. L. Cas., at p. 615), "I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees; they cannot hire him out (as was said by Lord Mansfield), and as a consequence the assignees cannot, after bankruptcy, adopt and enforce a contract made before the bankruptcy for the application of the personal skill or labour of a bankrupt; but I do not think it thence follows that, where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established that rights of action in general are vested in the assignees." There is also a passage in the opinion of Parke, B., in the same case to the like effect (at p. 625): "This contract, if unexecuted, would clearly not have passed to the assignees. But the question is not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed." It seems to me, therefore, that the contention put forward on behalf of the defendants that the contract, with all its incidents, passed to the trustee, in the same way all the rights under a contract for the sale of goods would pass, is not tenable. Subject to the limitation above mentioned, the contract did not pass to the trustee. The breach of the contract occurred after the bankruptcy, and gave rise to a cause of action for which the bankrupt could sue. There is, however, this well-established rule, that in regard to rights accruing to a bankrupt after the bankruptcy, though the bankrupt has a right to sue in his own name, the trustee may intervene and take the proceeds, except, in the case of personal earnings, so much as may be necessary for the maintenance of the bankrupt and his family. In actions of this class, if any moneys come to the bankrupt larger than are necessary for such maintenance, the trustee can intervene and intercept that amount. The question whether the trustee can intervene and intercept the proceeds of the action is quite distinct from the question whether the bankrupt has a right to bring the action in his own name. We are not deciding the question whether the trustee can intervene and claim the proceeds; we are only deciding that the bankrupt can sue in his own name.

It was said on behalf of the defendants that the point was decided in their favour by two cases—namely, *Emden* v. *Carte* and *Wadling* v. *Oliphant*. In *Emden* v. *Carte* the facts were these: The plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878. So we see that in that case the dismissal took place after the bankruptcy, and the contract, for breach of which the action was brought, had been made before the bankruptcy. Fry, J., held that he could not under the authority of the rules of 1875 substitute the trustee for the original plaintiff, but that he could add him as a co-plaintiff, which he accordingly did, and gave him the conduct of the action. I agree with Phillimore, J., that that decision does not involve this, that the action could not be maintained without the trustee being made a plaintiff, but that it does decide this, that the trustee could intervene. It was pointed out in that case by Fry, J., that it was not an action merely for personal services, but that there were other things to be done, which put it outside the narrow class of cases of personal service. The real point is that that decision does not involve the proposition that the bankrupt himself could not maintain the action, but all that the Court of Appeal and Fry, J., held was that the trustee was entitled to intervene and intercept the fruits of the action. The other case—*Wadling* v. *Oliphant*—is still more easy to distinguish from the present case. The head-note there states that a bankrupt, who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, and six years after the bankruptcy he was awarded by the decree of a competent court £104 as six months' salary in lieu of proper notice of dismissal. It was held that the bankrupt's trustee could claim this money before it was paid to him, as against any creditors subsequent to and without notice of the bankruptcy. In that case there was a clearly ascertained sum of £104 which accrued to the bankrupt after the bankruptcy, and it was held that in respect of that sum the trustee could intervene and appropriate it. But that case does not decide that the bankrupt was not a proper party to the action. Therefore, in neither of those cases was it suggested that the bankrupt himself could not maintain the action; it was merely decided that the trustee could intervene. It seems to me that the principle laid down in *Beckham* v. *Drake* governs this case, and the bankrupt is the proper person to sue. In my opinion the judgment of Phillimore, J., is right, and should be affirmed.

STIRLING, L.J.—I am of the same opinion. It is very important to observe the sequence of events. First, there was the contract between the plaintiff and the defendants whereby the defendants agreed to employ the plaintiff for a term of years as a

traveller. Next came the bankruptcy of the plaintiff; and after that the breach of contract by reason of the wrongful dismissal of the plaintiff. Upon that the present action was brought by the bankrupt alone to recover damages for wrongful dismissal. Upon that state of facts the question for our determination is whether the bankruptcy of the plaintiff is an answer to the plaintiff's claim, it not being alleged that his trustee in bankruptcy has intervened. It is contended on behalf of the defendants that on the bankruptcy of the plaintiff the contract vested in the trustee. The question what contracts vest in a trustee in bankruptcy was considered by the Court of Exchequer in *Gibson* v. *Carruthers*, 8 M. & W. 321, and Parke, B., in delivering judgment, said this at p. 333: "There can be no doubt that the effect of the assignment under 6 Geo. 4, c. 16, ss. 12 and 63, is to vest in the assignees, to use the language of Lord Tenterden in *Wright* v. *Fairfield*, 2 B. & Ad. 727, at p. 732, every beneficial matter belonging to the bankrupt's estate, and, amongst the rest, the right of enforcing unexecuted contracts, by which benefit may accrue to that estate, and such as may be performed on the part of the bankrupt by the assignees; such, in short, as would pass as part of his personal estate to his executors if he had died, which would not include that description of contract where the personal skill or contract of the bankrupt would form a material part of the consideration." It was therefore laid down that contracts in which personal skill is a material part of the consideration were excepted from assignment under the Bankruptcy Act then in force. If that is good law, there seems to me to be nothing in any of the subsequent Bankruptcy Acts, or in that now in force, to alter it. The real question, accordingly, is whether the law was correctly laid down by Parke, B., in the passage I have read. Not long after that decision came the case of *Beckham* v. *Drake*, which went to the House of Lords. In that case the sequence of events was different from that in the present case. There was first the contract of service; secondly, the breach; and thirdly, the bankruptcy of the plaintiff. The House of Lords held that the right of action vested in the assignees in bankruptcy of the plaintiff. The House was advised by a large number of judges, many of whom expressed a clear opinion in the sense indicated in the judgment of Parke, B., in *Gibson* v. *Carruthers*. I particularly wish to refer, in addition to the passages read by the Master of the Rolls, to passages in the opinions delivered by Williams, J., 2 H. L. Cas., p. 598; Erle, J., on p. 604; and Wilde, C.J., on p. 633. None of the learned judges expressed any opinion to the contrary, and in my judgment the view expressed by Parke, B., is correct in principle. The contract in the present case was, at the commencement of the bankruptcy, *in fieri*, and it could not be completed without the concurrence of the bankrupt, and the trustee had no power to compel him to concur. It seems clear to me that a contract of this kind does not vest in the trustee in bankruptcy. The two cases which have been so much referred to seem to me merely to decide that the trustee in bankruptcy may intervene and claim the damages which the bankrupt may recover. The trustee may still intervene in the present action, but up to the present he has not done so. The appeal therefore fails.

COZENS-HARDY, L.J., read the following judgment: It has been established for many years that, notwithstanding the generality of the language used in the Bankruptcy Acts, there are some contracts and some rights of action which do not vest in the trustee. For the present purpose it is sufficient to mention contracts for purely personal service. Such unexecuted contracts are not assignable by deed, and they are not, by virtue of the statute, vested in the trustee. If, however, at the date of the bankruptcy a sum of money is due in respect of services rendered under the contract, the trustee will take the money and not the bankrupt. But as to future services, the bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation. Now, it is clear that the plaintiff's contract of service did not pass to the trustee. The plaintiff continued to act as traveller after the bankruptcy. The judgment of the Exchequer Chamber in *Beckham* v. *Drake*, 11 M. & W. 315, and the opinions of the judges who advised the House of Lords in that case, 2 H. L. Cas. 579, place this beyond doubt. And there was not, at the date of the bankruptcy, any accrued right of action under the contract which might have vested in the trustee, as in *Beckham* v. *Drake*. So far as I am aware, there is no authority inconsistent with this view. I think that Phillimore, J.'s, decision was correct, and that the appeal fails.

*Appeal dismissed.*

Solicitor for the plaintiff, *C. G. Champion.*

Solicitors for the defendants, *Gush, Phillips, Walters, & Williams.*

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## High Court of Justice.

Chan. Div. Byrne, J. } Nov. 7.

*In re* S., A SOLICITOR. (*a.*)

*Practice—Motion to attach—Delivery of bill—Service of order—Form of notice of motion—R. S. C.*, 1883, *ord.* 44, *r.* 2.

*An order had been made on a solicitor for delivery of bill on a client's petition within a certain period. The period therein fixed was extended by a later order, but that order was not drawn up nor served upon the solicitor. On a motion to attach the solicitor,*

*Held, that the order extending the time should have been drawn up and served on the solicitor, and this not having been done, that the motion failed.*

Motion.

This was a motion for leave to issue a writ of attachment against a solicitor, Mr. S., for his contempt in not having delivered to the applicant, Mr. W. R. Renshaw, a bill of fees and disbursements in all suits, actions, and other matters of business in which he had been employed, pursuant to orders dated the 3rd of July, 1902, and the 5th of August, 1902.

The facts of the case were as follows:

The respondent had been employed by the applicant as his solicitor for several years, and had had a large number of business transactions with him.

By an order dated the 3rd of July, 1902, made on the petition of the applicant, it was ordered that the said respondent do within a fortnight after the service of the said order deliver his bill. This order was served on the 8th of July.

On the 31st of July, 1902, a summons was taken out by the respondent's firm, the respondent's solicitors, for a two months' extension of time, and by an order dated the 5th of August, 1902, the time for delivery was extended to the 28th of August,

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

1902. This order was never drawn up or served upon the solicitor or his firm.

As the accounts extended over several years, the respondent's firm found a difficulty in preparing them, and applied on the 28th of August for a fresh extension of time. This was refused, and on the respondent's firm's solicitors applying on the 22nd of September to take out a summons for extension of time, they were told that this was not vacation business.

The present motion was served on the respondent's firm on the 21st of October.

*Rowden, K.C*, and *Dickinson*, for the applicant.

*Norton, K.C*, and *Martelli*, for the respondent.

*Levett, K.C.*, and *Austen Cartmell*, for the respondent's firm.—The notice of motion is bad in point of form. The applicants did not draw up or sign the order of the 5th of August, and consequently they cannot bring themselves within ord. 41, s. 5.

*Rowden, K.C.*, in reply.—A distinction must be drawn between the form of order and the service of the writ.

BYRNE, J.—Two orders were made against the solicitor and one against his firm. By the order of the 8th of July the time for the delivery of the bill was limited to the space of a fortnight from the service of the said order. That order was duly served.

On the 31st of July, 1902, the respondent's firm, by whom he acted in the matter, took out a summons for a two months' extension of time to deliver the bills. On the 5th of August the master extended the time for delivery to the 26th of August.

Was that an order? In my judgment it was an order, and it should have been personally served. As a matter of fact it was never drawn up. The time fixed by the order expired on the 26th of August.

On the 21st of October, then, a motion for attachment is served. I shall not discuss points involved in the motion. There is the technical point that the order in respect of which it is proposed to attach the respondent, and which gave him additional time, has not been served on him, has not been personally served on him. If the extended time given by this order had expired before this order was drawn up, a four-day order should have been obtained and served before moving for an attachment. According to the practice both orders should have been served before moving. The application therefore fails, and costs must follow the event.

*Motion dismissed.*

Solicitors, *Broughton, Nocton, & Broughton; Seal & Edgelow.*

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Chan. Div. } Dec. 9.
Farwell, J. }

*In re* MANN.

HARDY *v.* THE ATTORNEY-GENERAL. (*a.*)

*Charity—Will—Institute erected for the benefit of inhabitants—Legacy for the benefit of the institute—General charitable intention.*

*A testatrix erected an institute, and during her life it was used for the benefit of the inhabitants of a place. By her will she gave £3,000 to trustees to be applied in such manner as they should consider most expedient for the benefit of the institute.*

*Held, that there was a general charitable intention, and that the legacy was valid.*

Summons.

The will of the testatrix, Miss Edith P. Mann, contained the following bequest: "I bequeath to my trustees the sum of £3,000 to be applied by them in such manner as they shall consider most expedient for the benefit of the Mann Institute, Moreton-in-the-Marsh."

The testatrix died on the 30th of May, 1902.

The summons was taken out to determine the question whether the bequest of £3,000 took effect, and if so whether it constituted a good charitable bequest.

*Beattie*, for the executors.

*R. J. Parker*, for the Attorney-General.

*Tyssen*, for the residuary legatees.

FARWELL, J., in giving judgment, said: In this case I think Mr. Tyssen's ingenious argument has really been disposed of by Mr. Parker's reply. I think Mr. Parker is well founded in saying that the testatrix, on the evidence, intended to found an institute to be used in various ways for the benefit of the inhabitants of Moreton-in-the-Marsh. Then the evidence goes on to specify the various modes in which it is attempted to obtain that benefit. And I have to decide this question on the assumption (because the point is not raised on the summons) that she did not convey the land on which the institute stood in a mode sufficient to satisfy the Statute of Frauds or the Mortmain Acts. Assuming, therefore, there was this institute as stated in the affidavits used during her life, but that it could no longer take effect so as to bind her residuary legatees after her death, I find that she has by her will given £3,000 to trustees, to be applied by them in such manner as they may consider most expedient for the benefit of the Mann Institute, in Moreton-in-the-Marsh. Mr. Tyssen's point was that that was for the buildings only, but I do not adopt that construction, that is too narrow a view. I think it is for the purposes for which the Mann Institute is founded—that is to say, for the benefit of the inhabitants. It seems to me that it is a charitable purpose, and the two particular modes in which it was used during her lifetime—namely, partly for a working men's club and partly for a hall and gallery for concerts, lectures, and other meetings, would both be public purposes for the benefit of the inhabitants not inconsistent with the general charitable intention which I have already inferred. Therefore I answer the question by saying that the £3,000 is so given. There must be a scheme.

Solicitors for the Attorney-General, *The Solicitor to the Treasury.*

Solicitors for all other parties, *Leslie & Hardy.*

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Chan. Div. } Oct. 28, 29.
Buckley, J. }

CARR *v.* ANDERSON. (*a.*)

*Convict—Administrator of convict's property—Power of sale—Action by convict against administrator—Costs—Felony Act*, 1870 (33 & 34 *Vict. c.* 23), *ss.* 12, 17, 20.

*The power of sale over the property of a convict, conferred by section* 12 *of the Felony Act*, 1870, *on his administrator, is absolute, and is not limited to a power*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

*of sale for the purpose of making the payments authorized by the Act.*

*If in regard to any sale of such property the administrator has in fact exercised a discretion, and his conduct has been otherwise* bonâ fide, *there has been a* bonâ fide *sale by him within section* 17, *and the sale cannot be called in question by the convict. Such discretion need not necessarily be exercised by the administrator individually in regard to every such sale, but may be exercised by laying down a reasonable course of practice in regard to a particular class of property.*

Semble, *section* 20, *which charges the costs of every action brought against the administrator with reference to the convict's property on such property, has no application to an action brought against the administrator by the convict to recover his property.*

Action with witnesses.

This was an action brought by an ex-convict against Sir Robert Anderson, the late, and Mr. Henry, the present, assistant commissioner of the Criminal Investigation Department, asking for an account of his property which had come into their hands, for delivery up of what might be found due to him, and for damages for wrongful conversion of his property.

On the 25th of July, 1895, the plaintiff had been convicted of felony and had been sentenced to six years' penal servitude and to pay the costs of the prosecution.

Sir Robert Anderson was appointed his administrator under the provisions of the Felony Act, 1870, and, as such, took possession of his property. This property consisted, among other things, of certain jewellery and other personal property, some shares in the Louisville and Nashville Railway, and certain bonds.

During the course of the administration all the property was sold with the exception of four foreign bonds, now alleged to be worthless, and was now represented by the sum of £2,327 12s. 10d. Metropolitan Stock and £564 1s. cash. The amount realized by the sales was £3,753 8s. 4d., and the disbursements (including an item of £737 16s. 6d. for the taxed costs of the prosecution) amounted to about £750. The facts as to the sale of the jewellery are set out in the judgment.

With regard to the sale of the Louisville and Nashville shares it appeared that in November, 1895, a demand for the payment of the taxed costs was sent to Scotland-yard.

The matter was brought to the knowledge of Sir Robert Anderson, and he gave directions that the Louisville and Nashville shares should be sold to defray these costs. Sir Robert stated, as his lordship found to be the fact, that he personally exercised a discretion in the matter and thought it desirable that the shares should be sold.

The actual conduct of the sale was left in the hands of a subordinate official, who is now dead, and who was, though not to Sir Robert Anderson's knowledge, a dishonest person. Instead of going to a stockbroker, the subordinate official negotiated their sale through a money-changer.

From the documentary evidence it appeared that the money-changer had been instructed to sell the shares on the Stock Exchange at the best price of the day, and had purported so to sell them at 52, and had charged broker's commission as well as a commission for himself. Whether there was in fact such a sale is doubtful, and evidence was given that the lowest Stock Exchange quotation of Louisville and Nashville shares on the day in question was 52½. The shares have since greatly increased in value.

The version which the money-changer now gave of the transaction, and which his lordship refused to believe, was that the arrangement between himself and the subordinate official was that he should sell for not less than 52, and that, if he sold for more he should keep the profit.

Some time before the expiration of the plaintiff's sentence, correspondence took place between his solicitors and the administrator relating to his property, and on the 22nd of March, 1900, Sir Robert Anderson, in answer to an inquiry, wrote that he had no bonds belonging to the plaintiff in his possession. This was a mistake, as he had then in his possession four such bonds.

Sir Robert Anderson ceased to be assistant commissioner in May, 1901, but was not relieved of his administratorship, and subsequent letters were written by Mr. Henry, his successor, on his behalf.

On the 29th of July, 1901, after the sentence had expired, he refused to give an account.

On the 31st of July the writ in the present action was issued. Subsequently the defendants took out a summons asking that the plaintiff be ordered to give particulars of the property he claimed, and that in default the action should be stayed. His lordship made an order to this effect, but the order was reversed by the Court of Appeal. The defendants then put in defences in which they did not offer to account or to pay anything. Afterwards, in obedience to an order, the defendants furnished accounts.

*Astbury, K.C.*, and *M.R. Emanuel*, for the plaintiff.—The Act under which the defendant was appointed administrator must be read according to the rules regulating ordinary trust instruments. Consequently the power of sale is to to be used only for the purpose of making the payments mentioned in the Act. Even if that construction of the Act is wrong, the plaintiff has shown that the exercise of the powers by the administrator is *primâ facie malâ fide*. There was no valid reason for the sale of the jewellery, and with respect to it the defendants in fact exercised no discretion. The sale of the shares was carried out in so irregular a manner that the administrator cannot say, as against the plaintiff, that it was a valid sale, for since there was no sale on the Stock Exchange there is no price at which the plaintiff can be fixed. From the evidence it is clear that the plaintiff could not have recovered his property without bringing this action.

*Birrell, K.C.*, and *T. T. Methold*, for the defendants.—The power of sale given to the administrator is absolute. So far as he was concerned the sale of the plaintiff's property was *bonâ fide*, and, therefore, cannot be called in question by the plaintiff. We admit, however, that the plaintiff cannot be charged with double commission. By section 20 the administrator is entitled to have his costs out of the property. In view of the special circumstances of the plaintiff's case, it cannot be said that the defendant acted so unreasonably as to be deprived of his costs. The sole object of the later stages of this action has been to make the administrator liable for wrongful conversion of his property, and the costs of those later stages should at any rate be paid by the plaintiff.

*Astbury, K.C.*, replied.

BUCKLEY, J.—In this case a large number of the matters which were in dispute between the parties are no longer in dispute between them. There are two matters on which the judgment of the court is required. The first one, which involves the construction of the Act of 33 & 34 Vict. c. 23, is whether the plaintiff is entitled to question the sale which was made by the defendant of his property; he asks for damages for the wrongful conversion of his property. The second is as to how the costs of this action ought to be borne.

The question arises in this way. The plaintiff, John Carr, was on the 22nd of July, 1895, convicted of felony and sentenced to six years' penal servitude. Under the Act to which I have referred the defendant, Sir Robert Anderson, was appointed administrator of his property. In the course of that administration he sold, in particular, certain Louisville and Nashville shares, and certain jewellery belonging to the plaintiff. The plaintiff says that he was wrong in so doing, that he had no right to sell them, and that the defendant is responsible to him in damages for so doing.

With regard to that I go at once to the Act of Parliament, to see what the powers of the administrator were. That Act, which was passed in the year 1870, abolished the forfeiture of land and goods for treason and felony, and provided for the appointment by the Crown of an administrator of convicts' property and gives him certain powers. Amongst those, by section 12, "The administrator shall have absolute power to let, mortgage, sell, convey, and transfer any part of such property as to him shall seem fit." Wider language it is difficult to conceive. There is an absolute power to sell as to him shall seem fit; the power, of course, is to be exercised reasonably and properly, but so far as that language is concerned it is an absolute power irrespective of whether money is wanted for payment of debts or not. Then follow four sections, 13, 14, 15, and 16, dealing with payments which the administrator may make out of the convict's property; and then section 17 runs thus: "The several powers hereinbefore given to the said administrator, or any of them, may be exercised by him in such order and course as to priority of payments or otherwise as he shall think fit; and all contracts of letting or sale, mortgages, conveyances, or transfers of property *bonâ fide* made by the said authority of the said administrator under the powers of this Act and all payments or deliveries over of property *bonâ fide* made by or under the authority of the said administrator for any of the purposes hereinbefore mentioned shall be binding, and the propriety thereof, and the sufficiency of the grounds on which the said administrator may have exercised his judgment or discretion in respect thereof, shall not be in any manner called in question by such convict or by any person claiming an interest in such property by virtue of this Act." It has been contended by the plaintiff's counsel that, in reading that section I ought to read the words "for any of the purposes hereinbefore mentioned" as if they qualified the words "all contracts of sale made by the administrator under the powers of this Act." In my opinion that is not the true construction of that section. I think you must read it thus, reading it shortly, "All contracts of sale *bonâ fide* made by the administrator under the powers of this Act shall be binding and all payments or deliveries over of property *bonâ fide* made for any of the purposes hereinbefore mentioned shall be binding," and that the words "for any of the purposes" apply only to the latter case and not to the former. That being, in my view, the true construction of the Act of Parliament, I go on to state what are the facts as to the sale which the administrator made. If I am right in my construction of the Act of Parliament, all I have got to look at is to see whether the administrator has made a sale *bonâ fide*. I agree that that involves that he shall not have made it blindly or carelessly, or without exercising any judgment or discretion upon it, but if he has *bonâ fide* sold, then that is to be binding, and the propriety of it, and the sufficiency of the grounds upon which he made it, are not to be in any way called in question by the court.

First, the convict had certain jewellery and other property. The administrator sold that in two lots, the one on the 13th of February, 1896, when there was a sale of goods, chattels, and jewellery for £49 5s. 6d., less a commission of £4 18s. 6d., leaving a balance of £44 7s. The other on the 6th of August, 1896, when there was a sale of goods and chattels and bags and clothing, for £21 12s., less a commission of £2 3s. 2d., leaving a balance of £19 8s. 10d. What Sir Robert Anderson, who has given evidence in the matter, tells me about that is this: He, as a superior official at Scotland-yard, does not attend to all the details of the administrations necessarily himself. A certain official was his subordinate, and in everything connected with the administration in which any act had to be done he had to come to Sir Robert Anderson personally to get authority to do it, but the matters of detail were attended to by the subordinate. As regards this sale of jewellery, it was made under a course of practice which is universally followed at Scotland-yard, that property of this description of comparatively small value belonging to a convict, is sold without special directions given in respect of it. Sir Robert Anderson does not recall, his memory does not serve him, that he personally gave any instructions as regards the sale of this jewellery. He says it was sold under an established course of practice. I think that is sufficient for the purposes of the Act of Parliament. It seems to me that a sale thus made is a sale *bonâ fide* made, a sale made because a reasonable course of practice is laid down in the office, which is followed by the administrator in dealing with that class of property. The only other ground on which the sale is attacked is this, that it is said, and said truly, that at that time no money was wanted for the purpose of paying any obligation of the convict. If I am right in my construction of the Act of Parliament, that has nothing to do with it. The administrator is not limited to selling for the purpose of paying debts. He has an absolute power to sell as he sees fit, if he sells *bonâ fide*, and he has sold *bonâ fide*.

The other matter is this. The convict was entitled to 260 hundred dollar shares in the Louisville and Nashville Railway Co. These were sold in two lots on the 20th of November and the 30th of November, 1895, and the story as to that requires some consideration in detail. [His lordship then stated the facts and reviewed the evidence as to these sales, and continued:] So far as Sir Robert Anderson was concerned, the sale was a sale on the stock. No broker's note has been produced; whether there was such a sale or not I do not know. That was the sale of these shares. There was a subsequent sale of the other ten certificates on the 30th, and another note of the money-changer relating to them. That sale, as it appears to me, was a sale *bonâ fide* made by the administrator, and it is a sale which, upon these materials, the convict cannot call in question. Supposing, as might be the case, that it would have been competent to him to have brought some action in which he would have set up that the administrator, as his trustee, had so sold these shares as that he was not entitled to rely on that sale, but was subject to attack in respect of it, not because the sale was not made *bonâ fide*, but because it was made in some improper manner, then it appears to me he ought to have come here proving these facts. No such allegation is made in this action, and I have only been listening to all this evidence as to what took place between the subordinate official and the money-changer for this reason, that in dealing with the affairs of a public department such as this it appears to me to be very necessary that the court should know

all the facts in order to form as reliable a judgment as possible as to whether the acts of the department have been really *bonâ fide*. As regards Sir Robert Anderson's action in this matter, I am quite satisfied that it was perfectly *bonâ fide*; but I cannot part with this case without saying that I am startled to find that the affairs of a department such as that at Scotland-yard have been so managed as I find these were managed. No subordinate ought to be allowed to go to a money-changer to consider whether bonds should be sold or not. That is not a proper way to approach the matter; and there is another matter which is perhaps even more serious in that it appears on the documents themselves, that there was a double commission paid—that the assistant commissioner has charged a commission to a broker, whether there was a sale through a broker or not, and a commission to the money-changer. Mr. Birrell has very fairly said, on behalf of Sir Robert Anderson, that he cannot support that, and the double commission cannot be charged. I think the attention of the authorities of Scotland-yard ought to be called to this case and I hope that the proceedings there will be more strictly regulated in future. It follows from what I have said that the plaintiff is, in my opinion, not entitled to any inquiry as to damages sustained by any improper sale with regard to his property. I think there has been no improper sale.

I pass on to consider the other question, and that is, how the costs of this action ought to be borne. I entirely bear in mind that an administrator appointed under the Act, particularly in the case of a criminal such as this, has an exceedingly difficult duty to discharge. He has to see that the property which comes to his hands, as having been in the hands of a convict, reaches, if possible, its proper destination, and there may be some sort of *primâ facie* presumption that the fact that it comes from the convict's possession is no evidence that it belongs to him. In this case the administrator used his power under the Act of Parliament to deal with a great deal of this property upon the footing that it belonged to other people, and it was handed back to other people. There remained certain property in his hands, and for that, under the Act of Parliament, subject, of course, to the powers and provisions of the Act, he was responsible to the convict at the expiration of his sentence—that is to say, the 22nd of July, 1901. [His lordship then related the negotiations between the parties prior to the commencement of the action, and continued:] The first question to consider with reference to the costs is whether the plaintiff was justified in issuing the writ. It seems to me that he was, he had got no information as to what his property was, and I do not anticipate that he would have got it unless he had issued his writ asking for relief in respect of that matter. The action went on and, ultimately, by an answer, sworn, I understand, on the 10th and filed on the 11th of June of the present year, a full account was rendered. Then, for the first time, the convict got his information. Under these circumstances, is he or is he not entitled to say that this action was rendered necessary by the conduct of the trustee? It appears to me that it was. Attention has been called to section 20 of the Act of Parliament, which provides that "the costs as between solicitor and client of every action or suit which may be brought against the said administrator," and so on "shall be a first charge upon" the property, and it has been argued that that section deals not only with actions brought against the administrator by third parties, but also with actions brought against the administrator by the convict himself. I think the better opinion is that it does not apply, and for this reason, that no such section is wanted in that case. Of course, in an action brought by the *cestui que trust* against his trustee relating to the trust, the trustee is *primâ facie* entitled to his solicitor and client costs, but whether the section applies or not, it concludes with these words "unless the court before which such action is tried or such suit is heard shall think fit otherwise to order," so that, even if the section applies, I have to consider whether I ought otherwise to order in this case. For the reasons which I have given it seems to me that the plaintiff was entitled to issue his writ, and that in seeking to enforce an account he is entitled to say that he was put to that expense by the action of the trustee. But, on the other hand, it seems to me that there are some other considerations that I ought to bear in mind. In the first place, the trustee would be entitled certainly to all his costs of rendering the accounts. He, of course, in accounting fully for all the trust property, is entitled to his costs of taking his accounts himself. He, of course, therefore, would be entitled to receive some costs. Further, I cannot shut my eyes to the fact that the great question which has been litigated before me here is the question whether the convict is entitled, as against the administrator, to damages in respect of the wrongful conversion of his property, on which I hold that the plaintiff is wrong. It seems to me, therefore, that although the plaintiff has a claim in respect of the costs of the action, on the ground that it was necessitated by the conduct of the trustee, that the trustee, on the other hand, in respect of certain matters is entitled to claim the costs as against the plaintiff, and I think that I shall do justice as between the parties by saying that there shall be no costs of the action.

Solicitors, *Emanuel, Round, & Nathan; Wontner & Sons.*

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K. B. Div. (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — June 23, 24, 1902.

REX v. OWEN AND ROBERTSON. (a.)

*Employer and workman—Compensation—Injury by accident in England—Employer resident and domiciled in Scotland—Application for arbitration—Jurisdiction of county court within whose district accident happened—"District"—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *Schedule II., clause* 9 *—Workmen's Compensation Rules, r.* 15.

*Where a workman, resident in England, is engaged by an employer, whose residence and domicil are in Scotland, is injured in the course of his employment by an accident occurring in England, proceedings for compensation under the Workmen's Compensation Act,* 1897, *may be taken in England, and the judge of the county court within whose district the accident occurs has jurisdiction under clause* 9 *of the* 2*nd Schedule of the Act to hear an arbitration for the settlement under the Act of the compensation due to the workman, and services of the necessary notices may be effected by registered post.*

In this case a rule *nisi* had been obtained calling on his Honour Judge Owen, the judge of the County Court of Monmouthshire, and William Robertson, of Glasgow, to show cause why the said judge should not proceed to hear and determine the matter of an arbitration under the provisions of the Workmen's

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Compensation Act, 1897, in the said County Court of Newport, between Isaac Jenkins, the applicant, and the said William Robertson, the respondent, for the assessment of the amount of compensation to be paid by the respondent to the applicant for personal injuries caused to him on the 15th of November, 1901, by an accident arising out of and in the course of his employment as a workman employed by the respondent as a dock labourer.

From the affidavits on which the rule was obtained it appeared that the applicant, Jenkins, a dock labourer, residing at Newport, in the county of Monmouth, was on the 15th of November, 1901, employed by the respondent's agent on board the steamship *Nugget*, which was then lying at the Ebbw Vale Wharf, River Side, Newport, for the purpose of assisting in stowing away iron rails which were being placed on board.

Whilst so employed one of the rails fell upon the applicant's feet, and the applicant sustained personal injuries which rendered him unable to follow his usual occupation.

The respondent, who was the owner of *The Nugget*, was at the time domiciled in Scotland, and neither resided nor carried on business in England or Wales.

Proceedings for an arbitration under the Workmen's Compensation Act, 1897, were instituted on behalf of the applicant in the County Court of Newport, holden at Monmouth, being the court of the district in which the accident occurred and the matter arose, as the applicant and the respondent resided in different districts.

The respondent filed an answer objecting, amongst other things, that the court had no jurisdiction in the matter as he, the respondent, was domiciled in Scotland.

The matter came before the learned county court judge on the 13th of March, 1902, and in a reserved judgment given on the 17th of April, 1902, the learned judge decided that he had no jurisdiction to hear and determine the arbitration; and he further decided that if he had jurisdiction the compensation to which the applicant would be entitled would be a sum amounting to £1 11s. 3d., being at the rate of 3s. 1½d. per week for ten weeks from the 20th of November, 1901, to the 14th of February, 1902.

In giving his reasons for holding that he had no jurisdiction the learned judge said he was of opinion that a person residing in Scotland was not liable to process from a civil court in England or Wales unless he was made liable by some statute or rule of court made by statutory authority; that clause 9 of Schedule II. to the Workmen's Compensation Act, 1897, was the only part, either of the Act or the rules made under it, which dealt with the question of jurisdiction; that the word "district" in that clause meant the district of a county court as mentioned in the County Courts Act, 1888, and as specified in the County Courts (District) Order in Council, 1899; that clause 9 went on to direct that if the parties "reside in different districts" the act to be done should be done "in the district in which the accident out of which the said matter arose occurred"; that he was of opinion that if the parties to an arbitration did not reside in the same district, and if the arbitration was to take place in the district where the accident happened, it was a condition precedent to such an arbitration taking place that the parties to it should reside in different districts of county courts, or, in other words, that they should reside in some part of England or Wales; that he could not find anything in the Workmen's Compensation Rules, 1898, which dealt with the question of jurisdiction; that rule 64 of those rules provided that in any matter not provided for under those rules the practice in county courts under the County Courts Act, 1888, and the County Court Rules should apply as far as practicable; that the County Courts Act, 1888, applied only to England and Wales, and there was not any provision, either in the Act or in the rules made under it, which enabled proceedings to be taken in a county court against a person residing in Scotland; and, after referring to section 164 of the County Courts Act, he said that he could not find that he had any power to hear an arbitration under the Act where the respondent, as in this case, resided in Scotland; and, further, that if he were to make an award in the applicant's favour such award could not, in his opinion, be enforced, as the Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), s. 10, which enabled a judgment of a county court to be enforced against a party to the action residing in Scotland or Ireland, did not apply except to a case in which the summons in the action had been personally served upon the defendant within the district of the county court by which the judgment was given; that an award of a judge made under the Workmen's Compensation Act could only be enforced in the same manner as a judgment or order of the court (see rule 26 (1) of the Workmen's Compensation Rules, 1898), and that if a judgment could not be enforced it was a strong argument, in a case where the jurisdiction to give the judgment was doubtful, that the jurisdiction did not exist; and for these reasons he held that he had no jurisdiction, and refused to hear and determine the arbitration.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides in Schedule II., under the heading "Arbitration":

Clause 9. Where any matter under this Act is to be done in a county court, or by, to, or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court.

Clause 14. In the application of this schedule to Scotland — (*a*) "Sheriff" shall be substituted for "county court judge," "sheriff court" for "county court," "action" for "plaint," "sheriff clerk" for "registrar of the county court," and "act of sederunt" for "rules of court."

Clause 15. Paragraphs 4 and 7 of this schedule shall not apply to Scotland.

Clause 16. In the application of this schedule to Ireland the expression "county court judge" shall include the recorder of any city or town.

Section 2 of the Act: (1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof. . . . (2) Notice in respect of an injury under this Act shall give the name and address of the person injured . . . and shall be served on the employer, or, if there is more than one employer, upon one of such employers. (3) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. (4) The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient

to prove that the notice was properly addressed and registered.

The Workmen's Compensation Rules, 1898, provide as follows: Rule 15. (2) Service may be effected either in accordance with the rules as to service of default summonses, or by registered post in accordance with the provisions of sub-sections 4 and 5 of section 2 of the Act with reference to service of notice in respect of an injury, and the provisions of those sub-sections shall apply to such service.

Rule 64. Where any matter or thing is not specially provided for under these rules, the same procedure shall be followed and the same provisions shall apply, as far as practicable, as in a similar matter or thing under the County Courts Act, 1888, and the rules made in pursuance of that Act.

*Lush, K.C.* (*Bailhache* with him), showed cause.—As a preliminary objection this is not a case for a mandamus, the only remedy is by appeal to the Court of Appeal. The learned county court judge did not decline to entertain the case, but, after fully hearing the arguments, decided that the proceedings could not be brought in the county court as the employer was domiciled in Scotland.

*Bonsey*, for the county court judge.

*Bankes, K.C.* (*A. Parsons* with him), in support of the rule.—The county court judge in reality declined jurisdiction, and the proper remedy is therefore by an application to this court for a mandamus to hear and determine the matter under section 131 of the County Courts Act, 1888: *Reg.* v. *Southampton County Court*, 65 L. T. Rep. 320, 40 W. R. Dig. 65; *Welland* v. *Great Western Railway Co.*, 16 Times L. R. 297.

THE COURT here decided to hear the case on its merits.

*Lush, K.C.*, for the respondent.—The learned judge had no jurisdiction to entertain these proceedings. The Act of 1897 does not apply where only one of the parties is resident in England. There are no provisions under which proceedings can be instituted against a person residing out of England or under which notice of accident can be served upon such person. Clause 9 of the second schedule is not applicable to an employer resident in Scotland. The word "district" in that clause means "county court district." Section 2, sub-section 3, implies that service of notice must be within the jurisdiction.

He referred to *The City of Agra*, [1898] P. 198, 47 W. R. Dig. 4.

*Bonsey*, for the county court judge.—The county court judge has no jurisdiction where the employer is resident out of England. Service of the notice on an employer in Scotland would not give the learned judge jurisdiction: *Spence* v. *Parkes*, [1900] 2 Ir. R. 619. The award could not be enforced in Scotland.

*Robson, K.C.*, for the applicant.—This Act applies to the whole of the United Kingdom and makes all employers liable to pay compensation in cases to which the Act applies, whether the parties reside in the same part of the United Kingdom or in different parts of it. The Act confers the jurisdiction; service of notice does not found the jurisdiction, but is merely a matter of procedure: see *dicta* of Cotton, L.J., in *In re Busfield*, 34 W. R. 372, 32 Ch. D. 123, and Bowen, L.J., in *In re King & Co.'s Trade-Mark*, 40 W. R. 580, [1892] 2 Ch. 462. The county court judge has jurisdiction under clause 9 of the second schedule. The word "district" in that clause means the area over which a county court or sheriff court has jurisdiction; it should not be read in its technical sense as meaning county court district. If the parties do not reside within the jurisdiction of the same court, the court which has jurisdiction in the matter is the court within whose jurisdiction the accident took place. Notice of the accident may be served by post by registered letter under section 2, sub-section 4.

Lord ALVERSTONE, L.C.J.—This is, in my opinion, one of the class of cases arising under this and other Acts where we do not and cannot expect to find every particular case dealt with in express words. What we have to decide is, looking at the whole scope of the Act and at certain expressions in it that have to be construed, what is the intention of the Legislature expressed in words which seem to me to be capable of two meanings. The facts may be shortly stated thus: An accident happened on board a ship at Newport, in Monmouthshire; the owner of the ship, being the employer, who would be respondent or defendant to a claim if he were resident in England, was a Scotchman domiciled in Scotland. It is therefore said that no county court judge can entertain any proceedings in respect of a claim by the workman under the arbitration clauses of the Workmen's Compensation Act, 1897, or any proceedings taken under the Act. Now, when we are dealing with parts of the United Kingdom, as to which parts there are separate systems of law, we do require to see that the Act of Parliament does not apply in cases in which the general scope of the Act would show that it does apply to the whole of the United Kingdom. Whether this case was a *casus omissus* from the Act, though I do not think it was, I have no doubt whatever that the scope of this Act was intended to apply to all three or four parts of the United Kingdom—England, Wales, Scotland, and Ireland. That the employers in that geographical area were meant to be made liable to the provisions of this Act I have not the least doubt; and if it should turn out that a Scotch employer, or an Irish employer, liable to pay compensation under the provisions of the Act, and having the rights and benefits of the Act, has been left out, then it would clearly be a *casus omissus*, and I think there is nothing in the Act of Parliament to show it was intended to be so. The main foundation of the argument for the applicant in support of the rule was that we find in the statute a general direction that employers are to be under certain liabilities as employers and that workmen are to have certain rights as against those employers, and that therefore the Scotch employer ought to be liable where the accident happens in England. The Act is by no means a one-sided one, because the employers are also to have certain privileges; and unless we find that the Scotch employer is excluded if the accident happens in England or Ireland, as the case may be, and unless the words are too limited to enable us to do so, we ought, if we can, to give effect to the intention of the Act. It is not disputed that the Act was intended to apply to Scotland. As a consequence of that it was thought necessary to make certain enactments in the statute in order to make the language and machinery of the statute apply to Scotland and to Ireland. These enactments are to be found in the definition of "dependants" in section 7; and I think it very important to find that it was not thought necessary upon that point to make any other reference, alteration, or special enactment in any other section until we come to that section. In the first schedule, which is the schedule dealing with the "Scale and conditions of compensation," there are two specific clauses, 16 and 17, which are inserted to make that schedule work in connection with jurisdiction in Scotland and Ireland respectively. Then when we come to the 2nd schedule—the arbitration schedule—there are two clauses, 14 and 15, which make the schedule specially apply to Scotland, and

clause 16 makes the schedule specially apply to Ireland. That is clear ground which, in my opinion, shows that the Act was intended to apply as a whole to these areas. That being so, we now come to the particular clause which has created the difficulty in this case—namely, clause 9 of the arbitration schedule. Clause 9 says: "Where any matter under this Act is to be done in a county court." Now, in the application of this schedule to Scotland, we are allowed, by clause 14 of the same schedule, for "county court" to read "sheriff court" as well, so that we may read it "sheriff court" or "county court"—"or by, to, or before the judge or registrar of a county court," for that we may read "by, to, or before the 'sheriff' or 'sheriff clerk.'" Therefore we have the opening words in clause 9 including sheriff court and county court, and also including for this purpose registrar and sheriff clerk. Then the clause goes on, "unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or, if they reside in different districts, the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court." Now, if that clause had read in this way, "the county court of the district in which all the parties concerned reside, or, if they do not all reside in the same district, the district in which the accident occurred," the matter would not have been so difficult. The particular form of expression chosen by the Legislature is, "or if they reside in different districts"; they have put the affirmative form instead of the negative form, "if they do not reside in the same district"; and that creates the difficulty. Looking at this Act of Parliament and its scope, it seems to me that it would be going a great deal too far to say that a different intention was disclosed by the particular way in which the absence of jurisdiction of a particular county court or sheriff's court is referred to, and I think that the real substantial effect of that provision means that, if the parties are not all subject to the jurisdiction of one county court contemplated by the Act, then the jurisdiction is to be where the accident occurred. That takes us the whole way, subject to the point whether there is a limit to be put upon the word "district"—whether, as the Act is referring *primâ facie*, so to speak, to a county court, the word "district" means county court district. I think that if that had been the intention of the Legislature we must have had in the Act the definition of the word "district" in reference to Scotland and in reference to Ireland. The framers of this Act probably thought that, when they had made the courts of Scotland and the courts of Ireland for this purpose equivalent to county courts, it was not necessary to define this expression "district." Therefore I think that for the purposes of this particular case we find two sets of courts contemplated by the Act—one, the court for the place in which the plaintiff resides; the other, the court for the place in which the defendant resides; one an English court and one a Scotch court. In my opinion, these parties did reside in "different districts" within the meaning of this Act, and it would be too narrow a construction of the Act to say that the whole jurisdiction is defeated because districts are confined in clause 9 of this schedule to English districts and do not include the districts of the Scotch courts already referred to. Therefore I think we are quite right in construing the word "district" for this purpose as meaning the district of a court which has jurisdiction under this Act. We were pressed by counsel who showed cause against the rule with regard to the difficulties which might arise in the very improbable case of a French owner or employer liable in respect of an accident happening somewhere within the jurisdiction of a district of a court, and also the not so improbable case of a British subject resident out of the United Kingdom and being still liable as an employer. But sufficient for this day is the evil we have to contend with in this case; though certainly I can see answers in connection with subjects of foreign nationality which would raise an entirely different set of objections on much broader grounds. Whether the difficulty which has been referred to of effecting service out of the district of the county court is got over in the case of a British subject in England, Scotland, or Ireland I do not wish to consider now, and we have not to decide the point. Without deciding the more difficult case, I myself am clearly of opinion that where the parties are resident in different districts, so that the first branch of clause 9 does not apply, then it was intended under this Act that the court which has the jurisdiction in the place where the accident happened has jurisdiction in the matter, and then the procedure as to the service being effected by registered letter, and so on, applies to the area which is within the ambit of the Act. As the case is down for hearing by the Court of Appeal, we should in such a case give leave to appeal—if appeal be necessary—and, if we are not right in this decision, then we should be set right by the Court of Appeal, who would then be able to deal with our decision on the ground that it is wrong, or with the decision of the learned county court judge on appeal from him under their original jurisdiction which they have by virtue of the Act. For the reasons given I think this rule should be made absolute.

DARLING, J.—I am of the same opinion. The question arises from the use in clause 9 of these words: "Where the parties reside in different districts." The difficulty is in applying those words to a case where one of the parties does reside in an English county court district and the other party does not reside in an English county court district at all, but in this case does reside within the area, whatever it may be called, of the sheriff's court in Scotland. The question therefore is, does the word "district" in that part of the clause mean merely "county court district"? The effect of the decision we are giving is this, that we hold that the word "district," where it is used in clause 9, does not mean—though it does in other places—merely county court district, but that it also includes the area over which a sheriff's court has jurisdiction; and I think the reasoning goes this length, that it includes the area over which a county court, or the court which in Scotland or Ireland is equivalent to a county court in England, has jurisdiction. It does not go the length of deciding what counsel really contended for, that the word "district" is used with regard to one of the parties as a county court district, and with regard to the other party who does not live in a county court district, as the area, whatever it may be, in which he lives and in whatever country. We limit ourselves, as I understand, to saying that the "district" means, with regard to one of the parties, the county court district in which he resides. "District" means, with regard to the other party, the district in which, if he is a Scotchman or an Irishman, he is subject to the jurisdiction in Scotland or Ireland respectively, equivalent to the jurisdiction of the county court in England. If the parties reside in "different districts" within that meaning, then the county court of the district where the accident happened is the place where the litigation is

to be. We do not for a moment affect to say that "district," with regard to the other party to the litigation, means the area in which a foreigner might live; for example, that it might mean a department in France, or a province or county in some other foreign country. We say nothing about that, and when that difficulty arises it will then be sufficient to say whether the argument of counsel expressed upon that point was well founded or not. But for my own part I express no opinion about it.

CHANNELL, J.—I am of the same opinion. I think when the case is fully examined, though it struck me quite the other way before the argument, it seems to come out very clearly. We start with the first section of the Act, which gives the right to compensation and creates the liability. That first section gives the right to the employed and it creates the liability of the employer, and it clearly applies both to subjects domiciled in England and to subjects domiciled in Scotland. According to ordinary principles it would so apply to both, unless Scotland was excluded, and, instead of Scotland being excluded, there are in other parts of the Act expressions to show that it was intended to be included. We have not, therefore, to deal with any of the difficulties which might have arisen if this were the case of a foreigner. The question in that case would be very arguable, and I do not desire to say anything about it one way or the other; but, in the case of the workman or servant in England and the employer domiciled in Scotland, it is perfectly clear that the right is created on the one hand, and the liability is created on the other hand, by the first section of the Act. Passing on to section 2, I think it is important to look at it for one purpose and for one purpose only. That section makes a condition precedent to the recovery of the compensation by enacting that a notice of injury shall be given, and the importance of that section for our present purpose is simply that it includes a service of the notice by post by registered letter. Inasmuch as we have arrived at the conclusion that the Act applies to Scotland as well as to England, it is perfectly clear that that provision about serving the notice by registered letter, which is a new enactment about service of the notice, applies to a person in England or to a person in Scotland to which the registered letter can go as well as to a place in England. Therefore we have that established as the construction of that second section. Then the remainder of the Act practically deals with and refers to two schedules, and to certain matters which it is not necessary to refer to. The first schedule relates to the amount of compensation that the workman is to get. There is nothing material in that for our present purpose except that it again shows that the case of Scotland and the case of Ireland is contemplated, because when we get to certain expressions used in that schedule, the meaning of which might be doubtful when applied to either Scotland or Ireland, there are definitions to say what is to be understood by those expressions when referring to a case in Scotland or Ireland. There is therefore nothing important in that schedule. Then we get to the most important schedule for our present purpose, the second schedule, which provides for the way in which the workman is to get his compensation. That is provided for by an arbitration. I think that the scheme of arbitration has not been acted upon quite in the way in which it was expected by the Legislature that it would be acted on. They seem to have contemplated mainly arbitrators appointed by the parties; but they also provided, very properly and reasonably, for what was to happen if the parties did not agree as to the arbitrator. In that case in substance in England the matter came to the county court judge; in Scotland it came to the sheriff, who is a judge of a similar position to that of the county court judge in England. Then we have next to consider the question as to which court is to deal with any particular case, and then it is that we come to clause 9 of the second schedule. That is intended to deal with the question of the particular court which is to deal with the matter, and for myself I entertain no doubt whatever that in point of fact the Legislature forgot the case of an accident happening in England where the employer was a person domiciled in Scotland or Ireland; otherwise the case would have been provided for, either expressly in this schedule or possibly in rules of court, which there would be power to make for carrying out the schedule, or probably by rules of court of both countries so as to clear away any difficulty as to which country ought to make the proper rules. That, however, has not been done, and the only question is whether we can get enough out of the paragraph to show which court ought to deal with the case. We have in clause 14 of this schedule "county court judge" defined as meaning, when we are dealing with Scotland, "sheriff." We have not got "district" defined as meaning "sheriffdom," which seems to be the technical expression in Scotland for what in England is called "county court district." If we had that definition, one difficulty would be removed. But is it a substantial and real difficulty? The word "district" is not a very technical word; it is a word of general application, and I might say it is common to the languages of both countries. Some of the words or technical expressions of the Scotch law we should perhaps not understand; they are not familiar to English lawyers any more than our technical expressions are familiar to Scotch lawyers. But such a word as "district" is not so technical as to make it absolutely necessary to have a definition of it, and it seems to me that there is no real difficulty in holding that "district" is a word of general application, and means the area over which the judge previously referred to—who is not only the county court judge, but also by definition the sheriff—has jurisdiction. If that can be fairly held, the difficulty in reference to the use of that word is removed. Counsel in support of the rule admitted against himself that he had to use the word "district" in the second place where it is mentioned in this schedule in a different sense to that in which he uses it in the first and third places where it is mentioned. If we only had a definition of the word with the mercantile expression "and/or" to it, we might use that expression or its equivalent, as a short definition, then "county court judge" would mean "and/or" sheriff, according to the usual meaning of that expression. It would then mean one or other as the context required, and if we can put some such similar meaning to "district," and especially if we can use it as a general word, it does not seem to me that the difficulty, which was to some extent admitted by counsel to be in his way, really arises. There is, however, as my lord has pointed out, no real difference between the words "or if they reside in different districts" and the words "or if they do not reside in the same district"; and, seeing what it follows—namely, "the district in which all the parties concerned reside"—"if they reside in different districts" clearly means if they do not reside in that same district. The result, therefore, is, so far as the court which has to entertain the matter is concerned, clear, and when the thing is carefully examined there is not any real difficulty. Then we come to what I thought at first was the real and the great difficulty in the case, which in fact was the difficulty put forward in the first instance by

counsel who showed cause against the rule. That was, that the county court has no power to serve out of its jurisdiction, at any rate unless that power is expressly given, and although we have arrived at the conclusion that this particular county court was the right county court in which proceedings ought to have been taken, there would have remained the difficulty as to how the proceedings in that court were to be initiated and brought on. That difficulty is met by what I may call an accident, because in all probability it was not intended to meet such a case by the words I am going to refer to. But I think the difficulty is met. Having regard to the extensive powers as to making rules incorporated in this Act and schedule, the proper way to provide for the difficulty would have been by rules of court. We therefore turn to the rules of court to see whether we can there get the necessary power to serve out of the county court jurisdiction. Rule 15, sub-section 2, of the Workmen's Compensation Rules, 1898, deals with service on respondents, and provides that "Service may be effected either in accordance with the rules as to service of default summonses, or by registered post in accordance with the provisions of sub-sections 4 and 5 of section 2 of the Act with reference to service of notice in respect of an injury, and the provisions of those sub-sections shall apply to such service." I have already pointed out that that service by registered post of the notice of injury clearly may be made in Scotland if the accident happens in England, and *vice versâ* in England if the accident happens in Scotland. Therefore we have an enactment here which shows that the necessary process for initiating procedure in the county court may be made by registered letter—by registered post—as the notice under section 2 of the Act. That seems to me, as I have said, almost by an accident, to meet sufficiently for these purposes the difficulty as to how the proceedings are to be initiated in the county court. Upon the whole, therefore, having regard to the fact that it is always desirable to carry into effect the obvious intention of the Act of Parliament, which was to apply this liability and this right of compensation to English and Scotch workmen and employers, and that it never could have been intended that there should be any difference when either of the parties did not happen to be domiciled in the same country, and that it was by a mere oversight that such a case was not provided for, it seems to me that when the thing is worked out we are justified in putting this interpretation upon the words used, and in holding that this jurisdiction existed.

*Rule absolute.*

Solicitors for the applicant, *Helder, Roberts, Walton, & Thomas*, for *Frank Lewis*, Newport Monmouth.

Solicitors for the respondent (the employer), *Botterell & Roche*, for *Vaughan & Roche*, Cardiff.

Solicitor for the county court judge, *The Treasury Solicitor.*

## House of Lords.

From C. A. (England). Aug. 5, 1902.

STEAMSHIP BALMORAL CO. *v.* MARTEN. (*a.*)

*Insurance, Marine—Ship—Valued policy—Salvage and general average contribution—Real value of ship—Liability of underwriters.*

*A ship was insured for £33,000 and was valued in the policy for the same sum. While the policy was current a general average loss was sustained and salvage services rendered to the ship, and the ship was valued in the salvage action at £40,000. In an action on the policy,*

*Held, that the shipowners were only entitled to recover from the underwriters thirty-three-fortieths of the amount due from the ship for salvage and general average.*

*Decision of the* Court of Appeal (50 *W. R.* 35, [1901] 2 *K. B.* 896) *affirmed.*

Appeal from an order of the Court of Appeal, 50 W. R. 35, [1901] 2 K. B. 896 (A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.), affirming a judgment of Bigham, J., 49 W. R. 137, [1900] 2 Q. B. 748.

The appellants brought this action to recover from the underwriters a portion of general average expenses and salvage charges incurred in respect of their steamship *The Balmoral.* The material facts sufficiently appear in the judgments.

*J. A. Hamilton, K.C.*, and *Leck*, for the appellants.

*Pickford, K.C.*, and *Scrutton, K.C.*, for the respondents.

THE HOUSE took time for consideration.

Aug. 5.—Lord MACNAGHTEN.—The question in this case is of little consequence as regards the money value of the claim. It is important in its bearing on a rule of practice which has prevailed with underwriters and average staters in this country for a long period.

Ship, cargo, and freight have had to contribute to general average and salvage charges. For the purpose of contribution the values of the ship, cargo, and freight at risk were ascertained. There is no question as to the value of the cargo or the freight. The value of the ship was taken to be £40 000, being the amount at which it was valued in the salvage proceedings. Contribution from the ship in respect of general average and salvage charges works out at £530 8s. 8d. This amount is claimed from the underwriters. The underwriters say: "That may be the proper amount of contribution as between ship, cargo, and freight, but as between us and you the policy on the ship was a valued policy. It was stipulated that 'for so much as concerns the assured by agreement between the assured and assurers' the ship, with its machinery and everything connected therewith, was valued at £33,000. As the value in the policy is so much less than the contributory value we are only bound to pay a proportionate amount, or thirty-three-fortieths of the ship's contribution." To this the shipowners answer: "You are opening the policy. The ship was fairly valued at £33,000. That value as between you and us must hold good for all purposes. You have nothing to do with the value put upon the ship at a different time and for a different purpose. It is impossible to determine with any degree of accuracy the value of a thing

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

which is not an article of commerce. The agreed value in the policy is, or was at the time of the agreement, just as truly the "real value" as the value arrived at somehow or other in the salvage proceedings. The ship was fully insured, and you must make good the loss just as you would have to reimburse the cost of repairs made necessary by sea damage."

Many authorities were cited, and all available text-books were referred to. But, speaking for myself, I must say that I think little help is to be obtained from text-books or reported cases. No case was cited which has more than a very remote and indirect bearing upon the question. Mr. Phillips, who upholds the English practice as against the New York practice, for which the appellants contend, puts the case very fairly when he says, section 1410, "There is nothing in the policy that favours one of these modes of construction in preference to the other, each being consistent with the language of the instrument." His conclusion is that the question must depend upon the application of "the general principles of insurance."

But I do not think one gets rid of the difficulty by referring it to the general principles of insurance. It seems to me that there is as much to be said on the one side as on the other. And although I think, if the matter were *res integra*, I should prefer the English rule, my preference would be based on this consideration, that the law of marine insurance in this country, although anomalous in many respects, is eminently practical. Just as the agreed value of the ship is disregarded when the question is whether a prudent uninsured owner would repair or abandon, so where there has been a value put upon the ship by a competent authority or adopted by a competent authority, or treated as binding in a business transaction, it seems to me that that value, whether it has or has not the better right to the title of "the real value," cannot be left out of consideration. And I think it is a salutary rule and not unreasonable that the underwriters' liability under the policy should be adjusted with regard to it.

However that may be, I do not think that Mr. Hamilton, in his able argument, succeeded in proving that the English rule is contrary to principle. That being so, there is, in my opinion, an end of the case, and discussion on the comparative merits of the English rule and the New York rule becomes academical.

The rule that prevails with English average staters is a rule that has been long established. It is well known, and it must have helped to form the basis of a vast number of contracts which are still running, and some of which may run for twelve months to come. In that state of things it seems to me that if the English rule is to be altered it must be altered by Parliament and not by a decision of this House. It would be open to Parliament, if it should see fit to enact a new rule, to fix a date for its coming into operation, and so avoid any semblance of injustice to those who have contracted on the footing of the old rule.

Stirling, L.J., in his judgment in the Court of Appeal, expresses an opinion that, theoretically, the sum recoverable would be that which would be payable if the agreed value in the policy had been employed in the average adjustment. I venture to think so too. The mode of calculation adopted by the average staters seems rather too favourable to the underwriters. Suppose the value of the ship in the policy, and also for the purpose of contribution, to be £16,000, the value of the cargo and freight to be £12,000, and the total amount required to be £840, the ship would then pay four-sevenths, or £480. Then suppose the ship, for the purpose of contribution, was valued at £18,000, the value of cargo and freight remaining the same, the ship would pay three-fifths, or £504—that is, £24 more than if the value for the purpose of contribution had been the same as the value in the policy. But if you reduce the ship's contribution in the proportion of eighteen to sixteen, the underwriters have only to pay eight-ninths of £504, or £448—that is, £32 less than would have been payable if the contributory value had been the same as the value in the policy. But there again the rule is well understood, and, though I do not think it is quite accurate, I do not think it ought to be disturbed.

Though the rule only speaks of general average, it has always been treated as applying to salvage expenses also. I do not think that any distinction ought now to be made between these two heads of expenditure.

The first part of the rule, which says that the insurers are not to pay more than the ship's contribution, although the contributory value be less than the value in the policy, seems to me to be unobjectionable, as the contract of insurance is a contract of indemnity.

In the result, therefore, I move your lordships that the appeal be dismissed with costs.

Lord SHAND.—I am also of opinion that the appeal should be dismissed, and the judgments of Bigham, J., and the Court of Appeal affirmed with costs. I confess I think the case a very clear one, and the ground of my judgment may be stated very shortly.

The policy of insurance provides that the ship, for so much as concerns the assured, by agreement between the assured and assurers in this policy, is and shall be valued at, say, £33,000. In all questions of indemnity, therefore, the parties to the policy, insurers and insured, have agreed that, though the ship may in truth be much more valuable, her value is to be taken at £33,000 only. There is no exception. The agreement is to apply in all cases of indemnity which may arise. So if the question were one of principle merely, and the rule of custom and practice, which has been so much referred to, had never existed, the House must give effect to this stipulation or agreement between the owner of the ship and the underwriter or insurer, who asks that the terms of his special contract shall receive effect.

An owner may insure so as to cover his whole risk, or he may insure only to cover part of his risk, and prefer to be his own insurer in part, or, to put it in other words, to leave his ship in part uninsured. This he does if he insures his ship below her true value. Thus, having a ship worth £40,000, he may insure her for £20,000 only, with a clause such as that above quoted, declaring that he has agreed that between him and the underwriter the ship shall be taken to be of that value only. What is the effect of this? Not only that the owner becomes his own insurer for one-half of the value of the ship, but he gets a present benefit. He pays only one-half of the premium which he must have paid had he insured his ship at her true value, and, on the other hand, the underwriter undertakes only the risk corresponding to the reduced premium on one-half of the real value of the ship.

In questions of salvage and general average, which at once give rise to claims of indemnity under an insurance policy, the value of the ship is necessarily a material element, for the value of the ship will, with the circumstances in which the salvage services have been given, enter deeply into the question of the remuneration to be given. Of course that value in a question with salvors must be the real value at the

time when the salvage services are rendered. Accordingly, in this case the ship was taken at her full value, and the owner had to pay a larger sum than if the value had been £33,000 only. It seems to me that when he claims full relief by way of indemnity, the underwriter in his defence is simply asking that effect shall be given to his stipulation in the policy than in all questions of indemnity the ship shall be valued at £33 000 only. It follows that he is liable to pay only the proportion which the value in the policy bears to the actual value on which the statement has been made up.

I therefore agree with Bigham, J., in holding that the rule or custom founded on it, is in accordance with sound principle; but even if that were open to question, the rule has been so long recognized and acted on that I am further of opinion with your lordships that effect should now be given to it, and it should continue to receive effect unless altered by legislation.

Lord BRAMPTON.—The steamship *Balmoral*, by a marine policy dated the 20th of December, 1898, and underwritten by the respondent, was insured for twelve calendar months against all ordinary perils of the seas. By the policy it was agreed that, for so much as concerned the assurers and the assured, she should be valued at £33,000.

In June, 1899, while on a voyage from Philadelphia to London, when near the Isle of Wight, *The Balmoral* met with so strong a gale, and so heavy and irregular a sea, that her tail shaft was fractured, and it became necessary to accept the voluntary assistance of the steam trawler *Amroth Castle* to tow her, as she did, during two days, when two tugs, which had been engaged and hired for that purpose, took her in charge in the Downs and towed her to the Millwall Dock, London.

The cost of these two tugs was £100, and formed the item in dispute of general average, and the owners of *The Amroth Castle* were awarded by the Admiralty Court as salvage the sum of £500.

In the course and for the purposes of the salvage action it was proved that the contributory value of *The Balmoral* was £40,000, so that, having regard to her agreed policy value, she was under-insured to the amount of £7,000. In adjusting these two items as between the owners of the ship, cargo, and freight, the adjuster, taking the contributory value of the ship to be £40,000, assessed the amount to be contributed by the owners for general average at £58 6s. 8d, and for salvage at £472 2s., making a total of £530 8s. 8d. payable by *The Balmoral*.

The question has now arisen between the shipowners and the underwriters—the shipowners claiming that the whole of those amounts is payable by the underwriters, as insurers of a fully insured ship, the underwriters contending that their liability is limited to such proportion of those sums as the agreed value of the ship bears to the contributory value proved in the Admiralty Court. This would reduce their liability to thirty-three-fortieths of the plaintiffs' claim, which they have always been prepared, and are willing, to pay.

Before Bigham J., it was proved by a very experienced average adjuster (Mr. Danson) that for many years a custom had existed—which certainly in and since 1874 had been adopted as a rule at Lloyd's—that when a ship is insured for less than the contributory value, the underwriter pays on the insured value. It was proved also that such custom applied to salvage as well as general average, and that salvage had until recently been always adjusted as part of a general average. The owners of the ship contended that the rule was inconsistent with the terms of the policy, for that *The Balmoral* was a fully insured ship, being valued as a whole at £33,000; and being so insured they were entitled to a full indemnity against the claims.

Bigham, J., overruled that contention, and refused to disregard the rule, on the basis of which, as he stated, policies for many millions had been made, and acting upon it he gave judgment for the underwriters. In that judgment I entirely agree.

I can well understand that in one sense, but in one sense only, *The Balmoral* may be said to have been fully insured as a ship; that is to say, every part of her structure forming a complete ship was in fact covered by the policy, but not to her full value, for it was expressly agreed in the policy that for all purposes of it her value should be limited to £33,000, being only thirty-three-fortieths of her contributory or real value, in respect of which the salvage was awarded. In adjusting the liability of the underwriters, therefore, the amount of salvage payable by them was properly arrived at, having regard to the proportion which the agreed value of the ship bore to the contributory value as proved in the salvage court. This was in exact accordance with the custom and rule proved by Mr. Danson.

Based, as the amount of a salvage award invariably is, upon the true contributory value of the ship, and the property saved, I cannot conceive anything more unreasonable or unjust than that an owner should seek to recover from an underwriter salvage based upon a value far in excess of its insured value, and so get the benefit of an insurance without paying the premium largely in excess of the smaller value which as between themselves they have agreed to treat and be bound by for all purposes of the policy.

Another consideration presents itself to me. It cannot be denied that, the ship being for all purposes of the insurance insured for £33,000 only, the property of the owners saved by the salvors was worth £7,000 more than the insured amount.

What sound or just reason can possibly be urged in support of the claim of the owners to be so indemnified by the underwriters, who have received from the owners no consideration for such indemnity? I can see none.

Let me suppose that the owners, having insured with the defendants in £33,000 on the ship valued at that sum, had effected another insurance with other underwriters, valuing the ship at £7,000, to make up its full value. Would anybody question that the salvage payable on the full value of the ship would be rightly claimed and payable by contributions from both sets of underwriters in the proportions which the sum insured by each bore to the whole value of the property salved—namely, £40,000? If the assured, whether with a view to save the premiums or for any other reason, preferred to leave the £7,000 uninsured, they became their own insurers to that amount; and I see no reason in law or good sense why they should not bear the burden they now seek, as I think improperly, to fix upon the underwriters.

I have considered carefully the very able arguments of the learned counsel for the appellants and the cases cited in support of them, but they have not substantially affected the views I have expressed and entertain.

The rule and custom of Lloyd's, upon which Bigham, J., acted, is, in my opinion, sound, sensible, and legal, and I am therefore content to rest my judgment upon it, and agree that this appeal should be dismissed with costs.

Lord ROBERTSON concurred.

Lord LINDLEY.—This case turns on the effect of expressing, in an ordinary marine policy, an agreed

value at which the ship insured by it is to be taken as between the assured and the underwriter. The effect has to be considered with reference to two losses sustained by the assured—namely, first, his share of a general average loss; and secondly, his share of a loss sustained by reason of salvage services for which payment had to be made. The assured's share of these two losses is £530.

The ship was valued in the policy at £33,000. In ascertaining the amount payable by the assured for general average and for salvage the ship was valued at £40,000. The underwriters thereupon contend that they are liable to pay thirty-three-fortieths of the above-mentioned £530. The assured, on the other hand, say that they are entitled to be paid the whole of this sum, as it does not exceed the limit of £33,000. The underwriters contend that their view is correct in principle and is in conformity with a long-established custom or practice at Lloyd's invariably followed in this country. The assured do not deny that the last statement is true, but they contend that the custom or practice is contrary to principle, and ought not to be judicially recognized. Bigham, J., who tried the case, and the Court of Appeal have both decided in favour of the underwriters, and your lordships are asked to reverse their decision.

Let us consider the principles applicable to the case independently of any custom or practice at Lloyd's or amongst underwriters.

The sum of £33,000 mentioned in the policy is a sum agreed upon between the assured and the underwriter. No one else is in any way bound to value the ship at that sum. If, as here, a general average loss has been sustained and has to be borne by the ship, freight, and cargo, according to their respective values, it is plain that the value of the ship must be ascertained in order to apportion the loss between them, and that the conventional value of £33,000 be disregarded, unless the parties concerned choose to adopt it. So as regards salvage: the salvors are in no way affected by the fact that the ship has been valued at a particular sum in her policy of assurance. The value of the ship saved must be ascertained, because the amount awarded for salvage depends, *inter alia*, and to a great extent, on the benefit which accrues to the owner of the ship, and this benefit can only be measured in money by the value of his property saved.

But, whatever the value of the ship, when the amount payable by the underwriter to the assured has to be ascertained, her value must be treated as £33,000; and if the owner makes any claim on him based on the ship being worth more, the underwriter is entitled to say the claim is not in accordance with the bargain between them. I confess I see no answer to this argument. It seems to me to follow from the decision of your lordships in *Irvine* v. *Manning*, 1 H. L. C. 287, where the true effect of a valuation clause in a policy was carefully considered and finally settled. For the sake of avoiding all disputes in settling what the underwriter has to pay, the value of the ship is to be taken at an agreed sum.

In order to prevent abuses by over-insuring, this principle may require qualification; but where, as here, the ship is under-insured, no qualification is necessary.

The notion prevalent at one time, and supported by the high authority of Mr. Benecke, that, although the valuation in a policy is conclusive in the case of a total loss, yet that in the case of a partial loss the valuation may be opened, has long been exploded: see 3 Kent's Com. 274; 1 Pars. Marine Ins. 272; 1 Arn. Ins. 299 and 2 *ib.* 939 (6th ed.). There are numerous decisions showing this to be the case in valued policies on goods and freight (the most recent being *The Main*, [1894] P. 320); and I am unable to discover any reason for applying to ships a doctrine repudiated as unsound when applied to goods or freight. At the same time, I have not discovered any direct decision on this point. The principle that the valuation in a policy on ships is to be regarded in cases of partial loss was assumed to be correct in *Pitman* v. *Universal Marine Insurance Co.*, 30 W. R. 906, 9 Q. B. D. 192, and was not questioned on appeal. The owners, however, contend that the underwriters have no concern with the mode in which the amounts payable for losses insured against are arrived at. The owners say they are fully insured up to a certain limit, and that if that limit is not exceeded all losses insured against must be fully paid. This appears to me to ignore the difference between valued policies, as understood in this country, and open policies, and to be erroneous according to English law. The introduction of the word "fully" occasions the fallacy in the plaintiffs' reasoning. It is not true to say that the plaintiffs are fully insured. If the word "fully" is introduced, it must be qualified so as to show its true meaning—that is, fully for a ship of the value mentioned in the policy. If in this case the ship had been totally lost, the owners would have found themselves uninsured to the extent of the ship's ascertained value—over £33,000. To say that the whole value, as fixed in the policy, is insured, and then to treat the assured as fully insured, appears to me misleading. The contract is not fully to insure the shipowner up to a certain limit, but to insure him on the footing that his ship is to be taken to be of the value of £33,000 for the purpose of ascertaining what is payable under the policy.

The foregoing observations are as applicable to losses owing to salvage as to ordinary general average losses. There is more difficulty in dealing with salvage losses, as the sum awarded for salvage services is arrived at by considering the risks and dangers encountered by the salvors as well as the value of what is saved; but this value is always a very material matter for consideration; and, other things being the same, it may for all practicable purposes be fairly regarded as regulating the amount awarded when the sum payable under a valued policy has to be ascertained. So the matter stands on principle.

Let us now consider the custom or practice or rule on which the underwriters also rely. The rule is set out in the appendix. As printed, the rule does not mention salvage; but it was proved at the trial that the rule is always applied to losses occasioned by salvage as well as to ordinary general average losses, and I have endeavoured to show that this is correct in principle.

The rule, as framed, treats over-insurances and under-insurances differently. It first deals with over-insurances, and says: "If the ship or cargo be insured for more than its contributory value, the underwriter pays what is assured on the contributory value." If this rule is applied to a valued policy, it infringes the principle of taking the agreed value for better and for worse in ascertaining what the underwriter has to pay. This deviation from that principle may perhaps be justifiable in cases of over-insurance, on the ground that it avoids all danger of fraud and endless disputes between over-insured owners and underwriters. But this part of the rule is inapplicable to the present case, and it is unnecessary to say more about it.

The second part of the rule applies to under-insurances and to the present case; and there being no danger of fraud, the rule says, "But when insured

for less than the contributory value the underwriter pays on the insured value." The rest of the rule is consequential on this This rule is, in my opinion, not wrong, but right in principle, and is calculated to save infinite trouble. The actual method of working out the rule adopted by underwriters may not be arithmetically accurate, but it is simple and convenient, there is nothing unfair in it, it has long been adopted, and there is no justification for disturbing it.

It is true that in New York the practice appears to be in favour of the appellants, but in this respect I believe New York stands alone; and although uniformity in these matters is greatly to be desired, your lordships cannot, in my opinion, judicially do otherwise than dismiss this appeal. So far as the actual words of the policy go, they appear to me consistent with both rival contentions; but the English rule is more consistent than the other with the interpetation which has for years been put on valued policies in this country.

The appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellants, *Lowless & Co.*

Solicitors for the respondent, *Waltons, Johnson, Bubb, & Whatton.*

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## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — July 21, 22; Dec. 6.

*In re* LLOYD.
LLOYD *v.* LLOYD. (a.)

*Fund in court subject to a mortgage—Application by mortgagor for payment out—Amount of arrears of interest to which mortgagee entitled—Statutes of Limitations, 3 & 4 Will. 4, c. 27, ss. 40, 42; c. 42, s. 3.*

*The court will pay out a fund in court which is the subject of a mortgage, on the application of the mortgagor or his representatives, only on the same terms as if he or they had brought an action for redemption—that is, on payment of full arrears of interest. Section 42 of 3 & 4 Will. 4, c. 27, applies only to proceedings by the mortgagee, and has no application where he is simply resisting proceedings by the mortgagor.*

Edmunds *v.* Waugh, 14 *W. R.* 257, *L. R.* 1 *Eq.* 418; In re Marshfield, 35 *W. R.* 491, 34 *Ch. D.* 721; *and* Dingle *v.* Coppen, 47 *W. R.* 279, [1899] 1 *Ch.* 726, *approved.*

In re Slater's Trusts, 27 *W. R.* 448, 11 *Ch. D.* 227, *disapproved.*

*Decision of* Farwell, J., *reversed.*

This was an appeal from a decision of Farwell, J.

The facts were as follows: By his will, made in 1861, E. A. Lloyd devised and bequeathed his residuary real and personal estate to trustees on trust for payment of the rents, interest, and dividends to his wife for life or widowhood, and from and after her death or second marriage on trust for sale and division among his children who had attained twenty-one or married in equal shares.

The testator died in 1862.

One of his children was Francis Lloyd, who, having attained a vested interest, mortgaged in 1867 by grant and assignment all his part or share in the testator's real and personal estate, or the stocks, funds, moneys, or securities for the time being representing it, to secure a loan of £500 and interest at 5 per cent. The mortgage, in addition to the usual covenant for payment, contained a provision that the mortgagee, his heirs, executors, administrators, and assigns, should by and out of any real and personal estate which should be received by him and them in pursuance of the grant and assignment pay all costs and expenses, and the moneys for the time being owing on the security, and pay or transfer the remainder or surplus (if any) to F. Lloyd.

F. Lloyd died later in 1867, and the mortgagee in 1887.

The testator's widow died in 1900, and this action was then commenced for the administration of the testator's estate, and his real and personal estate was sold under orders made in it, the share of F. Lloyd being carried over to a separate account.

The summons on which the present question arose was then taken out by F. Lloyd's representatives, asking for payment out of the balance of the fund after payment of the mortgage debt and six years' interest. The representative of the mortgagee, who was made a party to the summons, claimed to be entitled to full arrears of interest from the date of the security.

A conflict of authority existing on the question, Farwell, J., followed the authorities deciding that six years' interest only was payable, and made an order accordingly.

The mortgagee's representative appealed.

*Butcher, K.C.,* and *R. J. Parker,* for the appeal.—Where the interest is reversionary the statute does not run. But even assuming that section 42 applies so as to restrict us to six years' interest if the fund was entirely proceeds of realty, still two-thirds of it is the proceeds of pure personalty, and there is nothing in the statute to prevent us recovering full interest as against that. The case is analogous to a redemption action, in which a mortgagor can redeem only on the terms of paying all that is due under the security. Section 42 does not intervene to deprive us of our legal right, nor will equity give more right to the mortgagor and less to the mortgagee. If the property were not in court we could sell and pay ourselves, and the fact that it is in court makes no difference. Many of the conflicting decisions were cases where it was thought that a foreclosure action was not one for the recovery of land, but one to recover money, but *Pugh* v. *Heath,* 30 W. R. 553, 7 App. Cas. 235, decided that it is an action to recover land. [STIRLING, L.J., referred to *Hunter* v. *Nockolds,* 1 Mac. & G. 640.] That has not been followed in redemption actions.

They also cited or referred to *Mellersh* v. *Brown,* 38 W. R. 732, 45 Ch. D. 225; *Bowyer* v. *Woodman,* L. R. 3 Eq. 313, 15 W. R. Ch. Dig. 91; *Mason* v. *Broadbent,* 12 W. R. 118, 33 Beav. 296; *In re Stead's Estates,* 24 W. R. 698, 2 Ch D 713; *In re Slater's Trusts,* 27 W. R. 448, 11 Ch. D. 227; *Edmunds* v. *Waugh,* 14 W. R. 257, L. R. 1 Eq. 418; *In re Marshfield,* 35 W. R. 491, 34 Ch. D. 721; *Dingle* v. *Coppen,* 47 W. R. 279, [1899] 1 Ch. 726; *Smith* v. *Hill,* 26 W. R. 878, 9 Ch. D. 143; *Vincent* v. *Going,* 1 Jo. & Lat. 697; *Sinclair* v. *Jackson,* 1 W. R. 400, 17 Beav. 405; *Hughes* v. *Williams,* 3 Mac. & G. 683; *Thomson* v. *Eastwood,* 2 App. Cas. 215, 25 W. R. Dig. 341; *In re Blachford, Blachford* v. *Worsley,* 33 W. R. 11, 27 Ch. D. 676.

*Levett, K.C.,* and *Errington,* for the respondents.—The case turns on section 42 of the Act, and on the

(a.) Reported by H. W. LAW, Esq., Barrister-at-Law.

definition of land in the interpretation section (section 1). The Act is a statutory alteration of contracts, and if the law says that only six years' interest can be recovered by action equity will follow it in imposing conditions of redemption. There is no magic in the fact that the legal estate becomes absolute in foreclosure; there is no difference between foreclosure and redemption in this respect, and if a redemption action is dismissed the result is the same as if there had been a decree for foreclosure. The definition of "land" extends to any share, estate, or interest in corporeal hereditament. Proceeds of a trust for sale of land are an interest in land; they are therefore "land" within section 42, and the mortgage is a mortgage of land, and this is money charged on or payable out of land. Why should the mortgagee, because he has been saved the necessity of bringing an action, be in a better position than he would have been in if he had brought his action?

They also referred to section 25 of the Act, and to *In re Bell*, 44 W. R. 99, [1896] 1 Ch. 1; *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511; and *Greeaway* v. *Bromfield*, 9 Hare 201.

*Butcher*, in reply.—"Land" in section 42 means land of some tenure, not proceeds of sale of land. If included there would be no need for section 40. Nor is this a distress action or suit to recover an interest in land, even if this be such an interest. We are not enforcing a remedy.

He cited *In re Frisby*, 38 W. R. 65, 43 Ch. D. 106, and *Wolmershausen* v. *Wolmershausen*, 38 W. R. 537, 62 L. T. Rep. 541.

*Cur. adv. vult.*

Dec. 6.—STIRLING, L.J., read the judgment of the court, which, after stating the facts, continued as follows: The question is, whether section 42 of 3 & 4 Will. 4, c. 27, applies to the case. It was admitted at the bar on behalf of the respondents that, if the fund in court represented personal estate of the testator only, this section could not apply, and it was contended on behalf of the appellants that, even although the fund consisted to a large extent of the investments of proceeds of real estate, nevertheless they were entitled on various grounds to full arrears of interest. In the view which we take, it is necessary to consider only one of these grounds. It was said that the arrears of interest were not being recovered "by any distress, action, or suit," that the enactments in 3 & 4 Will. 4, c. 27 and c. 42, only destroyed the remedy for the arrears of interest, and not the debt itself, and that the court ought not to accede to the application of the legal personal representative of the mortgagor, except on the terms of payment out of the fund of all arrears. In considering whether effect ought to be given to this contention it is necessary to pay somewhat close attention to the course of decision on the provisions of the statutes of 3 & 4 Will. 4, c. 27 and c. 42, with reference to mortgages. The material enactments are the following: 3 & 4 Will. 4, c. 27, s. 40, No action or suit or other proceeding "shall be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land or rent at law or in equity . . . but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same"; section 42, "No arrears . . . of interest in respect of any sum of money charged upon or payable out of any land and rent . . . shall be recovered by any distress action or suit but within six years next after the same respectively shall have become due"; 3 & 4 Will. 4, c. 42, s. 3, "All actions of covenant or debt on any bond or specialty . . . shall be commenced and sued within the time and limitation hereinafter expressed and not after; that is to say, the said actions of covenant or debt on any bond or other specialty . . . within twenty years after the cause of such actions or suits but not after." In *Dearman* v. *Wyche*, 9 Sim. 570, decided in 1839, it was held by Shadwell, V.C., that a foreclosure suit was a suit for the recovery of the money secured by the mortgage within the meaning of 3 & 4 Will. 4, c. 27, s. 40. Of this decision Lord St. Leonards expressed his approval in *Henry* v. *Smith*, 2 Dr. & War. 381, see p. 387, decided in 1842, but subsequently in *Wrixon* v. *Vize*, 3 Dr. & War. 104, see p. 121, decided later in the same year, he found himself unable upon further consideration to take this view, and held that the true nature of a foreclosure suit was for the recovery of the equity of redemption of the mortgaged property, and consequently that the provisions of the statute 3 & 4 Will. 4, c. 27, applicable to foreclosure suits were to be found, not in section 40, but in the early clauses of the Act. It has now been decided in *Pugh* v. *Heath*, both by the Court of Appeal and the House of Lords, that the opinions expressed by Lord St. Leonards in *Wrixon* v. *Vize* are well founded in law. In the meantime, however, the view taken by Shadwell, V.C., was adopted by other judges in England, and in particular by Wigram, V.C., in *Du Vigier* v. *Lee*, 2 Hare 326, see p. 334, and by Lord Romilly, M.R., in *Sinclair* v. *Jackson*, 17 Beav. 405, see p. 410, and influenced their decisions with reference to the meaning and effect of section 42 of the same Act. In *Du Vigier* v. *Lee*, decided in 1843, it was held that, under the statutes 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, a mortgagee of land, whose mortgage debt and interest were also secured by a bond or covenant, was entitled in a foreclosure suit to charge the mortgage estate with the full arrears of interest accruing on the mortgage debt within twenty years before the institution of the suit. The accuracy of this determination came to be considered in 1850 by Lord Cottenham, L.C., in *Hunter* v. *Nockolds*. This was a suit instituted for the purpose of establishing an encumbrance on the estate of Sir Francis Vincent, in which a petition was presented by persons claiming to be entitled to an annuity charged on the estate, subject to the encumbrance. On the petition an order was made by which it was referred to the master to inquire whether the petitioners were entitled to any and what annuity and charge upon the estate in question and, in case he should find they were so entitled, what was due in respect of such annuity. The master found that the petitioners were entitled to an annuity of £111 charged upon the estate, and that there were due to the petitioners twenty-four quarterly payments of the annuity during the period of six years previously to the date of the order, and no more. The petitioners, however, claimed the whole of the arrears of the annuity from the 5th of February, 1829, the date of the deed by which the annuity was created, to the 5th of May, 1848, and excepted to the master's report. The exceptions were allowed by Wigram, V.C., and from this decision an appeal was brought. The Lord Chancellor held that the object of the Act 3 & 4 Will. 4, c. 27, was to relieve land from arrears of charges beyond six years, and that its provisions were applicable only to land, while the provisions of the later Act, 3 & 4 Will. 4, c. 42, related only to the personal remedy in actions upon covenant or debt upon specialty, and held that the petitioners were entitled to only six years of the annuity against the land. A similar decision was given by Lord St. Leonards in *Hughes* v. *Kelly*, 3 Dr. & War. 482, as to which it is to be observed that the encumbrancer was a defendant to

the suit, who neither presented any petition, nor took any active steps to enforce his charge. This charge, however, was one created, not by way of mortgage to secure a debt, but by a voluntary settlement conferring benefits on the settlor's children. In *Sinclair* v. *Jackson*, decided in 1853, it was held by Lord Romilly, M.R., that a mortgagee of a reversionary interest in land could only recover six years' arrears of interest as against the land mortgaged, although he might recover twenty years' arrears on the covenant to pay. In *Shaw* v. *Johnson*, 9 W. R. 629, 1 Dr. & Sm. 412, decided in 1861, Kindersley, V.C., held, on the authority of *Hunter* v. *Nockolds*, that a mortgagee cannot in a foreclosure action have an account of arrears of interest for more than six years, although the mortgage deed contained a covenant to pay the principal and interest. In *Round* v. *Bell*, 9 W. R. 846, 30 Beav. 121, also decided in 1861, the same point was decided by Lord Romilly, M.R. From that time down to the present it has been the uniform practice in foreclosure actions to confine the plaintiff to six years' arrears of interest. It was suggested that this practice depended on the view of the nature of a foreclosure action, which was held to be erroneous in *Pugh* v. *Heath*. Although some judges were influenced by this view, we think that the practice was really governed by the decision of the Lord Chancellor in *Hunter* v. *Nockolds*, and it is impossible for this court to depart from the rule which was thereby established. Still, all that the statute does is to take away from the mortgagee his remedy "by distress, action, or suit"; and the general rule is that, where the remedy of a creditor for his debt is barred by statute, but the right remains, he may enforce that right by means of any lien or right of retainer that is available to him: see *Higgins* v. *Scott*, 2 B. & Ad. 413, and *Courtenay* v. *Williams*, 3 Hare 539. It was, however, held by Lord Romilly in *Mason* v. *Broadbent*, decided in 1863, that, where a sale of a mortgaged estate had been made by the mortgagee under a power of sale, and the mortgagor instituted a suit to recover the surplus remaining after satisfaction of the mortgage debt, the mortgagee could not retain more than six years' arrears of interest out of the purchase-money which he had received. In *Edmunds* v. *Waugh*, decided by Kindersley, V.C., in 1866, the proceeds of sale of mortgaged property, sold under a power of sale in the mortgage by the trustees and executors of the will of of the mortgagee, were paid into court in a suit for the administration of the mortgagee's estate, and the trustees and executors petitioned for payment out of the fund to satisfy nearly twenty years' arrears of interest. It was held that if there had been no suit and the money had remained in the hands of the mortgagees they would have been entitled to retain out of it all the interest which they claimed, that the fund in court was still constructively in their hands, and that the petition was not a suit to recover interest within the meaning of section 42 of the statute. With respect to *Mason* v. *Broadbent*, the Vice-Chancellor said that he could not concur in the conclusion that a bill by the mortgagor to recover the surplus money comes within the terms of section 42, as being a suit by which arrears of interest are sought to be recovered, and he made these observations: "The intention of the Legislature, I think, was that if a man chose to let interest run into arrear for more than six years and then come to a court of justice to recover the interest, he should only be entitled to recover six years' interest; but it does not follow that the Legislature intended that a mortgagor who has lost his legal right, and comes to the court insisting on his equity to redeem, should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment of only six years' interest. There would be no justice in such a construction of the statute. Is the omission of the mortgagor to pay the interest, which he ought to have paid, less culpable than the omission of the mortgagee to demand and enforce payment of it?" In *In re Marshfield*, decided in 1887, it was held by Kay, J. (then a judge of first instance), in accordance with the reasoning of Kindersley, V.C., in *Edmunds* v. *Waugh*, that first mortgagees of land who had sold the mortgaged property under their power of sale and received the proceeds were entitled as against the second mortgagees to retain more than six years' arrears of interest. In *Dingle* v. *Coppen* it was held by Byrne, J., that a mortgagor seeking to redeem could only do so on paying all arrears of interest from the date of the mortgage. In our opinion the reasoning of Kindersley, V.C., in *Edmunds* v. *Waugh* is sound and the decisions in that case and in *In re Marshfield* and *Dingle* v. *Coppen* are in accordance with law. Not one of these decisions, however, precisely covers the present case, in which the mortgagees have never had in their hands the proceeds of sale of the mortgaged property. Nevertheless, the mortgagees are not at the present time seeking to recover arrears of interest by "distress, action, or suit"; they have taken no step whatever for the recovery of arrears of interest. They claim under a mortgage deed by which the mortgagor assigned to them all his interests, subject to a proviso for redemption on a day long since gone by, and, according to the terms of the deed, their title has long since become absolute. No doubt the representatives of the mortgagor are entitled to redeem, but on redeeming they would, according to the cases just mentioned, have to pay all arrears of interest. They do not in form seek to redeem; they ask for repayment to them of the surplus of the fund after deducting the principal and six years' arrears of interest only. Under the mortgage deed the representatives of the mortgagee have an interest in the fund to the extent of their principal and all their arrears of interest; but it is said that, if the representatives of the mortgagee applied for payment to themselves of the whole fund, the court would refuse to hand it over to them, and would pay only the principal and six years' arrears of interest, and in support of this contention *In re Bell* is relied on. That case shows that the court will not hand over the whole of a mortgaged fund to first mortgagees where that fund is more than sufficient for payment of what is due to the first mortgagees, in face of the opposition of subsequent encumbrancers, but it does not show that the court, merely in order to deprive a first mortgagee of interest for which he had lost his remedy, would withhold from him a fund his title to which remains unextinguished. But, however this may be, the mortgagees (as has already been remarked) are not proceeding by "distress, action, or suit." On the contrary, the pending proceeding is taken by the legal personal representative of a mortgagor, against whom the mortgagee's title has become absolute, and on whom a court of equity has the power to impose terms as the price of the relief which it may see fit to give. We think that the representatives of the mortgagor ought only to be allowed to recover the fund as against the mortgagees upon the same terms as if they had brought an action for redemption. This does not, in our opinion, conflict with the decision in *Hughes* v. *Kelly* already referred to, because, although in that case the encumbrancer was not taking active proceedings, still he was not a mortgagee whose title to the mortgaged property had become absolute, but was only entitled to an equitable charge,

which had been created by a voluntary settlement, and carried with it no right of foreclosure: see *Sampson* v. *Pattison*, 1 Hare 533; *Jenkin* v. *Row* 5 De G. & Sm. 107, and *In re Owen*, 43 W. R. 55, [1894] 3 Ch. 220. Two cases have still to be considered. The first is *In re Stead's Mortgaged Estates*. There money was paid into court under the Lands Clauses Act for the purchase of land which was subject to an equitable mortgage by deposit, with a memorandum undertaking to give a legal mortgage. The mortgagee petitioned for payment out of the fund. It was held by Malins, V.C., that the petition was analogous to a suit for recovery of the land, and, therefore, that the principal and six years' interest could alone be recovered. Whether this decision be well founded or not, it does not govern the present case, inasmuch as the mortgagor, and not the mortgagee, is here applying to the court for payment. The other case is in *In re Slater's Trusts*. There a petition was presented by one of several mortgagors for payment out of a fund in court which was subject to a mortgage, the mortgagee being made a respondent to the petition. It was held by Bacon, V.C., that the mortgagee was entitled only to six years' arrears of interest, on the ground, as I understand it, that if he had taken proceedings of his own he could have recovered six years' interest and no more. This appears to us to overlook the terms of section 42, and the difference in the position of a mortgagee who is proceeding actively himself and one who is simply resisting proceedings by his mortgagor. That decision is in point, but, in our opinion, it ought not to be followed. We think, therefore, that in the circumstances of this case, notwithstanding the statute 3 & 4 Will. 4, c. 27, s. 42, the appellants are entitled to receive their full arrears of interest out of the fund in court before the representatives of the mortgagor receive anything, and that the appeal accordingly ought to be allowed, with costs.

*Appeal allowed.*

Solicitors, *Norris, Allens, & Chapman; Palmer & Bull.*

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From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) Dec. 4.

BICKMORE *v.* DIMMER. (*a.*)

*Landlord and tenant—Lease—Covenant not to make alterations—Shop—Fixture—Advertising sign.*

*A tenant who occupied certain premises as a place of business under a lease, which contained a covenant by the lessee not to make any alteration to the premises without the consent of the landlord, erected on the front of the premises a clock some four feet in diameter and fastened into the stone of the front of the premises by iron bolts as an advertising sign without the consent of the landlord.*

*Held that the covenant ought not to be so construed as to extend to any alteration which did not affect the structure or form of the premises, and at the same time was reasonable and proper for carrying on the business of the lessee in an ordinary way.*

This was an appeal against a decision of Farwell, J.

The plaintiffs were the owners of certain premises known as 24 and 26, Sandon-buildings, Church-street, in the city of Liverpool, and by a lease dated the 5th of May, 1898, they demised part of these premises to Frederick Heath for a term of twenty-one years from the 1st day of January, 1899. The lease contained covenants by the lessee that he would within twelve months from the commencement of the said term expend the sum of £400 at least in alterations to the shop-fronts on the ground floor of the said premises and otherwise in such substantial improvements, internal structural alterations, and decorations of the said premises, and in such manner as the surveyor of the lessors should approve; and that he would not make or suffer to be made any alteration to the said premises except as therein expressly provided without the consent in writing of the lessors first had and obtained. The lease also contained a covenant by the lessee against assigning the same without the consent of the lessors. The lessors covenanted with the lessee that they would, within twelve months from the commencement of the term, expend the sum of £700, or some part thereof, in improvements to the staircase and lift in the said premises in accordance with the plans prepared by the lessors' architect, and in case the whole of the sum of £700 should not be required for that purpose would apply the balance in or towards the execution of the alterations and improvements thereinbefore covenanted to be executed by the lessee so as to relieve the lessee *pro tanto* from expending the whole of the said sum of £400 under the said covenants. This lease was assigned to the defendant by an indenture dated the 11th of December, 1900. The consent of the landlords was not obtained to this assignment, and they commenced an action against the defendant to recover possession of the premises. This action was compromised, on terms set out in an agreement dated the 7th of March, 1901, and made between the plaintiffs and the defendant. By this agreement the defendant agreed to restrict his business of a watchmaker and jeweller to a certain part of the demised premises and not to advertise or indicate in any manner in, upon, or over any portion of the restricted premises any such business. By a subsequent agreement dated the 27th of June, 1901, the defendant was allowed to make alterations to the premises in accordance with plans signed by the parties or their surveyors, but the agreement was not to prejudice or affect the covenant against alterations contained in the lease. The alterations in question were alterations to the front of the shop. After this the defendant erected outside the premises, though not on the restricted portion, a large clock contained in an iron circular frame four feet in diameter and fastened by iron bolts driven into the stone wall of the premises. The clock had two faces on which the defendant's name and business appear, and is lighted by electricity. This clock was not among the alterations mentioned by the agreement of the 27th of June, 1901, but was erected without the consent of the plaintiffs and in spite of their protests. The plaintiffs alleged that this constituted an "alteration" of the premises in breach of the covenant. They accordingly claimed a declaration that the erection of the clock was a breach of the covenant and a mandatory injunction for its removal.

Farwell, J., held that there had been a breach of the covenant not to make any alteration to the premises without the consent of the lessors, and granted a mandatory injunction for the removal of the clock.

The defendant appealed.

*Jenkins, K.C.*, and *Rutherford*, for the defendant.

*Butcher, K.C.*, and *Cochran*, for the plaintiffs.

*Jenkins, K.C.*, replied.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

VAUGHAN WILLIAMS, L.J.—This case depends upon the construction of a short covenant in a lease. It is never so easy to construe a covenant in a particular lease as it is to decide a question that depends upon a general principle. The whole of the lease and its purposes must be taken into consideration, and then you must see what, taking all these matters into consideration, is the proper construction of the particular covenant. In this case, the premises in question, though not originally demised as premises upon which the business of a jeweller and watchmaker was to be carried on eventually in the hands of the assignee came to be occupied for that purpose. The original assignment was made without the licence of the landlords, and the landlords took action to forfeit the lease by reason of the assignment being without their leave. That action was compromised substantially on the terms that the assignee was to be accepted as a tenant and allowed to carry on his business on the premises, subject only to this, that he was to be restricted from doing so on a certain part of the demised premises, and in respect of that part of the demised premises, he was, as appears by the words of the agreement, not to "advertise or indicate in any manner in, upon, or over any part of the restricted premises any such business"—that is, the business of a jeweller and watchmaker. On that *primâ facie* the parties contemplated that in respect of the rest of the premises he might carry on his business and in particular advertise or indicate his business in or upon the portion of the premises to which the restriction did not apply. I do not say that that casts much light, if any, upon the construction of the covenant in the original lease, but I do think it is a piece of evidence which goes to show what both parties here—the landlords and the tenant—were contemplating as being ordinary incidents of the business of a watchmaker and jeweller. That being so, I will now read the words of the convenant in respect of which this mandatory injunction is asked. [His lordship read the covenant in the lease, and continued:] Now we have to construe this word "alteration." I feel strongly that, having to construe this word "alteration," and note it is "alteration to the said premises," it is quite impossible to hold that every addition to the premises, whether it alters the form or structure of the premises or not, is within the meaning of this word "alteration." If we were so to hold, this tenant would be unable to put a fixed blind outside his windows or a lamp outside in front of his door or even a knocker on the door, upon which people might knock if they wanted to come in. It seems to me that that is an impossible construction, and the passage I have read from the agreement shows that the parties recognized that business people would, even with regard to the outside of the building, do all sorts of things which would come within this prohibition, if the word "alteration" is so widely construed. We are not entitled to make a new agreement for these parties, and it is therefore necessary to draw a line somewhere in construing this covenant. I do not, however, think it necessary to draw the line with reference to questions which do not arise in this case. We have to say here, "Does or does not this clock come within the words 'alteration to the premises'?" I think we would be justified in simply saying that, wherever the line is drawn, we do not think this clock comes within the words "alteration to the premises." But I prefer to draw the line more clearly than this. I was very much struck with this when it was put to counsel for the respondents in the course of the argument, that the word "alteration" could not include every addition fixed to a building, whether or not it altered the form or structure of the building; they did not stand out for such a contention, but they said "We do not complain of the clock. It may be that the addition of the clock, if it could be made to adhere to the building by some strong cement, would not be an alteration to the demised premises, but we do complain of the holes which have been made in the stones which form the front of the house." And they pointed out that the surveyor of the lessors said that in order to repair the structure of the house it would not be sufficient to plug these holes but it would be necessary to put in a fresh stone, which would cost £15 or £20. But, however that may be, I am trying to see whether this word "alteration" extends beyond alterations to the structure of the premises. Although I took a different view of the first covenant of this lease when I first heard it read, I was impressed with the argument of counsel for the appellants, and I do think that this covenant is a covenant for the expenditure of money upon permanent alterations which affected the structure of the house, and that consideration goes to confirm the view I take of the covenant which we now have to construe—namely, that the word "alteration" only applies to such alterations as affect the form or structure of the premises. That, if right, would get rid of any question whether the exception in the covenant sued on would stand in the way of the argument of counsel for the appellant. But whether I am right or wrong in drawing the line just where I have drawn it, I wish to add that we clearly ought so to draw the line defining the meaning of this covenant, that the covenant shall not operate to prevent a lessee who is intending to carry on business on these premises from doing those acts which are convenient or useful for a tradesman to do in the ordinary conduct of his business. To say that the covenant is to receive such a construction that a tradesman could not fix lamps to the front of his shop, or, as in the present case, a clock, if he thought it necessary to do so for the purposes of his trade, seems to me to be adopting a construction of the covenant which the parties could never have intended. I think that the judgment of Farwell, J., was wrong, and that this appeal ought to be allowed.

STIRLING, L.J.—I am sorry to say I cannot agree with the view taken by Farwell, J. The whole question depends upon the construction of a particular covenant in this lease, and really upon the construction of one word, "alteration," in that covenant. [His lordship read the covenant, and continued:] Now the exception of what is expressly provided refers to the earlier covenant under which the lessee gave an obligation to expend £400 at least in alterations to the shop-front, &c. It might have thrown some light upon the true construction of the second covenant if we had known what alterations were approved by the surveyor at the commencement of the lease, but as to that there is no evidence. I may observe, however, that on the face of the lease the alterations there contemplated must have been such as were suitable for the enjoyment of the demised premises as a place of business by the then intending lessee. The lease has been assigned and a subsequent agreement entered into between the defendant and his lessor, and under that agreement the defendant is to occupy the premises as a watchmaker and jeweller. It was admitted by counsel for the respondents that the word "alteration" could not be read without some limitation. They proposed to read it as meaning such alterations as were necessary to give effect to the enjoyment of this portion of the demised premises by the lessee as a jeweller's shop. I think counsel were right in making that concession. I think it could not have been intended by the parties

that the lessee should be bound to get the landlord's consent to every alteration necessary to adapt the premises to the purposes of a jeweller's shop. So far I go with counsel for the appellants, but I think their definition is too narrow. In my opinion the limitation ought not to be confined to things which are essential to the carrying on of the business in the sense that without them the business could not be carried on at all. I think it ought to be extended to alterations which are reasonable and proper for carrying on the business in an ordinary way. That being so, in my opinion the erection of this clock was a reasonable and proper method of giving notice to the public that the lessee was carrying on the business of a watchmaker and jeweller. On this ground I think the appeal ought to be allowed, and the mandatory injunction discharged.

COZENS-HARDY, L.J.—I agree with Farwell, J., that if there had been a breach of the covenant it was right to grant a mandatory injunction. If a man enters into such a covenant and then deliberately commits a breach of it, and there has been no *laches* by the other party, it would be a very dangerous doctrine to hold that a mandatory injunction ought not to be granted. But as to the construction of the covenant, I am unable to take the same view as Farwell, J. Some limitation must be put upon these words. They could not apply to the papering of a room or the putting up of gas brackets or electric light apparatus, even though in so doing holes must be made in the walls. It has been argued that the abstraction of a few cubic inches out of the stone surface of the wall is an alteration within the meaning of the covenant. I cannot accede to that view. I think "alteration" must mean an alteration to the form or structure of the building and that on this ground the appeal ought to be allowed.

Solicitors, *Norris, Allens, & Chapman*, for *North, Kirk, & Cornett*, Liverpool; *Wynne & Sons*, for *Whitley & Co.*, Liverpool.

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From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } Nov. 12.

*In re* SCOTT.
LANGTON *v.* SCOTT. (*a.*)

*Ademption—Double portions—Presumption—Advances to sons*—Inter vivos—*Gifts for temporary purposes.*

*A gift to a child by a parent, who has already by his will provided for such child, of a large sum in the interval between the date of his will and the date of his death* primâ facie *raises a presumption that the gift is to be taken by way of partial ademption, as coming within the rule against double portion. But all the circumstances of the case must be looked at, and the presumption is rebutted if it appears that the gift was made with the intention of affording mere temporary assistance to the child and not of permanently establishing him in life, according to the rule laid down by* Jessel, M.R., *in* Taylor *v.* Taylor, 23 *W. R.* 719, *L. R.* 20 *Eq.* 155.

*So far as* Taylor *v.* Taylor *conflicts with* Boyd *v.* Boyd, 15 *W. R.* 1071, *L. R.* 4 *Eq.* 305, *and* Blockley *v.* Blockley, 33 *W. R.* 777, 29 *Ch. D.* 250, Taylor *v.* Taylor *is to be preferred.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This was an appeal from a decision of Kekewich, J.

By his will dated the 5th day of June, 1891, John Scott, the testator in the action, bequeathed to each of his six daughters £5,000 to be retained in trust for them and their issue, and after a devise of freehold premises in the City of London the testator devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees upon trust for conversion and investment and to stand possessed thereof in trust for all his, the testator's, children who might be living at his decease in such proportions that the shares of each of his sons should be double the amount of the shares of each of his daughters, and that the shares of his daughters should be equal, and the testator further declared that the sum of £5,000 given by him to each of his married daughters on their respective marriages, and the like sum of £5,000 recently given by him to each of his unmarried daughters, was not in any way to be brought into account in ascertaining the share of his same daughter of and in the residuary trust funds, but was to be retained and enjoyed by her in addition to such share. Provided always, and the testator declared that if any child of his should die in his lifetime, leaving a child or children who should survive him and being a son should attain the age of twenty-one years or being a daughter or daughters should attain that age or marry under that age, then and in every such case the last mentioned child or children should take, and if more than one equally between them, the share which his, her, or their parent would have taken of and in the residuary trust estate if such parent had survived the testator. Prior to the date of the said will the testator had given to each of his six daughters a sum of £5,000.

On the 3rd of August, 1892, the testator wrote to his son Alfred Scott that he had placed to his order £5,000 with the testator's firm, and he hoped that his son would find this sum useful, and something to lean on and call his own. According to an affidavit of two of the testator's daughters, the testator used to refer to this sum of £5,000 as being on precisely the same footing as the sums of £5,000 given to his daughters.

The testator made a codicil dated the 7th of June, 1894, to his said will. In the codicil he made no reference to the gift of £5,000 to Alfred, but concluded by confirming his said will. The testator had in the year 1866 taken his son John into partnership with him in his business as a shawl maker and warehouseman. For many years the profits of the business were very good, but for some time preceding the year 1897 they had materially diminished. The son John Scott originally brought no capital into the business, and none was advanced him by the testator, but a proportion of the son's share of the profits was accumulated as capital. Owing to the diminution of the profits of the business the son was compelled to encroach on his capital.

In August, 1897, he applied to the testator for assistance, with the result that the testator transferred £5,000 from his account to the account of the son in the books of the partnership. The testator also gave him a further sum of £1,500 to reduce the mortgage on the son's house. This further sum of £1,500 was transferred from the account of the testator to the account of the son in the partnership books on the 21st of September, 1897. John Scott, the son, died in the lifetime of the testator on the 22nd of January, 1899, leaving one daughter him surviving, who on the 19th of May, 1900, was married to H. L. Bland. The testator died on the 12th of May, 1899.

The present summons was taken out by the trustees of the testator's will for the purpose of ascertaining

whether the sum of £5,000 given to Alfred and the two sums of £5,000 and £1,500 given to John ought to be brought into account by way of hotchpot in the division of the testator's residuary estate.

Kekewich, J., held that the sums in question ought not to be brought into hotchpot. His lordship was of opinion that the sums in question were advanced for temporary purposes by way of gift and not in any way in satisfaction of the provision made for the testator's sons by will. He was also of opinion so far as the sums given to John were concerned that the daughter being substituted for her father could not in any case be compelled to bring these sums into hotchpot.

The testator's daughters appealed.

*Younger, K.C.*, and *Whitehead*, for the appellants.

*Warrington, K.C.*, and *C. James*, for Mrs. Bland.

*Renshaw, K.C.*, and *E. S. Ford*, for Alfred Scott.

*Davenport*, for the trustees of the will.

*Whitehead* replied.

The following cases were cited: *Lacon* v. *Lacon*, 39 W. R. 514, [1891] 2 Ch. 482; *Taylor* v. *Taylor*, 23 W. R. 719, L. R. 20 Eq. 155; *Blockley* v. *Blockley*, 33 W. R 777. 29 Ch. D. 250; *Boyd* v. *Boyd*, 15 W. R. 1071, L. R. 4 Eq. 305; *Leighton* v. *Leighton*, 22 W. R. 727, L. R. 18 Eq. 458; *Rose* v. *Rogers*, 39 L. J. Ch. 791, 19 W. R. Dig. 138-9; *Fowkes* v. *Pascoe*, 23 W. R. 538, L. R. 10 Ch. App. 343; *Ravenscroft* v. *Jones*, 12 W. R. 362, 4 De G. J. & S. 224.

VAUGHAN WILLIAMS, L.J.—We think that the judgment of the learned judge must be supported in respect both of John and Alfred, but I may say, although I do not know that it is material for the purpose of dealing with this appeal, that we cannot agree with the conclusion that the learned judge arrived at about the daughter because we think that it is quite plain that the daughter could only take that which her father would have taken, and it is impossible to arrive at the conclusion that the result would have been different in the case of the father and in the case of the daughter who took in the event of his death. The real question here is whether either of these two sons by the receipt from the father of the sums of money which they respectively received brought the case within the rule against double portions so that the sons would now, when the residue comes to be distributed under the father's will, which was made before the payment to either of the sons of these sums of money, have to bring them into account or into hotchpot.

I think that the case is not within the rule against double portions.

I will deal with the case of the son John first, and I shall attempt to deal with that case exactly upon the basis which is pointed out in *Lacon* v. *Lacon* as being the right basis. I will take the statement of the law in Bowen, L.J.'s, judgment in *Lacon* v. *Lacon*, [1891] 2 Ch. at p. 498, the passage which Mr. Whitehead read to us in the course of his very cogent argument a few minutes ago. I begin here, "in the first place both of the suggested gifts or donations must be gifts in the nature of a portion." So every gift will not do to bring you within this rule against double portions, you must have two portions and in order to make the second portion the gift which follows the will must be a gift in the nature of a portion. "The first presumption here comes under discussion: it is said that whatever gifts are made by the father, which it may be supposed will have to be distributed among the children, or which are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule." That is, not every gift is to be taken to be a portion within the meaning of the rule, but gifts which show those characteristics are to be within the meaning of the rule. "We have, therefore, to ask ourselves in the first place were these two shares which were received during the lifetime of the father received under such circumstances as to justify their being treated and considered as a portion?"

Now, with regard to the son John the payment of this gift or whatever it may be called—of this sum of £5,000, a large sum of money—is a gift which so much bears the characteristics of a portion that I think that in the absence of anything to rebut the conclusion we ought to assume the first of those presumptions which is mentioned by Bowen, L.J., in his judgment. Then he goes on: "But supposing both gifts are gifts in the nature of portion, then comes a further question for the solution of which a further presumption is invoked. That question is whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, and then the second presumption which is invoked has to be dealt with—a presumption to the effect that the former gift, the gift *inter vivos*, was intended as an advancement *pro tanto* of the gift under the bequest—a presumption, it is said, which ought to be made in favour of equality amongst children, it being the view of the law that equality is what the father in dealing with his children would in most cases presumably intend."

Now it seems to me that according to that judgment of Bowen, L.J., we are entitled and have the duty to consider the circumstances of this case and see whether this presumption is rebutted or not, and when dealing with that I want to call attention to something which occurs in the judgment of James, L.J., in *Fowkes* v. *Pascoe*, L. R. 10 Ch. App. At p. 350 he says: "The principle is that the will shows the distribution which the father thinks just and expedient for his children, and if, after having made such a scheme for distribution, he advances one of his children on marriage, or going out to establish himself in the world, or the like, it is to be presumed, as a *presumptio juris et de jure*, that the advancement is an anticipation of the testamentary provision, just as under the Statute of Distributions an advancement is to be brought into hotchpot." I do not think by that James, L.J., meant in any way to say that these presumptions are irrebuttable presumptions. It seems to me that to so read his judgment would be inconsistent with all the cases. It is not necessary that I should go through them one by one, but amongst cases which have been cited to us in the course of the argument there have been plenty of cases in which the circumstances were such as to raise a *primâ facie* presumption which was afterwards rebutted. Cozens-Hardy, L.J., reminds me that *Lacon* v. *Lacon* itself, from which I have just read this passage, is an instance of that.

That being so, what I have to really consider here is whether this particular £5,000 was intended by the father as something on account of the son's share of the family fund which he was distributing by his will. I think it was not so intended. I do not propose to base that conclusion upon any one fact alone; one has to take the whole matter into consideration. Before one can come to the conclusion that the £5,000 was so intended one must ask oneself whether there was a payment which, taking all the facts into consideration, was intended for the establishment of the child in life or for any one of those sort of purposes which are detailed by Sir George Jessel in

*Taylor* v. *Taylor*. When one asks oneself that question one finds that as a fact the sum of £5 000 was a sum which the testator had given to all his children. He had given it to his daughters. He makes an express provision in the case of the daughters that these sums of £5,000 are not to be brought into account. Then what happens? The son is in partnership with him, the son has overdrawn his capital account, which was a matter which could be complained of by the father and by the father only; and in those circumstances, when they are brought to the notice of the father by the son, he deals with the son in the same way that he has dealt with the daughters—that is, he gives him a gift of £5,000, and in my judgment, the sum being identical is itself a matter which must not be left out of consideration when one has to consider whether this is a gift or an advancement of a portion. But more than that, one sees that the father, who is, as I have said, the only person who could complain, in effect is releasing the debt of the son to him. He is in fact, according to my judgment, extricating the son from the difficulties in which the son then found himself, and it seems to me that really for this purpose it makes no difference whether the debt was a debt due to the father or whether it was a debt due to someone else; the ultimate object of the father was to relieve the son of his embarrassments, and if one looks at *Taylor* v. *Taylor* one finds there that the father, who had paid a large sum, £650, to extricate his son from debts of honour in India, was treated by Sir George Jessel as having made a gift to his son and not an advancement by way of portion. Taking all these circumstances together I think that there is sufficient here, even assuming that the amount of the payment was such as to raise a *primâ facie* presumption that the £5,000 was an advancement, to displace that presumption and leave the £5,000 a gift.

I have dealt now with the £5,000, but there was a further sum of £1,500. With regard to the £1,500 it seems to me that that payment clearly falls within the rules laid down by Sir George Jessel which I have just called attention to. It was a plain payment to relieve the son from a debt which might have been enforced by the mortgagees against the son unless the father had come forward with his assistance.

Having dealt with the case of the eldest son, I will pass to the case of the son Alfred. With regard to the son Alfred, here again the amount which was given to Alfred was just the same as had been given to the daughters, and *primâ facie* it would seem to me that that payment is to be treated as upon the same basis—that is, as a sum which was not to be brought into hotchpot, but in the case of Alfred you have got the additional fact that after the gift there was a codicil which confirmed the father's will in all respects. In these circumstances I think the conclusion of the learned judge as to Alfred was right also, and therefore this appeal fails.

STIRLING, L.J.—I am of the same opinion. The question arises here with regard to certain sums which were given by a testator after he had made his will to his two sons. [His lordship stated the facts, and continued:] I shall assume that *primâ facie* the gift of £5,000 to Alfred, being a large sum, would in an ordinary case—in the case of an ordinary estate—be taken as an advance within the rule against double portions; but I think it is a circumstance which in this particular case must be taken into consideration and have considerable weight given to it that the testator had given the large sum of £5,000 to each of his daughters, and yet he had expressly stated by his will that those sums were not to be deemed advancements. So that we are dealing with a testator who had given six sums of £5,000 and yet did not dream of those sums being brought into account in the ultimate distribution of his estate. But the matter as regards Alfred does not rest there. Two of the daughters have made an affidavit in which they state the conversation which after this event took place on the subject between themselves and their father; and we have this general result, that in his conversations with the daughters, in speaking of what he had given to the daughters and of what he had given to this particular son, the testator dealt with them on the same footing. The reasonable inference from that would be that his intention in giving this sum of £5,000 was to put this son, who was not in business with him, on the same footing as the daughters.

Lastly, there is this circumstance to be observed—that after he had made this gift, and before he made the gift to his other son, the testator made a codicil to his will. He does not expressly refer to the gift he had made to Alfred, but he does in express terms, after making certain dispositions which it is unnecessary to mention, in all other respects confirm his will. In *Jones* v. *Ravenscroft* it is laid down by Knight-Bruce, L.J., that that is a circumstance which is to be taken into consideration, and looking at all the circumstances together I think that Kekewich, J., has come to the right conclusion with respect to the sum of £5,000 given to Alfred.

With respect to the son John the case is not the same, and it is one perhaps of more difficulty. Two of the elements upon which I have rested my judgment in the case of Alfred do not occur here, for there is no evidence of any such conversation with reference to the gift to John as there is in reference to the gift made to Alfred, and the testator made the gift to John after the codicil. Nevertheless, looking at all the circumstances I come to a similar conclusion in this case. [His lordship referred to the position of the son John in the partnership in 1897, and to the fact that he had drawn out of the business in excess of that which he was entitled to draw. He continued:] The position, in fact, was that the son's capital had been reduced, and legally he was under an obligation to his father to pay his excess of drawings if the father chose to insist upon it. In these circumstances he approached his father on the 31st of August, 1897.

No doubt the advances which had been made to the daughters and to Alfred were perfectly well known to John. They seem to have been no secret in the family, and the application which John made to the father is partly based on the ground that he had had nothing, as his brothers and sisters had. The result was that the father dealt with him in this way. He transferred £5,000 capital from his own account to the account of the son, and he gave him £1 500 in cash to pay off the mortgage on his house. The question is whether these payments ought to be treated as advances within the rule or no. I have come to the conclusion that they ought not. I think that the distinction which was taken by Sir George Jessel in *Taylor* v. *Taylor* is sound. In that case the father amongst other things had paid the debts of the son for him, and Sir George Jessel deals with that in this way: "Sums paid for debts in India appear to be in the nature of temporary assistance; thus if a child were in business and required further capital a sum given for that purpose would be an advancement, but a sum given merely to assist him temporarily would not." It was said that in form this fell within what is laid down by Sir George Jessel with reference to a son engaged in business and requiring additional capital, for it is perfectly true that the form this transaction took as between father and son was a transfer of £5,000 from

the father's capital to the son, but it will be observed that no further capital was brought into the business by that transaction, and it seems to me that it is not really the case of further capital being required for the business but of a debt from the son to the father in the business being wiped out by means of the £5 000 which was so transferred. As regards the £1,500 which was advanced to pay the mortgage, it seems to me that it also was a temporary assistance. The whole thing was done with the view of enabling the son to keep the position which he had acquired by means of the partnership originally entered into between the father and the son without the son bringing in any capital, and to tide over the difficulties which had arisen from the small amount of profits earned during the three or four years preceding the transaction. I think, therefore, this appeal ought to be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion. I agree with counsel for the appellants that if nothing more had been known than that a large sum —£5,000—was given by a father to a child in the interval between the date of his will and the date of his death there would be a presumption, which in that case would not be rebutted, that it was to be taken by way of partial ademption. I think, however, that it is clear, as was said by Knight-Bruce. L.J., in *Ravenscroft* v. *Jones*, that all the circumstances and the manner of the gift must be looked at, and if I come to the conclusion, as the Lord Justice did in that case, that the testator in making the gift had not his will or his testamentary disposition in his mind, then I think that the presumption is one which is not binding and which ought to be rebutted. I do not propose to go over the facts again. We are dealing here with a very wealthy man, with an estate worth £200 000 or £250,000 He had before his will given £5,000 to each of his daughters, and he gave this £5,000 to his son Alfred—identical in amount. The terms of the gift we know from the letter, and we also have evidence—the evidence of two of the appellants in this case, which alone, I think, would be quite sufficient to negative the presumption. They say they were told that the gift by their father to Alfred was of the same kind substantially as the gift of their own £5,000—that is to say, it was given in circumstances which would not require it to be brought into hotchpot. Then there is the codicil, to which I attach also considerable weight because it is a confirmation of the will with regard to the gift of the £5,000.

As to John, there is, no doubt, more difficulty, but for the reasons which have been assigned by my brethren I agree that in this case also the presumption is rebutted. Our decision, no doubt, involves this—that in so far as there is a difference between the view expressed by Sir George Jessel in *Taylor* v *Taylor* on the one hand, and that expressed by Wood, V.C., in *Boyd* v. *Boyd* and by Pearson, J., in *Blockley* v. *Blockley* on the other hand, we adopt the view of Sir George Jessel and not the view of Wood, V.C., and Pearson, J. I think in so doing we are really following, not perhaps the decision, but the indication of view of the Court of Appeal in *In re Lacon, Lacon* v. *Lacon*. For these reasons I think that the appeal ought to be dismissed.

*Appeal dismissed.*

**Solicitors,** *Phelps, Sedgwick, & Biddle; P. W. Chandler.*

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## High Court of Justice.

Chan. Div. } Dec. 9, 10.
Buckley, J. }

*In re* GARWOOD'S TRUSTS.
GARWOOD *v.* PAYNTER. (*a.*)

*Partnership—Assignment of share—Agreement between partners to pay each other salaries—"Management or administration of partnership business"—Partnership Act,* 1890 (53 & 54 *Vict. c.* 39), *s.* 31.

*If, after the assignment by a partner of his share in the partnership, the partners in good faith agree to give themselves salaries, such an act is an act done in "the management or administration of the partnership business," and cannot, under section* 31 *of the Partnership Act,* 1890, *be called in question by the assignee of such share.*

Action with witnesses.

This was an action brought by Mrs. Garwood, one of the beneficiaries under a deed dated the 21st of February, 1889, against Captain Garwood, her husband, and a Mr. Paynter, two of the trustees of that deed, asking for the construction of that deed and for certain relief.

Various questions were argued, but the only one which calls for a report was as to the rights of an assignee or mortgagee of the share of a partner in a partnership.

At the date of that deed the defendants Garwood and Paynter and a Mr. Dunn were partners in equal shares for thirty-one years under a deed of the 21st of November, 1870, as colliery owners. The partnership deed contained no affirmative words defining the duties of the partners and no provision for the payment of a salary to any partner.

By the deed of 1889, which was a separation deed between the defendant Garwood and the plaintiff, the defendant Garwood charged his share in the partnership business and assets (subject to certain mortgages) to trustees, of whom the defendant Paynter was one, on certain trusts which were mainly for the benefit of the plaintiff.

Down to 1893 the business did not engage the active attention of the partners. In 1893 and 1894 arrangements were entered into under which the defendant Garwood became the manager of the London agency at the salary of £150 a year. That arrangement lasted only for a year and three-quarters, and no question arose as to that. The arrangement as regards the defendant Paynter was that he was to give up one day a week to go up to the colliery and be the acting manager at the salary at first of £100 and later at £150 a year. It was also arranged that Mr. Dunn was to go to the colliery, look after the stores, inspect the books, and check the sales at the pit's mouth. There was evidence that the salaries had been paid *bonâ fide*—that is to say, without any intention of injuring the plaintiff, and that work had been done in respect of them. In 1897 there had been a settlement of accounts, under which a balance of £20 had been paid to the plaintiff, on the footing that the salaries had been charged. The plaintiff now complained of these salaries.

*Buckmaster, K.C.,* and *A. C. Clauson,* for the plaintiff. —No partner is entitled to remuneration for acting in the partnership business: Partnership Act, s. 24 (6). After the assignment the defendants had no right to agree to pay each other salaries, and thus diminish

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

the amount of profits payable to the plaintiff, Captain Garwood, because he had assigned his share, and Mr. Paynter, because a trustee has no right to prejudice his *cestui que trust*.

*Astbury, K.C.*, and *Borthwick*, for the defendant Paynter.—The salaries were paid to the partners in respect of extra work. The plaintiff has no power to interfere in the management of the partnership business, and must accept the account of profits agreed to by the partners: Partnership Act, s. 31 (1); *Watts* v. *Driscoll*, 48 W. R. 521, 49, *ib.* 146, [1901] 1 Ch. 294, Lindley on Partnership, p. 575. The plaintiff is bound by the settlement of accounts. The action cannot be maintained in the absence of Mr. Dunn.

*H. Terrell, K.C.*, and *Sheldon*, for the defendant Garwood.

*Buckmaster, K.C.*, replied.

BUCKLEY, J., after stating the facts, continued: The question I have to determine is whether, as against the assignees of Captain Garwood's share, the two £150 salaries can be charged at all. Now, section 24 (6) of the Partnership Act provides that no partner shall be entitled to remuneration for acting in the partnership business. So I start with that, that the two partners, Mr. Paynter and Mr. Dunn, were *primâ facie* not entitled to anything because they did work for the partnership. But under section 31 an assignment by a partner of his share does not now effect a dissolution, nor give to the assignee, during the continuance of the partnership, any right to interfere in the management or administration of the partnership business. The assignee must accept the account of the profits agreed to by the partners. He is entitled only to receive the share of profits to which the assigning partner would otherwise be entitled. The question is whether an arrangement such as that in this case, which, it is conceded, was *bonâ fide* made in the sense that it was not intended to defeat the rights of Mrs. Garwood in any way, and was not improper or fraudulent, does not bind the assignee, as being something done in the management or administration of the partnership business of which the assignee cannot complain. It seems to me that the conclusion that an assignment prevented partners from arriving *bonâ fide* at such an arrangement as this would be disastrous. Mark what it means. A., B., and C. are partners; A. assigns, B. and C. cannot say that is a dissolution. The contention involves this, that B. and C. continue bound towards a partner who, by the assignment, is rendered incapable of *bonâ fide* agreeing with them in a matter of management or administration which otherwise he could have agreed to. I think that would be a very serious result. I think the intention of the Act was to substitute the assignee for the assignor as the person entitled to such profits as the assignor would have received if there had not been an assignment, but to give the assignee no right to interfere at all with anything *bonâ fide* done in management or administration. Suppose this case, which I put in the course of the argument as an illustration: A house belonging to the partnership is let at a rental, and the partners think it is very desirable that one of the partners should live there because it adjacent to the partnership premises, or because, for some reason or other, it would be advantageous to the partnership that a partner should live there, and so, on the determination of the lease, or by an arrangement that the tenant should quit, the tenant goes and the partner lives there, paying no rent. Could an assignee complain of that? I should say not. In the beneficial management or administration of the partnership the partners agree amongst themselves to do something, which, I agree, will diminish the profits of the partnership, but it is something *bonâ fide* done for management or administration.

Here, as a matter of fact, what took place was this. The three partners—Captain Garwood, the assignor, no doubt was one—*bonâ fide* considered that it was beneficial for the partnership that the sales, say, at the pit's mouth, should be checked, so as to stop robbery, and that one partner should go and superintend that work and see that those moneys were properly received, and that he should be paid for his work. I think that is something *bonâ fide* done in the management and administration of the partnership business. Mrs. Garwood cannot say she has lost the £150, and at the same time take the benefit of the saving which has, perhaps, been effected by stopping the robbery in the sales thus made.

Further, I think this has to be borne in mind, that in 1897 there was a settlement of accounts upon the footing that these salaries were paid, and that all things had been done perfectly honestly and above board, and that the partnership business might have suffered if the additional work these two persons themselves performed had not been done. In 1894 Captain Garwood's office and salary ceased, and, therefore, the real effect was that Mr. Paynter and Mr. Dunn gave their time, Captain Garwood not giving a similar amount of time, and in the result produced profits for the partnership, and for that they received salaries. I think that was an act in the management or administration of the partnership which, under section 31, is binding upon the assignee.

I may say that I feel no difficulty in deciding this in the absence of Mr. Dunn, inasmuch as I am deciding the point in his favour. Mr. Dunn was a partner who was party to arranging these salaries and, of course, I can, in his absence, decide something which is not against him. I therefore hold that the salaries ought to be allowed.

Solicitors, *Collyer-Bristow, Hill, Curtis, & Dods*, for *Ralph Sheriton Holmes*, Newcastle-on-Tyne; *King, Wigg, & Co.*, for *Clayton & Gibson*, Newcastle-on-Tyne; *Withers, Pollock, & Crow*.

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Chan. Div.
Swinfen Eady, J. } Nov. 13; Dec. 2.

*In re* FERNSIDE.
BAINES *v.* CHADWICK. (*a.*)

*Inland revenue—Estate duty—Incidence in respect of appointed fund—Residue—Testamentary expense—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1; *s.* 6, *sub-section* 2; *s.* 8, *sub-sections* 3, 4; *s.* 9, *sub-sections* 1, 4.

*Where an executor receives personal property, appointed in pursuance of a general power, this property constitutes "assets which he has received as executor" within the meaning of section* 8 (3) *of the Finance Act*, 1894. *Assets which a person rightfully receives as executor are assets which pass to him as executor, within the meaning of the Finance Act*, 1894, *even although not strictly speaking assets to which he is entitled* virtute officii.

*The estate duty is payable out of the residue and not out of the appointed funds. Estate duty is a testamentary expense.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Adjourned summons.

The question raised in this case was whether estate duty upon property appointed by will under a general power of appointment is to be borne by the appointed property, or whether it is payable out of the residue.

The facts are given in the judgment.

The Finance Act, 1894, provides: Section 6. (2) The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death . . . and may pay in like manner the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment.

Section 8. (3) The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property, wheresoever situate, of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received.

Section 9. (1) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable. . . .

(4) If the rateable part of the estate duty in respect of any property is paid by the executor, it shall, where occasion requires, be repaid to him by the trustees or owners of the property.

*Micklem, K.C.*, and *Kenyon Parker*, for the residuary legatees.

*Macnaghten, K.C.*, and *Christopher James*, for the trustees of the will.

*Eve, K.C.*, and *Pattullo*, for the specific legatees.

SWINFEN EADY, J., in giving judgment, said: The question remaining to be disposed of upon the present summons is whether the rateable part of the estate duty payable upon and in respect of one moiety of the Howley-park Colliery over which the testatrix had a general power of appointment, and which she specifically appointed and bequeathed by her will, is to be borne by this moiety, or is payable out of the residue of the estate, which the testatrix bequeathed to the Royal Agricultural Institution. If this appointed moiety passed to the executors of the testatrix "as such" within the meaning of the Finance Act, 1894, then the duty was properly payable out of residue, and the residuary legatees are not entitled to have the amount so paid recouped out of the specific property. If, however, the appointed moiety did not pass to the executors "as such" within the meaning of section 9, sub-section 1, of the Finance Act, 1894, then (unless the will contains a direction to the contrary) the duty will be a first charge on the appointed moiety, and must be recouped under sub-section 4 of the same section.

It is clear that the moiety of the colliery in question was "property of which the deceased was at the time of her death competent to dispose" within section 2, sub-section 1, and that estate duty was payable in respect of it. By section 6, sub-section 2, the executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at her death. The executors were, therefore, in my opinion, bound to pay the estate duty on this moiety of the colliery. By the same sub-section they are empowered (but not required) to pay the estate duty in respect of any other property (that is, other than personal property of which the deceased was competent to dispose at his death) which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment. A subsequent part of the statute emphasises this distinction; the executor is made accountable for duty which he is required to pay; he is not made accountable for duty which he is only empowered to pay. By section 8, sub-section 3, the executor is (to the best of his knowledge and belief) to specify in appropriate accounts all the property in respect of which estate duty is payable upon the death of the deceased (that is, all property whether real or personal and whether the executor is under any obligation to pay the estate duty or not); the sub-section then provides that the executor shall be accountable for the estate duty in respect of all personal property, wheresoever situate, of which the deceased was competent to dispose at his death; this language is identical with that in section 6, sub-section 2, and undoubtedly extends to and includes all personal property over which the deceased had a general power of appointment; sub-section 3 of section 8 then further provides that the executor shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received.

Having regard to the context in which the words are found, following upon an enactment making the executor accountable for estate duty in respect of appointed personal estate, I am of opinion that he is protected from liability, not in respect of all appointed funds (upon the ground that he does not receive them "as executor"), but only in respect of personal estate, whether the testator's own property or subject to his general power of appointment, in excess of the amount received, or which but for wilful default he might have received. In other words, that the expression "the assets which he has received as executor, or might . . . have received," includes appointed personalty as well as the testator's own personalty.

In *In re Hoskin's Trusts*, 25 W. R. 779, 6 Ch. D. 281, at p. 283, it was treated by the Court of Appeal as established beyond all question—that where a *feme covert*, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor when he has proved the will is entitled to receive the appointed fund. Nor is it now open to dispute that the executor is bound to apply the fund as assets—equitable assets—in the payment of debts; and on taking the accounts against an executor under a creditor's administration judgment, the executor would be disallowed and held personally responsible for any payments to beneficiaries out of the appointed funds, if the creditors remained unpaid. Under these circumstances I am of opinion that where an executor receives personal property appointed in pursuance of a general power, this property constitutes "assets which he has received as executor" within the meaning of section 8, sub-section 3. A different construction of this sub-section would lead to a very curious result; an executor who received the appointed funds would be "accountable" for the estate duty, but yet not "liable," as the assets would not be received by him as executor; and the person

to whom the property passed for a beneficial interest in possession would not be liable for the duty under sub-section 4 of section 8, because the executor would be "accountable." If, then, funds, appointed under a general power, received by the executor are "assets which he has received as executor," within the meaning of section 8, sub-section 3, it cannot properly be held that the same assets constitute "property which does not pass to the executor as such" within the meaning of section 9, sub-section 1. Assets which a person rightfully receives as executor are, in my opinion, assets which pass to him as executor, within the meaning of this statute, even although not strictly speaking assets to which he is entitled *virtute officii*.

There are conflicting decisions of judges of first instance upon this question of the incidence of estate duty in respect of appointed funds. Kekewich, J., in *In re Treasure, Wild* v *Stanham*, 48 W. R. 696, [1900] 2 Ch. 648, and *In re Maddock, Llewelyn* v. *Washington*, 50 W. R. 54, [1901] 2 Ch. 372, and Byrne, J., in *In re Power, In re Stone, Ackworth* v. *Stone*, 49 W. R. 678, [1901] 2 Ch. 659, take one view; Buckley, J., in *In re Moore, Moore* v. *Moore*, 49 W. R. 373, [1901] 1 Ch. 691, and in *In re Dixon, Penfold* v. *Dixon*, 50 W. R. 203, [1902] 1 Ch. 248 takes the other view. I have, under these circumstances, to express my own opinion. Although personal property subject to a general power of appointment, does not pass to an executor by a will containing nothing more than the appointment of an executor (*In re Davies's Trusts*, 20 W. R. 165, L. R. 13 Eq. 163, at p. 166, *In re Thurston*, 34 W. R. 528, 32 Ch. D. 508), and in some cases where a power is executed by will and an executor appointed, it has been considered clear that the appointed property did not pass to the executor *virtute officii*, yet I am of opinion that where such appointed property is received by an executor, he receives it "as executor," and it passes to him "as such" within the meaning of the Finance Act, 1894. The result is that in the present case the duty is payable out of residue and not out of the appointed funds.

I am also of opinion that the will itself imposes this duty upon the residue. The testatrix owned one moiety of the colliery and had a general power of appointment over the other moiety. By her will she directed her trustees to pay her funeral and testamentary expenses and just debts, and, after specifically disposing of the Howley-park Colliery and certain lands and hereditaments in the township of Morley, she gave, devised, and bequeathed all her residuary real and personal estate, whatsoever and wheresoever. Her residuary estate is what remains after satisfying the previous dispositions made by her will, one of them being the direction to pay her testamentary expenses. The estate duty is a testamentary expense, as was decided by Kekewich, J., in *In re Clemow, Yeo* v. *Clemow*, 48 W. R. 541, [1900] 2 Ch. 182. It is conceded that the estate duty on the moiety of the colliery which belonged to the testatrix absolutely must fall on residue, and I am of opinion that the duty on both moieties is covered by the direction in the will to pay the testamentary expenses, and that, according to the true construction of the will, testamentary expenses fall on residue.

Solicitors, *C. O. Humphreys & Son; Speechly, Mumford, & Co.*, for *North & Sons*, Leeds; *Helder, Roberts, & Co.*, for *Simpson & Co*, Leeds.

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Chan. Div.
Swinfen Eady, J. } Nov. 25.

*In re* INMAN.
INMAN *v.* INMAN. (*a.*)

*Estate* pur autre vie — *Tenant — Special occupant — Intestacy — Devolution.*

*An estate* pur autre vie *was conveyed to A., his heirs and assigns. By his will A. devised the said estate to trustees in trust for the use of B. when he should attain the age of twenty-five, or at such earlier period as the trustees should decide upon. The estate vested in B., who subsequently died intestate before the* cestui que vie.

*Held, that, on the death of B. intestate, his interest in the estate* pur autre vie *devolved upon his administrator as part of his personal estate.*

By a settlement dated the 25th of January, 1836, a certain farm, situate at Porchester, in the county of Southampton, was assured upon the death of the survivor of the settlors, William Friend and Elizabeth Friend his wife, and in default of appointment, to the use of trustees, their heirs and assigns, upon trust to receive the rents and divide the same equally between the six daughters of Richard Marden Morey (a brother of the said Elizabeth Friend) and the son of R. M. Morey, and their respective assigns, share and share alike as tenants in common for their respective lives. And after the respective deaths of the said six daughters and the son of R. M. Morey as they should respectively die upon trust to convey the share of such one or more of them so dying unto and equally between their children on attaining the age of twenty-one years and their respective heirs and assigns as tenants in common *per stirpes*. And it was provided that in default of issue taking vested interests of any of the six daughters and son of the said R. M. Morey, then the share whether original or accruing of him or her so dying in the said hereditaments and the rents thereof should go to the survivors and survivor and their, his, or her issue respectively.

The said Elizabeth Friend died on the 23rd of September, 1836, without having exercised her power of appointment, and the said William Friend died on the 29th of September, 1836, leaving the six daughters and James White Morey, the son of R. M. Morey, him surviving.

By indenture of the 29th of November, 1848, the said James White Morey conveyed to the testator, James Inman, and his heirs and assigns, his undivided seventh share during his life in the said hereditaments.

By his will dated the 15th of November, 1852, James Inman devised (subject to a life estate in favour of his wife Mary Inman) his share in the said hereditaments and in the rents thereof, which he purchased from J. W. Morey, unto his trustees upon trust to receive his share of the rents and apply the same in the manner thereinafter directed. And upon further trusts if the trustees should think it desirable or beneficial to sell his share in the said hereditaments or in the rents thereof and to stand possessed of the proceeds upon trust to invest and apply the interest and until the sale the said share of the rents for the use of his grandson Mathew Inman, the issue of testator's son Mathew Inman and Matilda his wife, in such manner as they should think proper in promoting his education and advancement in life. And upon further trust to pay and transfer the testator's share in the said rents and securities in which the produce thereof should have been invested unto his grandson Mathew Inman as and when he should

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

attain twenty-five years, or if the trustees should deem it desirable to assign the same to him at such earlier period as they might decide on.

The testator, James Inman, died on the 7th of February, 1859, and Mary Inman, his widow, died on the 27th of December, 1870.

Mathew Inman, the grandson, died on the 9th of May, 1886, intestate, and after his death his share of the income was retained by the trustees of the settlement of 1836, and was ultimately represented by the sum of £944 15s. 6d.

J. W. Morey died on the 3rd of August, 1901.

This summons was now brought by the trustees of the will of James Inman to have it determined whether upon the true construction of the will the interests in the nature of an estate *pur autre vie* of the testator in the above hereditaments devised by the testator to his trustee upon trusts in favour of his grandson Mathew Inman, devolved upon the death of the said Mathew Inman intestate on the heir-at-law of the said Mathew Inman or how otherwise.

*R. J. Parker*, for the trustees.

*W. R. Sheldon*, for the plaintiffs, argued that the interest of Mathew Inman in the estate *pur autre vie* devolved upon his administrator as part of his personal estate. There was no authority in England for the statement that once you had an estate *pur autre vie* it remained of the same quality however far it descended. The Irish cases might not agree, but they were not binding authorities on an English court. The case of *King* v. *King*, [1899] 1 Ir R. 30, was inconsistent with the decision in *Earl of Mount Cashell* v. *More-Smyth*, [1896] A. C. 158, 44 W. R. Dig. 11.

Counsel also referred to the cases of *Reynolds* v. *Wright*, 9 W. R. 211, 2 De G. F. & J. 590; *Doe d. Blake* v. *Luxton*, 6 T. R. 289.

*Theobald, K.C.*, and *G. H Paice*, for the defendant, argued that the intestate's interests devolved upon his heir-at-law, and referred to the cases of *Wall* v. *Byrne*, 2 Jo. & Lat. 118, and *King* v. *King*.

Counsel distinguished the cases of *Philpotts* v. *James*, 3 Dougl. 425, and *Doe d. Lewis* v. *Lewis*, 9 M. & W. 662.

SWINFEN HADY, J.—The question which arises on the present summons is whether the interest of James Inman in the nature of an estate *pur autre vie* in certain hereditaments devolved on the death of Mathew Inman intestate upon the heir-at-law of Mathew Inman as special occupant or upon his administrator as part of the intestate's personal estate. [His lordship then stated the facts, and proceeded:] It is not disputed that the effect of the testator's will was to pass to the testator's grandson, Mathew Inman, the whole of the estate *pur autre vie*. But it is contended on the part of Mr. Theobald that it passed to Mathew Inman as freehold so as to have the same legal effect as if devised to him and his heirs; and so on the death of Mathew Inman intestate his heir-at-law was entitled to enter as special occupant. On the other hand, it is contended that there is nothing on the face of the will to show that the heir takes as special occupant, and therefore the rule provides that the interest passes to the executor or administrator of Mathew Inman by virtue of the Wills Act (7 Will. 4 and 1 Vic. c. 26), s. 6. Now, before the Statute of Frauds (29 Car. 2, c. 3), an estate *pur autre vie* was not devisable. Then the Statute of Frauds for the first time made estates *pur autre vie* devisable, but the heir took before the statute as well as afterwards, when he took as special occupant, as such and not by descent, as is clearly shown in Lord Kenyon's judgment in *Doe d. Blake* v. *Luxton*, 6 T. R., at p. 291: "These questions on estates *pur autre vie* do not frequently arise. Such estates certainly are not estates of inheritance: they have been sometimes called, though improperly, descendible freeholds, because the heir-at-law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have pleaded *riens per descent*, for these estates were not liable to the debts of the ancestor before the Statute of Frauds." So that if the heir entered as special occupant he was not liable for the debts of his ancestor—*i.e.*, for such of the debts of his ancestor as he would have been liable for according to the then state of the law in case he took assets by descent. But he would have been liable for those debts of his ancestor that were secured by bond or covenant expressly provided for by the Act. Section 12 of the Statute of Frauds enacted "that any estate *pur autre vie* shall be devisable by will . . . and if no such devise thereof be made, the same shall be chargeable in the hands of the heir if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple." I read that as meaning not that before the statute the heir would take those assets as assets by descent, but that after the passing of the Act they should be liable as assets as if they had been assets by descent in the same manner as in the case of lands in fee simple.

Then the statute goes on to say "and in case there be no special occupant thereof it shall go to executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands." Then the subsequent question arose as to whether after the payment of the debts of the intestate the executors took beneficially, and that matter was dealt with by the statute of George II. (14 Geo. 2, c. 20), under which they took after paying the debts for the benefit of the next-of-kin. Now, these provisions are substantially reenacted by the Wills Act, so that I am of opinion that it is not sufficient to show that the intestate Mathew Inman took the whole of the estate *pur autre vie* which the testator, James Inman, had. It may be that he took it in a certain sense to descend, but the heir-at-law would not have taken it by descent; the heir-at-law must take as a special occupant, and if he has not a sufficient interest under the will as a special occupant then it goes to the executor or administrator. Now, it has been contended on the authority of cases in Ireland that where the whole of the estate *pur autre vie* is vested by terms of the grant or devise in an intestate, then the heir is entitled to take, and in any case it is said that the cases of *Wall* v. *Byrne* and *King* v. *King* do go that length. The first was decided before the recent decision of *Earl of Mount Cashell* v. *More-Smyth*, but *King* v. *King* was decided after.

As decisions of the courts in Ireland they are not binding on me, and if they conflict with English decisions I should decline to follow them, and therefore proceed to consider the English cases. In the case of *Philpotts* v. *James* Butler, J.'s, view was that the plaintiff took as heirs of a descendible freehold. In the case of *Doe d. Lewis* v. *Lewis*, Baron Parke said: "Now here there is no special occupant, the title of the first lessee having been put an end to by the will, the land has been held under a tenancy *pur autre vie* to W. J. Lewis, the son, and his assigns; and as he died without creating any assigns, the property goes to his personal representative." Mr. Theobald sought to distinguish this case, but in my opinion the result would have been the same had the word assigns not been mentioned, and, consequently,

there being no special occupant, the whole would have gone to the executor.

Therefore, as it appears to me, I have to choose between the Irish and English cases, because certainly the recent case in the House of Lords (*Earl of Mount Cashell* v. *More-Smyth*) does not throw any doubt whatsoever on the English decisions. In my opinion there is nothing whatever on the face of the will in question to entitle the heir to claim as special occupant. The whole of the interest is given to Mathew Inman, and there the matter is left at large. Under the Wills Act, as there is no special occupant, the property goes to the administrator. If that were all, I am of opinion that the administrator would be entitled to take. But it is argued further that the administrator would only take from the date of the grant of administration, and that there was an interval between the day of death and the day on which administration was granted. I understand that no legal personal representative has yet been actually constituted. But there is no occupancy here. The trustees under the original deed of 1836 were entitled to hold and enjoy the property, and to receive rents, and, in my opinion, they held a one-seventh share of the rents, and still hold from the date of the death of Mathew Inman in 1896 in trust for the legal personal representative of Mathew Inman when constituted as part of his personal estate.

Solicitors, *Paice & Cross*, for all parties.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) Oct. 23.

ORMSKIRK UNION *v.* CHORLTON UNION. (*a.*)

*Poor law — Settlement — Irremovability — Patient in hospital—Poor Law Removal Act*, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

*The word "hospital" in section* 1 *of the Poor Law Removal Act includes any institution where patients are medically treated. Therefore where an epileptic was sent by his friends to a home, whose object was to cure patients mainly by outdoor exercise and recreation,*

*Held, that it was a "hospital" within the meaning of the section, and that residence for seven years in the home did not give the patient a settlement in the union where the home was situate.*

Case stated by consent and by order of Bucknill, J., in pursuance of 12 & 13 Vict. c. 45, s. 11.

The special case set out the following facts:

A pauper named H. Coxon was in 1893 sent to a home for epileptics in a township in the Ormskirk Union and remained there for seven years. He then became an inmate of the respondent's workhouse.

On the 10th of January, 1902, an order was made by two justices adjudging his settlement to be in the union of Ormskirk by reason of his seven years' residence there, and ordering his removal there. The home in question was founded by one Henry Cox and endowed by him with the sum of £2,000. Its object was to secure epileptics a home where they would have the benefits of hospital treatment as well as a healthy outdoor life and suitable recreations. Its property consisted of buildings and five acres of land. There was attached to the home a large medical staff. The average number of patients was 120, who were divided into three classes, the third and largest, to which Coxon belonged, paying 7s. 6d. a week, this sum being provided by his relatives.

By 9 & 10 Vict. c. 66, s. 1 it is provided as follows: "That from and after the passing of the Act no person shall be removed from any parish in which any such person shall have resided for five years next before the application for such warrant: Provided always that the time during which such person shall be . . . a patient in a hospital shall be for all purposes excluded in the computation of time hereinbefore mentioned."

And by 39 & 40 Vict. c. 61, s. 34, it is provided as follows: "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein."

*F. F. Byrne*, for the appellant union.—The question here is, was the home "a hospital" within the meaning of the Act? A hospital is any place where patients receive medical or surgical treatment, and the Maghull Home was a hospital in that sense, and the fact that the patients or their relatives paid subscriptions does not change its character.

*Brooke Little*, for the respondent union.—The word hospital implies a place entirely or mainly for medical treatment, and does not apply to a home of this description, where the central idea was to cure patients by rational work and recreation. The words "confined in a hospital" must imply some element of compulsion.

He referred to *St. Olave's Union* v. *Canterbury Union*, 45 W. R. 302, 529 [1897] 1 Q. B. 438, 682.

Lord ALVERSTONE, L.C.J.—This is an important point on which we have not had the assistance of authorities. The question here is, not if the pauper has acquired a settlement in the Chorlton Union but whether we ought, on the facts before us, to order him to be removed to the Ormskirk Union. That depends on the terms of 9 & 10 Vict. c. 66, s. 1. I cannot lay down exhaustively the reasons for that section, but speaking broadly it provides that residence for certain specified objects shall not count towards the period of residence necessary to acquire a settlement. In the present case, the man's friends sent him to this home, where he was treated by a competent medical staff. Speaking for myself, I think that the words of this section did not exclude this class of institution. It would be narrowing the word "hospital" down too much to say that a home of this character was not a hospital. There are many undoubted hospitals which receive paying patients. I do not think that there is sufficient for us to order the removal of the pauper.

WILLS, J.—I agree. It is true that the man went voluntarily to the home, but there is in all such cases an element of compulsion. It seems to me that the resident of this man in the home differed from the kind of residence meant by the Act, which is the residence of a man pursuing the ordinary vocations of life. It would, in my opinion, be unfair to the unions where they are situate to make residence in these large homes residence for the purpose of a settlement.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

CHANNELL, J.—I agree.

*Appealed allowed.*

Solicitors, *Rowcliffe, Rawle, & Co.*, for *Alfred Dickinson*, Ormskirk; *Gibson & Weldon*, for *T. H. Wild*, Manchester.

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K. B. Div. (Bigham and Darling, JJ.) July 25, 1902.

REX *v.* HOLLOWAY (GOVERNOR OF). *Ex parte* SILETTI. (*a.*)

*Extradition—Extradition treaty with Belgium—Fugitive criminal pleads an* alibi—*More evidence to support defence forthcoming since committal—Jurisdiction of the court to consider such evidence*—Habeas corpus—*Procedure—Extradition Act*, 1870 (33 *&* 34 *Vict. c.* 52), *ss.* 9, 10, 11.

*In an extradition case where a magistrate has jurisdiction to commit, and where there is any evidence to justify a committal the court has no jurisdiction to review the question whether the magistrate had properly exercised his discretion or not.*

*Therefore, the court can only on an application for a* habeas corpus *entertain the question of the jurisdiction of the magistrate to commit under sections* 10 *and* 11 *of the Extradition Act*, 1870, *and decide whether the crime charged comes within the Act or whether it is an offence of a political character, and the question whether there was evidence to support the magistrate's decision.*

*The fact that there is fresh evidence forthcoming which was not before the magistrate, and which might have affected his mind, is no ground for granting a* habeas corpus.

Rule calling on the governor of his Majesty's prison at Holloway to show cause why a writ of *habeas corpus* should not issue directed to him to bring up one Guiseppe Siletti before the court.

The rule *nisi* for *habeas corpus* had been obtained at the instance of one Siletti, who had been committed to Holloway prison to await extradition to Belgium.

The ground upon which the rule had been granted was that since the magistrate's decision evidence had been forthcoming which might have affected his mind in favour of the prisoner.

At the hearing before the magistrate the evidence as to the identity of Siletti as the person who was guilty of the alleged fraud—taking property by a trick—in Belgium, consisted chiefly of a photograph, which was sworn to by the witnesses as being the photograph of the person who had committed the fraud.

Since the order of committal was made, however, Siletti had brought forward certain documents for the purpose of showing that at the time when the fraud was committed he was serving in the Italian army, and did not obtain his discharge until some ten days after the fraud was committed in Belgium.

There admittedly was a question to be investigated before the warrant of the secretary of state was drawn up handing over the prisoner to the authorities for trial in Belgium and it was not contended that this might not be a case of mistaken identity.

The prosecution had therefore communicated this circumstance to the Belgium authorities, and a telegram had been received from the Belgium embassy to the effect that they were getting witnesses over who would be able to put the question beyond doubt as to whether there had been a mistake as to the identity of the prisoner.

Meanwhile Siletti had obtained the rule which now came on for argument.

By section 10 of the Extradition Act, 1870, it is provided that "in the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

"If the magistrate commits such criminal to prison he shall commit him to the Middlesex house of detention or to some other prison in Middlesex, there to await the warrant of a secretary of state for his surrender, and shall forthwith send to a secretary of state a certificate of the committal and such report upon the case as he may think fit."

Section 11: "If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days and that he had a right to apply for a writ of *habeas corpus*.

"Upon the expiration of the said fifteen days, or if a writ of *habeas corpus* is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a secretary of state, it shall be lawful for the secretary of state, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal by the foreign state from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly."

*Sir R. B. Finlay, A.G.* (*H. Sutton* with him), for the Crown.—The rule should be discharged, for this is practically an application for the court to review, and if it thinks fit reverse, the decision of the magistrate upon the production of evidence not forthcoming at the hearing before the magistrate. But the court has no jurisdiction to interfere with the order of the magistrate sending a man to prison on such a charge as this except under circumstances which do do not exist here. Once a magistrate has committed the man to prison, the order for his being handed over to the Belgium authorities or discharged rests entirely with the Home Secretary. The court can only review a magistrate's decision where there is a question of jurisdiction involved—for instance, if the offence charged was alleged to be of a political character or it was said that the man was a British subject: *Guerin's case*, 37 W. R. 269 60 L. T. Rep. 538; *Castioni's case*, 39 W. R. 202, [1891] 1 Q. B. 149. In *Castioni's case* the observations of Denman and Hawkins, JJ., relied on by the other side, which appear to suggest that the court might review on grounds other than that of the questioned jurisdiction of the magistrate, are merely *obiter*, and are opposed to the decisions in *Arton's case*, 44 W. R. 351, [1896] 1 Q. B. 509; *Ex parte Huguet*, 29 L. T. Rep. 41; and *In re Meunier*, 42 W. R. 637, [1894] 2 Q. B. 415.

*H. G. Rooth*, in support of the rule.—The prisoner's discharges prove that at the time of the crime he was

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

serving in the Italian Army, and great injustice would be done if the order for committal stands unreviewed. [*Sir R. B. Finlay.*—No, it is not imperative on the secretary of state to make the order, and I will see that the prisoner does not suffer if the rule is discharged.] The court has power to review the evidence upon which a man was committed by the magistrate to take his trial abroad. [BIGHAM, J.—What is your authority for saying so?] By section 11 of the Extradition Act, 1870, the accused can apply for a writ of *habeas corpus* as of right, and therefore the Act which gives him that right must by implication give the court power to adjudicate upon the writ. That would appear to be the view of Denman and Hawkins, JJ., from the observations they made in their judgments in *Castioni's case.* That case was decided in 1891 and has not been dissented from, nor has the point been directly raised since in another case. The rule ought, therefore, to be made absolute.

BIGHAM, J.—The rule, I think, must be discharged. The accused in this case has the right which all persons accused before a magistrate have—the right to apply for a *habeas corpus.* The Extradition Act does not give him that right. He has it already at common law. The Extradition Act merely gives him the right to be informed of the fact that he may exercise the power of applying for a *habeas corpus* if he chooses to do so. Then, if he applies for a *habeas corpus* and obtains a rule, the question arises, what points may be taken upon the argument of the rule? For my part I think the only question that this court can entertain is the question of jurisdiction, and applying that observation to this particular Act, all that the accused person may say is that the crime with which he was charged was not a crime within the meaning of the Extradition Act—*i.e.*, that it did not come within the class of offences contemplated, or that it was an offence of a political character, and therefore was outside the Act altogether. He may also say that there was absolutely no evidence upon which the magistrate could exercise his discretion as to whether he would commit or not. These things he may say; but I am clearly of opinion that there is one thing he cannot say, and that is that there is evidence one way or the other, and that this court ought to enter into the consideration as to whether the magistrate has exercised his discretion as to it properly. That he cannot say. It is said that the judgments in the case of *In re Castioni* show that the court can enter into the question of the weight of evidence and can review the decision of the magistrate. For my part I do not think that the learned judges in that case meant to say anything of the kind. If they mean to say that, I am of opinion that their judgment in that respect was *obiter* and was contrary to a long course of decisions which have been brought by the Attorney-General to our attention. Therefore I think that this rule ought to be discharged.

DARLING, J.—I concur. With regard to the statement that it is only upon questions of jurisdiction that this court can interfere, I think jurisdiction is not quite the right word to use. It is used by my brother Bigham, as I understand it, to cover a good deal more than is usually meant when we use the word jurisdiction in ordinary cases. It is used to cover want of jurisdiction in the magistrate—that is, want of that which would properly be called jurisdiction. It is also used to cover the case of there being no evidence against the accused at all; and where there was, in the opinion of this court, no evidence against the accused, not even a *primâ facie* case against him, in such a case as that this court would go into the matter, and on ascertaining that there was no evidence would make the rule absolute for a *habeas corpus.* The argument in support of the rule which we have heard comes to this—that under this statute we have to discharge an absolutely different duty from that which we should discharge on the argument of a rule for a *habeas corpus* applied for by a person in respect of committal for a crime committed in England. I do not see anything in the Extradition Act to support that contention. It may be that it might be necessary to go into fresh evidence in some conceivable case, because in these extradition cases it may be necessary to apply foreign law as well as English law, for this reason, that it has to be ascertained that the offence charged is an offence by the law of England as well as by the law of the foreign country which applies for the extradition. If the proposition of counsel for the applicant is carefully looked at it comes to this—that the court has jurisdiction to consider the question as though it was an application for a new trial on the ground that the finding of the magistrate was against the weight of evidence. In my opinion to do so would be to do what the courts have never yet done. For myself I do not think we are overruling what was said by Denman and Hawkins, JJ., in the case of *Re Castioni*, but if what we are are now deciding necessitates our differing from that case, I think it is because that case necessitates our doing so. I still, however, in that case should hold the opinion which my brother Bigham has expressed, that if our decision is in conflict with that case, then it seems to me that we have authority for what we are now deciding in the passage which was cited to us in *Arton's case*, where Lord Russell, L.C.J., said: "We are not a court of appeal on questions of fact from the magistrate. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit." Here it is plain the magistrate had authority to commit. It is not alleged that he had not. He had jurisdiction to commit, and we have only to see whether he had such evidence before him as justified him in exercising that authority and jurisdiction. It is really not contended that he had not. What is contended is that if he had had something else before him, then he would not have committed. It seems to me that, when the matter is put in that way, it is perfectly plain that this rule ought to be discharged.

*Rule discharged.*

Solicitor for the applicant, *J. Weaver Burnard.*

Solicitor for the Crown, *The Treasury Solicitor.*

## Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Nov. 19, 20.

BOOTH v. NEW AFRIKANDER GOLD MINING CO. (a.)

*Company—Sale to intermediary company—Resale to new company— Commission— Underwriting agreement— Offer to public—Companies Act,* 1900 (63 & 64 *Vict. c.* 48), *s.* 8 (1) (2).

*A company sold its undertaking on the terms that the purchasers should form a new company to repurchase the property. The consideration for the sale to the purchasers was to be shares in the new company, and the consideration for the resale to the new company was to be the same number of shares together with a sum in cash. The purchasers were to take up all shares that were not taken up by members of the old company.*

*Held, that the proposed cash payment was a payment by way of "commission, discount, or allowance . . . in consideration of . . . subscribing . . . for . . . shares" of the new company within sub-section* 2 *of section* 8 *of the Companies Act,* 1900, *and that as such payment was not authorized by the articles of the new company it was not validated by sub-section* 1 *of the same section.*

This was an appeal from a decision of Swinfen Eady, J.

As the action was originally constituted, the plaintiff, who held 1,000 fully paid up shares in the New Afrikander Gold Mining Co. (Limited), applied for an injunction to restrain the carrying out of an agreement for the sale of the business undertaking and assets of the company, on the ground that such agreement provided for the payment of commission for underwriting shares in violation of the provisions of section 8 (2) of the Companies Act, 1900.

The original defendants to the action were the New Afrikander Co., its liquidator, and the Associated Guarantors (Limited). The capital of the New Afrikander Co. was £250,000 in £1 shares, of which 205,014 had been issued and were fully paid up.

The agreement in question was made between the New Afrikander Gold Mining Co. and the Associated Guarantors, and was dated the 11th of July, 1902. It provided for the sale of the undertaking, business, and assets of the New Afrikander Co. to the Associated Guarantors. The purchasers undertook to form a new company, which has since been incorporated under the name of the Afrikander Gold Mining Co. (1902), to repurchase the subject-matter of the sale on the terms provided in a draft agreement scheduled to the first agreement. The Associated Guarantors undertook to procure that the new company would allot such number of its shares, to be of the value of £1 each with 12s. paid thereon, up to 205,014 as the old company or its liquidator should require, to satisfy all liabilities of the old company, including the costs of a proposed liquidation. Shareholders who refused to take shares were to be entitled to no compensation. All shares allotted to the old company or its liquidator which members of the old company declined to accept were to be taken up by the Associated Guarantors.

The scheduled agreement fixed the price to be paid by the new company to the Associated Guarantors at £205,014 in £1 shares, with 12s. paid up, out of a total of 250,000 of such shares, and £12,300 in cash.

The plaintiff asserted that the provision for this cash payment was in effect a provision for payment of commission by the proposed new company, and was obnoxious to section 8 of the Companies Act, 1900, and that it invalidated the whole agreement.

Swinfen Eady, J., was of opinion that the agreement did provide for the payment of an illegal commission; and, though that payment might be legalized by being authorized in the company's articles of association and disclosed in the prospectus when issued, he could look only at the existing state of things. He thought, therefore, that a case was shown for granting an interlocutory injunction.

The defendant company appealed.

On the hearing of the appeal it was agreed that the appeal should be treated as the trial of the action, and for the purpose of deciding the whole question the new company of 1902 was by consent added as a defendant, and a shareholder of the new company was, also by consent, added as a plaintiff suing on behalf of himself and all other shareholders in the company, and the statement of claim was treated as if amended accordingly.

*Haldane, K.C.*, and *Sargent*, for the appellants.—This case is one of a sale and re-sale. If the view taken by Swinfen Eady, J., is correct, no sale can be made for shares if there is any consideration added to induce the vendor to the company to accept payment in shares. The present transaction being a sale is not one of underwriting at all. Consequently section 8 of the Companies Act, 1900, does not apply. But if it should be held to apply, then it is submitted that this payment is protected by sub-section 1 of section 8.

They referred to *Hilder* v. *Dexter*, [1902] A. C. 474; *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 34 W. R. 749, 33 Ch. D. 85.

*Hon. E. C. Macnaghten, K.C.*, and *Sargent*, for the Associated Guarantors.

*Eve, K.C.*, and *Beddall*, for the plaintiffs.—This is not a simple case of sale and re-sale. The Associated Guarantors cannot deal with the property except in a certain way. They are bound to contribute the 8s. per share so far as it is not contributed elsewhere. The cash payment is a payment to them for doing this, and is illegal by reason of sub-section 2 of section 8 of the Companies Act, 1900.

*Sargent*, in reply, cited *Postlethwaite* v. *Port Philip Gold Mining Co.*, 38 W. R. 246, 43 Ch. D. 452.

VAUGHAN WILLIAMS, L.J.—In this case, if it were possible, having regard to the alteration made in the whole question, I should like to say that I affirm the decision of Swinfen Eady, J.; but, really, the matter as it now comes before us is so utterly different from that which came before Swinfen Eady, J., that I do not know that the word "affirm" would be appropriate. In these circumstances I think perhaps the better way of expressing myself is to say that as the claim is now framed, having regard to the addition of a plaintiff, the addition of a defendant, and the alteration of the statement of claim, I think that the plaintiff is entitled to an injunction. Having said that, I will state shortly what the nature of the case is.

There was the 1898 company, which wanted £65,000 more capital. It did not see its way to getting the capital, and the suggestion was made that there should be formed a new company, and the shareholders in the old company should be entitled to take shares in the new company with a liability of 8s. per share, 12s. being paid. Then it was suggested, and very properly suggested, that shareholders do not like to come in in that sort of undertaking unless they are sure that the whole of the shares thus offered are, somehow or other, going

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

to be taken up. It would obviously be a rash thing to come in and take your proportion of shares if it were likely that a great number of shares would not only not be taken by your co-shareholders in the old company, but also not by anybody else. In those circumstances it was proposed that the taking up of the shares in the new company—205,000 odd shares—should be made a certainty. One very natural way of making that a certainty would have been by getting gentlemen of position and solvency to come in and guarantee the taking up of the whole lot of these shares. Of course, people will not do that without being paid a commission for the risks that they are undertaking, and very often the risk is of such a nature that the ordinary brokerage will not at all meet the case. Now it has by the 8th section of the Act of 1900 become lawful on the conditions therein mentioned to pay such a commission; and the question that we have to determine here is whether this particular payment comes as a commission, discount, or allowance within the 2nd sub-section of section 8; and supposing that we do so hold, then, we have to go on and say whether this payment would come within the 1st sub-section?

As the action was originally brought it was an action by a Mr. Booth, a shareholder in the 1898 company, and he wanted an injunction granted which very probably through the absence of the new company he was not entitled to have; but since everybody here is anxious to get a decision on this section, a shareholder in the new company whose assent it has been undertaken shall be given in writing has been added as a plaintiff and the new company has been added as a defendant—that is, the 1902 company—and the claim is to be treated as if it included amongst other things a claim by the plaintiff, who is a member of the 1902 company, on behalf of himself and the other members of the company against that company or its officers to restrain them from paying out the sum of money which is the subject-matter of this discussion—that is, the £12,000 odd.

The first question that we have to determine here is whether this particular payment comes within the 2nd sub-section—that is, comes within the prohibition. Now I have no manner of doubt that it does. There is a sum of £12,300 and it is being paid by the new company, and being paid by the new company out of the capital which is raised at the time of the formation of this company by way of commission to certain persons or a certain company. I am not sure whether it is the intermediary company or the guarantors—but it is really paid to the intermediaries in consequence of their undertaking to take up so many of a block of shares allotted to the liquidator of the old company as the members of that old company decline to accept in specie; and whatever the amounts may be which are rejected in that way the guarantors undertake to take those shares, and this £12,000 odd is to be paid to them in consideration for so doing. The question is, whether or not that payment comes within the prohibition in the 2nd sub-section of section 8. I have already said I think it does. I think one only requires the facts to be thus stated to show clearly that it is a payment by this new company of "commission to persons in consideration of their subscribing."

The real ground upon which it is suggested that this does not come within sub-section 2 is that the persons to whom the money is paid are really, it is said, purchasers, and the sum of money which they are to receive is not commission, but is the profit upon a resale to the 1902 company. I think if one looks at the facts of this case it is impossible not to see that this is not a profit upon resale, for there is in substance no resale at all. The guarantors—the intermediaries—never had any right or power to distribute the assets in any way but by assigning them—the subject-matter of the purchase that is—to the new company to be formed, and when one looks at the difference of the considerations between the so-called intermediate sale and purchase and the sale to and purchase by the 1902 company, I cannot doubt that the £12,000 odd was commission, and really a commission for underwriting. I think, therefore, this payment clearly falls within sub-section 2.

Then it is said that it is saved by sub-section 1. The words of the sub-section are: "Upon any offer of shares to the public for subscription it shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company if the payment of the commission and the amount or rate per cent. of the commission paid or agreed to be paid are respectively authorized by the articles of association and disclosed in the prospectus, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized." Now, taking that sub-section line by line, in my judgment there has never been here any offer of shares to the public for subscription. I do not think that these shares which were agreed to be allotted by the 1902 company to the liquidator of the old company for distribution amongst the old shareholders were in any sense offered to the public. I agree that the payment was a payment of a commission to persons agreeing to take up these shares, but that is not justified in every case. It is only authorized in cases where the payment of the commission and the amount or rate per cent. of the commission paid or agreed to be paid are respectively authorized by the articles of association or disclosed in the prospectus.

Now, I am of opinion that the payment of this £12,000 odd is not authorized by the articles of association. The article which it is said authorizes this is the 9th article. That article says: "If the company at any time shall offer any of its shares to the public for subscription the directors may pay a commission at a rate not exceeding 50 per cent. to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company."

First, I doubt very much whether there has ever been an offer to the public within the meaning of this article 9. But, even assuming that there has been, it is only authorized by article 9 when such commission takes the form of a rate not exceeding 50 per cent. In my judgment this agreement—the agreement which appears in clause 5 of the scheduled agreement, which has now, I understand, been executed by the new company—does not come within the terms of that article. Clause 5 runs, "as the balance of the consideration for the said sale"—that is, the sale by the intermediary to the new company—"and purchase, the purchasing company shall pay to the vendors the sum of £12,300 in cash." That amount of £12,300 in cash is exactly what I think is contemplated by the words of sub-section 1 of section 8, and the amount and the rate may either or both of them be authorized by the articles, but it is only in so far as the articles authorize and determine the form in which the commission may be paid that advantage can be taken of sub-section 1. In my judgment this amount of £12,300 mentioned in clause 5 of the scheduled contract does not fall within the word "rate" as it is employed in article 9 of the articles of association.

Having said that, I really do not know that there is anything more that it is needful to say here, but I should like to mention two points that were made upon the question whether the whole agreement, having regard to the memorandum of association, was or was not *ultra vires*. Speaking for myself, so far as the provisions contained in the memorandum are concerned, I am inclined to think that the sale of the undertaking and the payment for it in partly-paid shares does fall within those provisions; but I have not really, in the view that I have taken of this case, to decide that, and I do not propose to decide it. All that I have to decide is, first, does this payment fall within sub-section 2 of section 8? Yes it does. Therefore it is prohibited unless it is saved by sub-section 1. Is it saved by sub-section 1? I think not. I have already been through the section line by line and pointed out the respect in which I think this payment does not fall within the provisions of sub-section 1. I think, therefore, that an injunction will now have to be granted.

STIRLING, L.J.—I have come to the same conclusion. There are really two points which have been seriously argued and arise in this case. The first is whether the sum of £12,000 odd which is mentioned in what I may call the scheduled agreement is a payment of capital money by way of commission, discount, or allowance to any person in consideration of subscribing or agreeing to subscribe for shares in the company. That must in each case be a question of fact, and I do not, in coming to the decision which I am now giving, in any way affirm the proposition which was put forward in the course of the argument, that if the decision of the learned judge in the court below is upheld it would be impossible to make a sale of property partly in consideration of shares and partly in consideration of cash. The question in each case whether the case is or is not in the nature of a commission must, in my judgment, be a question of fact, and I have simply to say in the present case that, reading the agreement between the company of 1898 and the Associated Guarantors and the further agreement—which has now become an actual agreement—in the scheduled form annexed to that agreement by the light of the circular of the 14th of July, 1902, which is in evidence in this case, I come to the conclusion as a matter of fact that the payment of the £12,000 odd is a commission within the terms of sub-section 2 of section 8 of the Act of 1900.

Now, that being so, it follows that the new company cannot pay any portion of that sum unless they bring themselves within the provisions of sub-section 1 of the same section. That sub-section only applies upon an offer of shares to the public for subscription—which means, as it appears to me, an offer by the new company of shares to the public for subscription. I think that is the meaning of the section, but in any case, if it were doubtful, one of the conditions of the validity of the payment is that the payment of the commission and the amount or rate per cent. of the commission paid or agreed to be paid are authorized by the articles of association. The articles of association, as has been already pointed out, only authorize the payment if the company shall at any time offer any of its shares to the public for subscription. The offer, therefore, either by the terms of the statute itself or by the terms of this article, must be an offer by the company. At the present moment really no offer has been made of any kind; but there has been put in evidence the terms of a proposed offer which has not yet been actually made. I assume that what is contemplated by the new company is that an offer shall be made on the terms of that document. Then if my opinion is asked whether that is such an offer as is contemplated by the articles of association of the company, I say no. Plainly upon the terms of that document that offer is not one made by the new company, but an offer by the liquidator of the old company in his right as liquidator and as dealing with the assets of the old company. In my judgment that is not such an offer as is authorized by sub-section 1. It does not follow, however, that the company may not be able in some shape or form to bring themselves within sub-section 1. In the first place it is possible to alter the articles of association and to frame them in a different manner. It is also possible for them to make their offer when they do make it in a different form from that contemplated by the circular which has been put in evidence. It seems to me, therefore, that in any injunction that is granted there ought to be an opportunity left to the new company of considering their position and taking such steps as may bring them within sub-section 1 of section 8.

Those are the two principal questions which have been dealt with. A third question, which is one of some importance, has also been argued, which the Lord Justice has briefly mentioned. I do not propose to go into it at this period of the day at length, but simply to state that in my judgment the proposed sale of the undertaking of the old company in consideration of partly paid up shares of the new company is not beyond the powers of the old company as defined by the memorandum of association.

COZENS-HARDY, L.J.—I am of the same opinion, and at this hour I do not propose to occupy much time in stating the reasons why I concur. The fundamental point seems to be this: that there are not here two contracts of sale and purchase. There is really only one. There never was a moment of time in which that which has been called the intermediary company could become owner of the property and deal with it as it thought fit, for when you look at the contract you find that the intermediary company could only pay the old company by means of an allotment of shares in the new company, which they could only get by transferring all that they were said themselves to have purchased. In short, I think we are shutting our eyes to all the manifest inferences from the documents and facts if we did not see that this sum of £12,300 was plainly a remuneration for underwriting, and that this arrangement of the intermediary company and the two agreements was merely a complicated and involved mode of receiving the requisite underwriting. If so, it seems to me to follow necessarily that the transaction falls within sub-section 2 of section 8. The £12,300 was the consideration given for subscribing or agreeing to subscribe for shares in the new company.

It only remains, then, to consider whether it falls within the protection conferred by sub-section 1. In my view it does not, and I think so for several reasons. In the first place there is, in my view, here no offer of the shares to the public by anybody. Certainly there is no offer of the shares to the public by the new company, which I think is implied by the language of the section. The only offer, if there be any offer, to the public is by the liquidator of the old company. And, lastly, but by no means of the least importance, this commission is one which is not authorized by the articles of association of the company. The event has not happened in which the payment is authorized and the rate mentioned in the articles has not been complied with.

For all these reasons it seems to me that the payment cannot be justified. It is prohibited by sub-

section 2; it is not protected by sub-section 1. As to the precise form of relief, the declaration which is suggested is this: "Declare that the contract of the 11th of July, 1902, so far as it provides for the payment of £12,300 by the 1902 company out of the capital money of the company is prohibited by section 8, sub-section 2, of the Companies Act of 1900, but this is without prejudice to such right, if any, as the new company may have to claim the benefit of sub-section 1 of section 8." It will be understood that the court is not expressing any opinion one way or the other whether it can be brought within sub-section 1 of section 8. We wish to keep that open. There will be an injunction on the footing of the declaration, and the defendants must pay the costs of the action.

Solicitors, *Burn & Berridge; Paines, Blyth, & Huxtable; Booth & Smee.*

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From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } Oct. 28, 30, 31; Nov. 1, 3, 4, 5.

WRIGHT *v.* CARTER. (*a.*)

*Solicitor and client—Fiduciary relationship—Gift by client to solicitor—Purchase by solicitor from client—Competent and independent advice—Avoiding deeds as against solicitor and upholding gifts to client's children in same deeds.*

*W., being at the time under considerable financial liabilities, executed in* 1900 *two deeds settling property in favour of his children, B. and N., and his solicitor, C. The deeds were settled in C.'s office, but were, before execution, inspected and explained to W. by another solicitor, A. In* 1901 *W. executed a further deed, by which he assigned all his property in favour of B. and N. and C., they covenanting to pay him an annuity. This deed was prepared by another solicitor, T., but C. made alterations in it before execution.*

*Held, on the evidence, that W. had not competent and independent advice on either occasion, and that all the deeds must therefore be set aside as against C., and that the deed of* 1901 *must be set aside altogether; but that the deeds of* 1900 *ought not to be set aside so far as they conferred benefits on W.'s children, B. and N.*

*The rule laid down by* Lord Eldon *in* Hatch *v.* Hatch, 9 *Ves.* 292. *applied.*

*Observations of* Farwell, J., *in* Powell *v.* Powell, [1900] 1 *Ch.* 243, 48 *W. R. Dig.* 168, *as to the duty of a solicitor advising a client who wishes to confer a gift on a person in a fiduciary relation, approved.*

*The conditions necessary for the upholding of gifts by a client to his solicitor and purchases by a solicitor from his client respectively, discussed.*

*Order of* Kekewich, J., *varied.*

This was an appeal from a decision of Kekewich, J. (reported 46 SOLICITORS' JOURNAL 216, 50 W. R. Dig, 176).

The facts were as follows: In and previous to 1898 Colonel Charles Ichabod Wright was a member of a banking firm carrying on business at Nottingham. In 1898 the business was sold by him and the other partners to the Capital and Counties Bank for £110,000. The agreement for purchase, however, gave the Capital and Counties Bank the right to reject any of the assets of the banking business they were purchasing which they should consider to be below the value at which they stood in the books of the firm. Such rejected assets were to be realized; and the amount by which, on realization, they fell short of that value was to be deducted from the purchase-money, while, if the amount of the deficiency exceeded that of the purchase-money, the members of the firm covenanted to make good such excess. The Capital and Counties Bank in fact rejected assets to the value of £350,000, and Colonel Wright and the other partners were thus placed under a heavy liability to them; while Colonel Wright also had personal liabilities under settlements and otherwise. Colonel Wright was possessed of considerable property both at Nottingham and at Torquay, and in 1897 he began to consult on matters of business a solicitor at Torquay named Francis John Carter, who acted as his solicitor in all his affairs from 1899 till the end of August, 1901, and was employed in realizing the assets rejected by the Capital and Counties Bank.

On the 15th of May, 1900, Colonel Wright executed two indentures, both expressed to be made between himself of the one part and Carter and Nevill Wright (a son of Colonel Wright) of the other part. By the first of these indentures Colonel Wright conveyed to Carter and N. Wright all his freehold hereditaments (subject to certain incumbrances) on trust for Colonel Wright for his life and after his death on trust for sale and conversion. He also assigned to them by the same deed the benefit of the purchase agreement with the Capital and Counties Bank, and all the moneys payable to him thereunder and all his share in the rejected assets, on trust for conversion and investment and to pay the income to Colonel Wright for life. At his death certain liabilities of Colonel Wright were to be discharged, and subject thereto the proceeds of sale of all the property comprised in the deed were to be held in trust as to nine-twentieths for Blanche T. Wright (a daughter of Colonel Wright), as to nine-twentieths for N. Wright, and as to the remaining two-twentieths for Carter. By the second indenture of the 15th of May, 1900, Colonel Wright assigned to Carter and N. Wright all the furniture and chattels in and about his houses, on trust to allow him to enjoy the same during his life, and after his death on trust to sell and out of the proceeds to pay £500 to Carter and divide the residue equally between Blanche and Nevill Wright. The provisions in favour of Carter were expressed to be in consideration of services rendered by him.

The drafts of both deeds were prepared in Carter's office, and settled by counsel instructed from Carter's office, but Carter handed them to Colonel Wright in order that he might obtain the advice of another solicitor upon them.

Colonel Wright accordingly took them to another solicitor named Almy, who acted as clerk for a firm of solicitors at Paignton and Torquay, and managed their Torquay office.

Almy explained the deeds to Colonel Wright and also consulted one of the partners in the firm, and finally came to the conclusion that Colonel Wright could safely be advised to execute the deeds. He had, however, no knowledge of the position of Colonel Wright's affairs, or of the exact relationship between him and Carter; nor had he knowledge of the affairs connected with the Capital and Counties Bank.

Early in 1901 the bank commenced proceedings against Colonel Wright in respect of an overdraft which he had guaranteed, and the trustees of a settlement also commenced proceedings against him in respect of a liability under covenant.

In consequence, Carter suggested the execution of a further deed to be prepared by another solicitor named Tarbet, and this was done, and the document executed by Colonel Wright on the 13th of March, 1901.

Tarbet handed it to Carter, who made certain

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

alterations in it, and returned it to him for re-engrossment and re-execution by Colonel Wright, who in fact re-executed it on the 14th of March, and stated that he was under the belief that it was merely a duplicate of the document which he had executed on the 13th of March.

The deed of the 14th of March was made between Colonel Wright of the first part, N. Wright and Carter of the second part, and Blanche Wright, N. Wright, and Carter (therein called "the reversioners") of the third part, and was expressed to be supplemental to the first indenture of the 15th of May, 1900. By it it was declared that in consideration of the joint and several covenants of the reversioners thereinafter contained the trustees should stand possessed of the trust premises comprised in the principal indenture freed and discharged from the trusts declared thereby in favour of Colonel Wright and the reversioners, on trust for the reversioners in equal shares, and Colonel Wright also assigned to N. Wright and Carter all the real and leasehold hereditaments not comprised in the principl indenture to which he was beneficially entitled, all moneys owing on certain mortgages, and the real and leasehold hereditaments comprised in such mortgages, and all personal effects which he Colonel Wright might then be or might thereafter become entitled to or acquire, on the trust declared by the principal indenture and this indenture. The reversioners on their part covenanted to pay Colonel Wright during his life an annuity of £500, to be increased to £800 in a certain event.

Finding that Colonel Wright's furniture was not covered by this document, Carter obtained from him a further document dated the 13th of July, 1901, under which Colonel Wright was to receive £200 out of the sale moneys of the furniture in consideration of his life interest, Carter was to receive £425, and the remainder was to be divided equally between Blanche and N. Wright.

Colonel Wright afterwards commenced this action, claiming that all four deeds should be delivered up to be cancelled, reconveyance of all property passing under them, and an injunction against dealings with such property. He also asked for a receiver and for damages for fraud and conspiracy, but this plea was abandoned at the trial.

Almey and Tarbet were made defendants to the action, but were not parties to the appeal.

Kekewich, J., held that the deeds of May, 1900, were originally voidable by Colonel Wright, but that he had now lost his right to set them aside because by the deed of March, 1901, he had agreed that they should be treated as a nullity, and that the deed of March, 1901, could not be set aside.

Colonel Wright appealed.

*Warrington, K.C.*, and *A. à B. Terrell*, for the appellant.—On the evidence, Carter has not shown that the transaction was a fair one and that the appellant had competent and independent advice. All that Almy and Tarbet did was to say that the appellant knew what he was doing and was not at the time under the actual persuasion or influence of Carter; but the court will presume the existence of influence from the general relation of solicitor and client. Almy and Tarbet had not sufficient knowledge of Colonel Wright's affairs to enable them to advise him. And the advice must be as to whether the gift should be made; here Colonel Wright's mind was already made up. As to the gifts to Blanche and Nevill Wright, the deeds were voluntary ones; and if a voluntary transaction be attacked successfully in any one particular the whole of it falls with that part. If part of it be gone, the transaction cannot be carried out as a whole, and the intention of the settlor cannot be inferred from what remains. The intention of the settlor must be established, or he must consent to the reformation of the settlement. [STIRLING, L.J., referred to *Hatch* v. *Hatch*, 9 Ves. 292.] At all events the deeds must be set aside as against Carter. A solicitor cannot take gifts while the relation subsists.

They cited *Huguenin* v. *Basely*, 14 Ves. 273; *Montesquieu* v. *Sandys*, 18 Ves. 302; *Tomson* v. *Judge*, 3 W. R. 561, 3 Drew. 306; *Rhodes* v. *Bate*, 14 W. R. 292, L. R. 1 Ch. App. 252; *Willis* v. *Barron*, [1902] A. C. 271, 50 W. R. Dig. 48, and in C. A. 48 W. R. 579, [1900] 2 Ch. 121; *Holman* v. *Loynes*, 2 W. R. 205, 4 De G. M. & G. 270; and *McPherson* v. *Watt*, 3 App. Cas. 254, 26 W. R. Dig. 228.

*Badcock, K.C.*, and *Marcy*, for Nevill Wright, submitted to any order the court should make, and took no part in the argument.

*Warrington, K.C.*, and *Christopher James*, for Carter.—It is not illegal for a client to make a gift to his solicitor even during the continuance of the relationship; there is merely a presumption of influence which is rebuttable, and is rebutted by the evidence here. The idea of benefiting Carter originated, not with him, but with Colonel Wright. Colonel Wright had competent and independent advice, and Almy's view of his duty as adviser satisfies the requirements of the law as laid down by Lord Eldon.

They cited *Rhodes* v. *Bate*; *Smith* v. *Kay*, 7 H. L. Cas. 750; *Mitchell* v. *Homfray*, 29 W. R. 558, 8 Q. B. D. 587; *Liles* v. *Terry*, 44 W. R. 116, [1895] 2 Q. B. 679; *Walker* v. *Smith*, 29 Beav. 394, 10 W. R. Ch. Dig. 67; *In re Holme's Estate*, 3 Giff. 337, 10 W. R. Ch. Dig. 67 (s.n. *Woodward* v. *Humpage*); *Allcard* v. *Skinner*, 36 W. R. 251, 36 Ch. D. 145; *Edwards* v. *Merrick*, 2 Hare. 60; and *Cockburn* v. *Edwards*, 30 W. R. 446, 18 Ch. D. 449.

*Duke, K.C.*, and *Hon. F. Russell*, for Blanche Wright.—Because the deeds are bad as against Carter they are not necessarily bad as against Colonel Wright's children. They do not claim through Carter at all; the gifts to them are totally independent gifts from a father to his children.

They cited *Bridgman* v. *Green*, 2 Ves., sen. 627.

*Warrington, K.C.*, in reply.—It is not enough for the solicitor to say that another adviser was called in if the relationship of solicitor and client continues. With regard to the deed of March, 1901, Carter has not shown that the transaction was a fair one, and this deed must be set aside altogether.

He referred to *Powell* v. *Powell*, [1900] 1 Ch. 243, at pp. 245-6, 48 W. R. Dig. 68, and *Harris* v. *Tremenheere*, 15 Ves. 34.

Nov. 5.—VAUGHAN WILLIAMS, L.J., after stating the facts, continued: Dealing first with the two deeds of 1900 alone, I agree with Kekewich, J., that they cannot stand, and I desire to state shortly the ground on which they cannot stand. A great many authorities have been cited, and I do not say that they have not all a direct bearing on the question, but I propose to deal only with certain landmarks in the current of authorities. I will begin with *Hatch* v. *Hatch*, decided by Lord Eldon in 1804, and I will read his words in 9 Ves., at p. 296: "This case proves the wisdom of the court in saying it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do

more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the *cestui que trust*, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it, unless quite satisfied that the act is of that nature, for the reason often given; and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, inquiry is so easily baffled in a court of justice that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression, and the difficulty of getting property out of the hands of the guardian or trustee thus increased; and, therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud, where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party, under the care of the guardian or trustee." I do not say that that judgment of Lord Eldon stands in all its stringency at the present day, having regard to the subsequent authorities; but, on the other hand, I do not think that as regards the application of that judgment to the facts of this case it has been altered or modified by the subsequent authorities. Lord Eldon was dealing with the case of a gift, and it is perfectly clear that in the case of a gift the rule applied by courts of equity is much more stringent and absolute than that applied in the case of a bargain or contract. I understand Lord Eldon to be affirming the principle that whenever you have a fiduciary relationship (in the present case that of solicitor and client), the moment the relation is established there arises a presumption of influence which continues as long as the relation continues, or at all events until it can clearly be inferred that the influence has come to an end. I am not saying that the presumption of influence affecting or avoiding the gift is an irrebuttable one, nor do I think Lord Eldon meant to lay down this. I think he only means that as long as the fiduciary relation continues it will be very difficult to support the gift, and the court will refuse to go into nice discussions as to whether the gift—here a gift by a client—was advantageous to the client or not. I do not say that if the gift is manifestly one which a prudent man would not have given if the relation of solicitor and client had determined *in hac re* you may not take such a fact into consideration as showing that, notwithstanding the determination of the actual relation in the particular matter, the influence of the solicitor has not ceased, but still continues. I cannot find in the later authorities anything which in terms qualifies or disapproves of Lord Eldon's judgment in *Hatch* v. *Hatch*. There are, however, later authorities in which, even with regard to a gift, the fact that the donor had competent and independent advice seems to have been considered a material matter; and though I think that in one of the earlier cases the view was taken that Lord Eldon regarded the having competent and independent advice as immaterial in the case of a gift, I do not understand him as having said so; I think he considered that, at all events where there is no continual employment *in hac re*, the existence of competent and independent advice would be relevant and lead to the inference that the influence had ceased.

Applying Lord Eldon's rule to this case, I think Colonel Wright's desire to execute these deeds was very much promoted by the pressure under which he was from the Capital and Counties Bank. It is clear that he was feeling very much his present shortness of money, and the prospect of its continuing for the rest of his life. At all events, I cannot conceive that any prudent man, professional or other, who was asked by Colonel Wright to advise him whether he should make these gifts to his solicitor would have failed to say, "I cannot advise you as to that unless I know what your means and prospects are, what is your present income, and whether you have any reason to suppose that it will be larger when these gifts take effect. I should also like to have a full list of your property," which in this case would of course include a full account of the rejected assets and equities of redemption. [His lordship then held on the evidence that Almy had not a sufficient knowledge of Colonel Wright's affairs to make him a competent and independent adviser.] It does not seem to me that the solicitor here has in the slightest degree discharged the onus thrown on him by *Hatch* v. *Hatch*, and he has failed to satisfy the court that these deeds were executed free from any influence of his. He was advising Colonel Wright in the whole matter, and the very fact that he was a party to the deeds being carried through was in itself a fact from which Colonel Wright might reasonably suppose that his solicitor, whom he trusted so much, approved of this transaction and thought it a reasonable and proper thing for him to do. The influence need not take the form of a direct persuasion to make the gift, nor is there any evidence of this in the present case, though, on the other hand, there is no evidence that Carter advised Colonel Wright that there was no reason why he should make the gift, and that he had better not make it. The judgment of Wigram, V.C., in *Edwards* v. *Meyrick* has been cited, and deserves great attention. It is suggested that he laid down that Lord Eldon's rule has no application unless the solicitor is employed *in hac re*. But Wigram, V.C.'s, decision was dealt with afterwards by Lord Cranworth and Turner, L.J., in *Holman* v. *Loynes*, where Turner, L.J., says (4 De G. M. & G. 270, at p. 283): "Gifts from clients to their attorneys can be maintained only when not only the relation has ceased but the influence may rationally be supposed to have ceased also." In my view Carter never, from first to last, ceased to be Colonel Wright's solicitor. He was the solicitor advising him in all his affairs, and particularly in regard to his dealings with his property, including the rejected assets; with the bank, who were his most pressing if not his only creditors; and with the settlements which he was to make on his children and the deeds by which they were to be made. Under these circumstances, I think he continued his solicitor *in hac re*, and it cannot possibly be said, at all events, that his influence can reasonably be supposed to have ceased. I think, therefore, that as against Carter these deeds of the 15th of May, 1900, cannot stand.

With regard, however, to the position of the other beneficiaries under these deeds I regret to say that I cannot agree with Kekewich, J. It seems to me that the gifts to the children and the gifts to the solicitor were entirely different and might just as well have been made by a separate deed. The reason which seems chiefly to have induced Colonel Wright to make these gifts to his solicitor was not the reason which induced him to make a provision for his children, and I think it cannot be said that the gifts to the solicitor and the provision for the children and wife were one and the same transaction induced by the same motives, and that the wife and children claim in any sense through the solicitor. I think, therefore, that except as regards Carter these deeds must stand. [His lordship then held on the evidence relating to the deed of

March, 1901, that Tarbet was not in a position to give Colonel Wright competent and independent advice on the matter, owing to his insufficient knowledge of Colonel Wright's affairs.] I am not prepared to lay down that in every case of purchase by a solicitor competent and independent advice is necessary, for it may be that a particular transaction of sale appears so manifestly fair that such advice is not necessary. But there is no evidence to show that this transaction was a fair one. As far as I can draw inferences from the circumstances of this case, it seems to me highly probable that it was not a good bargain for Colonel Wright; at all events we have not sufficient evidence that it was so, nor had Mr. Tarbet the material to form a judgment. In my opinion, not only is this deed one which does not show that it was a fair bargain, but there is a good deal to show that it was a bargain which a prudent person would never have entertained. As against Carter I have no doubt that the transaction cannot stand, for under it he gets a new consideration and he and his co-covenantors do not take over the whole liabilities of his client, whose whole property they were taking. With regard to the other two beneficiaries, Blanche Wright and Nevill Wright, I think that they are for this purpose in the same position as Carter, and that the consideration coming from them cannot be separated. The earlier deeds were deeds of gift, but this is a bargain which in my judgment was entered into under such circumstances that it is not binding on Colonel Wright. In my opinion Carter was acting throughout the transaction in concert with Blanche Wright and Nevill Wright, and under these circumstances it would be against conscience for them to attempt to take advantage of a bargain so obtained. It was said that the rule in *Huguenin* v. *Basely* only applies where fraud has been proved, and that we must take it that none has been proved here. I do not agree with that at all. It is established here, to my mind, that this deed was executed by Colonel Wright under the influence of Carter, without fully understanding what was being done and without competent and independent advice. Not only cannot Carter enforce this deed, but it is in my opinion against conscience within the rule in *Huguenin* v. *Basely* that any of the parties to the bargain should be able to enforce their rights. I think, therefore, that the deed of the 14th of March, 1901, must be set aside as against all these defendants, but the agreement of the 13th of July, 1901, which was supplemental to the second deed of the 15th of May, 1900, is, like that deed, void as against Carter only.

STIRLING, L.J.—I have come to the same conclusion; and after the exhaustive manner in which the case has already been dealt with by Vaughan Williams, L.J., I think I need not go very deeply into the case. I desire, however, to state more particularly the grounds on which I consider that the deeds of 1900 must be set aside as against Carter, and that the deeds of 1901 must be set aside altogether.

The two sets of deeds have been treated, and ought to be treated, in different ways. The deeds of 1900 were deeds by which gifts were conferred on a solicitor by his client, and it is stated in them that the motive and consideration for them consisted of services rendered by the solicitor to the client.

That being so, the transaction is brought within the very terms of the rule of the court as laid down by Lord Eldon in *Hatch* v. *Hatch*. I have always understood that Lord Eldon's judgment in that case contained an accurate statement of the law as it then stood, and that it continues to be an accurate statement of the law as it stands now. At all events, I think it is a clear authority for two propositions—the first being that transactions of gift between client and solicitor are watched and sanctioned by the court with the utmost jealousy; and the second, that the presumption against them is not entirely irrebuttable, though extremely difficult to rebut. As to the first, the rule so laid down is grounded on important reasons of public policy. The court has laid down that before such a gift can be upheld it must be satisfied that, in Lord Eldon's words, "it is an act of rational consideration, an act of pure volition, uninfluenced"; in other words, that in dealing with such a transaction the court starts with the presumption that undue influence exists on the part of the donee, and throws on him the burden of satisfying the court that the gift was uninfluenced by his position as solicitor. As for rebutting the presumption, Lord Eldon says that it is "almost impossible" to uphold such a gift in the case of the relations which he specifies, one of them being that of solicitor and client. Now, it has been laid down in recent cases, particularly in two cases in this court—*Mitchell* v. *Homfray* and *Liles* v. *Terry*—that in order to support a gift of this kind the donee must have competent and independent advice in conferring the gift. That may, in my opinion, be laid down in a negative form—that is to say, the transaction cannot be upheld unless that condition is satisfied; but it still remains the rule that the court must look at all the circumstances of the case, and the introduction of a new solicitor, though a highly important element, does not conclude the case; the court still requires to be satisfied that the influence arising from the relationship of solicitor and client can no longer be supposed to exist, and I think also that the new solicitor called in to advise in such a case takes upon himself no light or easy task. The duties of the adviser have been considered by Farwell, J., in the recent case of *Powell* v. *Powell*. In the course of his judgment he says ([1900] 1 Ch. 243, at p. 247): "The solicitor does not discharge his duty by satisfying himself that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances, and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists." With this view of a solicitor's duty I agree. I think a solicitor would fail in his duty if he neglected to inform himself of the circumstances under which the transaction was taking place. It might turn out, for example, to be one in which a poor man was divesting himself of all his property in favour of the solicitor, and in such a case it would be impossible, I think, to uphold the transaction, whatever the advice might have been.

After these remarks on the general state of the law applicable to such a case, I will make a few observations on the position regarding the deeds of 1900. Without going into detail, I may point out what seems to me the salient feature of the transaction. In the first place, though a new solicitor was called in, he was not called in at the inception of the transaction. The terms of the gift had been defined and draft deeds had been prepared in Carter's office before Almy's services came into operation. It is true that nothing to bind Colonel Wright had been done, but still the advice which he received was not given until the transaction had progressed to a certain extent. In the second place, the relationship of solicitor and client continued to exist between Colonel Wright and Carter in regard to every transaction except that of the settling and completing of the proposed deeds. I have already pointed out

that the motive and consideration for the deeds appear, on the face of them, to be the services rendered by Carter to his client; and these services had been rendered with reference to many very important matters, particularly Colonel Wright's position as regards the Capital and Counties Bank and the dealings which were taking place between him and the bank. In regard to these matters Carter's services continued to be given. Thirdly, with regard to Almy's advice to Colonel Wright, I come on the evidence to the conclusion that Almy took no steps to inform himself of the propriety of the gifts, or whether Colonel Wright's circumstances were such as would justify a prudent man in his position in doing what he did. He gave Colonel Wright no advice on this subject at all. He merely told him that if he intended to benefit Carter it was essential that he should be free from his influence; and he says that Colonel Wright gave him to understand generally that he was entirely free from that influence and that he merely desired to give Carter a benefit in return for services rendered. If that is all that need be done to establish such transactions, there will in reality be very little substantial difficulty in dealing with them, instead of their being very difficult and almost impossible to uphold. Speaking for myself, I can only say that I am not satisfied that the undue influence which must be attributed to Carter did not continue to exist at the time when these deeds were executed, and therefore, in my opinion, they ought to be set aside as against him.

Then arises the question whether the provisions in favour of Colonel Wright's wife and children are also vitiated; and on this point I entirely agree with what Vaughan Williams, L.J., has said. The case does not fall within the rule laid down by Lord Eldon in *Huguenin* v. *Basely*, and I do not think that the benefits conferred on the wife and children have in any way been derived from Carter's undue influence. It is clear on the evidence that quite apart from this intention to confer a benefit on Carter, Colonel Wright intended to confer substantial benefits on his wife and family, and under those circumstances I think they are entitled to retain the benefits conferred on them by the deeds.

I will now consider the deed of the 14th of March, 1901. That deed can no longer, I think, be treated in this court as a transaction of gift pure and simple; it has been treated in argument as a transaction of sale, and I am prepared so to regard it. Here I am differing from the opinion of Kekewich, J., but with the utmost respect I confess I cannot agree with him in his view that this was a good deed. An onus is here also thrown on Carter, but one of a different kind. In a transaction of sale in which the solicitor is a purchaser the court requires it to be proved, first, that the client was fully informed; secondly, that he had competent independent advice; and thirdly, that the price given was a fair one; and the onus of proving all this lies on the solicitor. Now, without dwelling on the first two requisites, I think in this case the third entirely fails. This is a sale of all the property, real and personal, of the client; it is described in general terms in the deed, and he executed the deed without Mr. Tarbet, the solicitor who was advising him, being informed of what the property included in the deed consisted or of its value. How, then, is it possible to say that the full consideration was given for the property? I am not satisfied that any one of the three requisites to which I have referred is established as regards this deed, which is open to still further observations; but I think it must fail as against Carter on the ground laid down in *Holman* v. *Loynes*, that he has failed to prove that the full value was given. Then comes the question, How does that affect the two children of Colonel Wright, Nevill Wright and Blanche Wright, who joined with Carter in executing this deed for an annuity secured only by their personal covenants? It seems to me that if the transaction is bad as against Carter they are so mixed up with it that it cannot be separated, and that the deed must be set aside as against them, on proper terms, no less than as against Carter. It is one single transaction, and as it fails as against him it fails as against them also. For these reasons I think Colonel Wright is entitled to the relief which he claims.

COZENS-HARDY, L.J.—I am of the same opinion, but I wish briefly to state my own view without attempting to recapitulate the facts or to discuss the authorities. I think that the deed of March, 1901, cannot stand, and I do not regard it as in any real sense a transaction of sale and purchase. Colonel Wright's guiding object was not to obtain the best price for his property, but to obtain a means of defeating the bank. It is true that we cannot in this action decide whether the conveyance was for the purpose of defeating his creditors; but I think we are entitled and bound to ask whether this was a real bargain between vendor and purchaser or mere device by which the so-called vendor divested himself of all his property, present and future, without reference to its value. Having regard to the evidence of Tarbet, I think only one answer can be given to that question; but assuming that the transaction is to be treated as a sale by Colonel Wright to Carter, his solicitor, and to Blanche and N. Wright, I am clearly of opinion that it rests on Carter to justify the sale, and to show that "the transaction was perfectly fair, that the client knew what he was doing, and that a fair price was given." These are the words of Kindersley, V.C., in *Tomson* v. *Judge*, and so far as I know that statement of the law is consistent with all the authorities. Carter has utterly failed to show this; perhaps it would be more correct to say that he has not attempted to do so; but it was argued that he did all that the law required when he saw that Mr. Tarbet, a respectable solicitor, was called in to advise Colonel Wright. Mr. Tarbet is not now a party to the action, and I desire to avoid needlessly saying anything which may prejudice him, but I am bound to ask for what purpose he was called in to advise. It was not as to the sufficiency of the consideration nor as to the propriety of the transaction, but only to do what was necessary to carry out the scheme previously arranged. It seems to me that against Carter the transaction of March, 1901, cannot stand, and it has scarcely been contended by counsel for Blanche Wright that, on that assumption, she can hold her share. The consideration was the joint and several covenant of the three combined to pay an annuity, but Carter was really at law the most responsible person. The contract of purchase was one and indivisible, and the deed must be set aside as a whole. I may add, though it is not necessary for the decision, that the circumstances attending the preparation and execution of this extraordinary deed are such that I doubt whether it could be supported if no fiduciary relation had existed between Colonel Wright and Carter. With regard to the transaction of 1900, that was one of pure gift, without any covenant of pur chase. It was one of gift to Carter, Blanche Wright, and N. Wright. As regards Carter, I agree with Kekewich, J., that the transaction cannot stand. His view was that in this case the circumstances precluded the possibility of competent and independent advice being given to Colonel Wright. Assuming, as I do, that the presumption of undue influence in the case of a gift by a client to his solicitor during the continuance of the relationship is not irrebuttable, I hold that

something beyond what was done here is essential to rebut it. Almy had not the materials necessary to him to advise, and he seems, moreover, to have taken a somewhat incorrect view of his duties, for he says that he understood that the relation of solicitor and client continued as to other matters. I doubt whether any competent and independent advice can be given to a man who says that he has arranged to make a gift to his solicitor, except that he had better not do so, and it is difficult to see what bearing such advice, if ineffectual, can have upon the validity of the gift. In my opinion the deeds of 1900 and the supplemental agreement of the 13th of July, 1901, must be set aside as against Carter, and a resulting trust declared of the benefits taken by him under them; but I see no reason for impeaching any of them as against Colonel Wright's children. They do not claim through Carter, and on the evidence it is not shown that the benefits that they take were procured by him, or were due to any influence exerted by him. Neither *Huguenin* v. *Baely* nor *Barron* v. *Willis* touches this point. My view is that the gifts under these instruments are severable, and that as far as the children are concerned there is neither evidence nor presumption of undue influence.

*Appeal allowed in part.*

Solicitors, *Horace W. Chatterton; Tucker, Lake, & Lyon*, for *H. Wing & Son*, Nottingham; *E. & J. Mote; C. Russell & Co.*

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## High Court of Justice.

Chan. Div. Kekewich, J. } Dec. 12.

*In re* ALPHA CO.
WARD *v.* ALPHA CO. (*a.*)

*Practice—Debenture-holder's action—Plaintiff suing in representative capacity—Plaintiff* dominus litis—*Discontinuance after decree pronounced.*

*A plaintiff in a debenture-holder's action, although suing "on behalf of himself and all other debenture-holders," may discontinue his action after decree pronounced if he has no notice of claim and is not required to continue, by any other debenture-holder of the same class.*

*Forms of decree in creditors' administration actions and in debenture-holders' actions respectively, compared.*

Handford *v.* Storie, 2 *Sim. & St.* 196, *discussed.*

Adjourned summons.

On the 21st of October, 1902, the plaintiff, at that time the holder of one debenture for £1,000 in the defendant company, and suing "on behalf of himself and all other debenture-holders" in the company, obtained judgment in usual form and with the usual accounts and inquiries.

On the 19th of November, 1902, the plaintiff received from the liquidator of the company payment in full of all moneys due to him in respect of his debenture.

It appeared—and the evidence was uncontradicted—that there were in fact no other debentures outstanding, and under those circumstances the company took out this summons asking that the action might be discontinued.

*E. W. Martelli*, for the summons.—This case is analogous to a creditor's administration action, where the rule is that before decree a plaintiff can discontinue proceedings, but cannot do so afterwards if there are others of the same class: *Handford* v. *Storie*, 2 Sim. & S. 196. Here there are no such others, and the rule therefore does not apply; the plaintiff is *dominus litis* and further proceedings are wholly unnecessary.

*T. K. Crossfield*, for the plaintiff, supported the argument.

KEKEWICH, J., stated the facts, and continued: The question is whether the plaintiff is entitled to discontinue after judgment. The action has been compared to a creditor's administration action, but in my opinion that is not a correct analogy. In a creditor's administration action, so soon as the plaintiff creditor obtains his judgment, if it is a proper judgment, he cannot stop proceedings, for this reason—viz., that a proper judgment in such an action not only directs inquiries as to debts, &c., but also that the assets shall be applied "in a due course of administration." It is settled that if there is not such a direction as that, the decree is not a full and proper administration decree, and in its absence an action at law against the executor or administrator cannot be restrained; but if that direction is given creditors can be restrained, and for this reason, that the court has assumed the duty of applying the assets, and will not suffer them to be wasted by creditors outside, who must trust the court to administer the estate fairly. In such a case, then, until the certificate is made that all other debts are paid, the plaintiff is not *dominus litis*: he is, in fact, a trustee of the action for other creditors.

But in my opinion the position of a plaintiff in a debenture-holder's action is entirely different; no doubt he sues "on behalf of all other debenture-holders"—that is because he is one of a class; and there are other cases, too, in which a person may sue as representing a class. He obtains judgment, but he does not undertake, nor does the court undertake, the administration of the estate as in a creditor's administration action. No doubt the court will generally have the supervision, but not as a duty, because there is nothing in the decree in a debenture-holder's action equivalent to a direction for administration in a due course. In *Handford* v. *Storie*, (which, although a debenture-holder's action, was not such an action in the modern sense of the term, although in Seton (6th ed.), p. 1396, it is wrongly classed as an administration action), the plaintiff after judgment sought to dismiss the action, and Leach, V.C., said this: "A plaintiff who sues on behalf of himself and all other persons of the same class, as he acts upon his own mere motion and at his own expense, retains the absolute dominion of the suit until decree, and may dismiss the bill at his pleasure. After a decree he cannot by his conduct deprive other persons of the same class of the benefit of the decree if they think fit to prosecute it." No more can this plaintiff, but there is no duty on him to proceed himself. He cannot prevent another debenture-holder coming in and claiming the benefit of the action, but he is not bound to go on simply because some other person may be entitled to such benefit. I am not, therefore, hampered by that language on the part of the Vice-Chancellor; but then he proceeds: "The reason of the distinction is that before decree no other person of the class is bound to rely upon the diligence of him who has first instituted his suit, but may file a bill of his own; and that after a decree no second suit is permitted." No more is it now. When a debenture-holder's action has been commenced no other debenture-holder is allowed to commence a similar action, and to prevent such a

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

step every action of the kind is now entitled "In the matter of" the particular company, so that search can be made to see whether such an action has been commenced. But if such second action were by inadvertence commenced the court would stay it, not because the court has undertaken a duty, but because of its jurisdiction to prevent unnecessary costs. That was always the case in administration actions before debenture-holder's actions such as this were thought of. I think that is all Leach, V.C., meant—that after decree no second suit could be brought, not because the court had undertaken the duty of administering assets, but because for the prevention of costs the second writ would not be allowed if the first was sufficient for all purposes. I see no reason why this plaintiff, although suing in his representative capacity, not having notice of any other claim and not being required to go on by another debenture-holder, should not now discontinue his action. What would happen if some other debenture-holder applied, I need not say, though I do not see how he could be excluded. But here there is nothing of that kind. The plaintiff remains master of the position and may discontinue proceedings.

Solicitors, *Burton, Yeates, & Hart*, for *Glaisyer, Porter, & Tangye*, Birmingham; *Alfred Double.*

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Chan. Div. Joyce, J. July 9, 10, 15, 1902.

*In re* HETLEY.

HETLEY *v.* HETLEY. (*a.*)

*Will—Construction—Parol directions as to disposition—Admissibility—Uncertainty.*

*A testator, after giving all his property to his wife for life, added the following clause, "I desire and empower her to dispose of my estate by her will or in her lifetime in accordance with my wishes verbally expressed by me to her."*

*Held, that the clause was void for uncertainty, for parol evidence was not admissible to prove what these wishes were.*

In re Fleetwood, Sidgreaves *v.* Brewer, 15 *Ch. D.* 594, 28 *W. R. Dig.* 245, *distinguished.*

By his will, dated the 3rd of December, 1897, the testator appointed his wife the sole executrix of his will, and continued: "I give, devise, and bequeath to her all my real and personal estate whatsoever and wheresoever for her use, enjoyment, and benefit during her life, and I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her."

The testator died on the 13th of March, 1902.

It appeared from the evidence that before February, 1897, the testator had several conversations with his wife as to the disposal of his estate, in which he had expressed in more or less detail his wishes as to its disposal.

The testator's wife had made a memorandum of these wishes and promised that she would carry them out.

The evidence, however, was not quite clear as to whether all these conversations had taken place before the execution of the will or not.

This summons was taken out to decide what interest the widow took under the will—viz., whether she was entitled absolutely, or took only a life interest, and in the latter case whether the residue was disposed of or not.

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

*Greenwood*, for the widow.—Under the words of the will my client has a power of appointment amongst the objects mentioned in the trust: *Moss* v. *Cooper*, 1 Joh. & Hem. 352, 9 W. R. Ch. Dig. 114. The court will admit evidence to show whether a trust was created where there is a reference to the testator's wishes: *In re Fleetwood*, 15 Ch. D. 594, 28 W. R. Dig. 245, this case was recently followed by Farwell, J., in *In re Huxtable*, 50 W. R. 185; [1902] 1 Ch. 214. [He also referred to 28 W. R. Dig. 245, *Riordan* v. *Barron*, Ir. Rep. 10 Eq. 469, 25 W. R. Dig. 343, and *In the Goods of Marchant*, [1893] P. 254.] [JOYCE, J., referred to *Scott* v. *Brownrigg*, 9 L. R. Ir. 246, 30 W. R. Dig. 232.] In *In re Boyes*, 32 W. R. 630, 26 Ch. D. 531, Kay, J., did not inforce the trust because it was not communicated. A gift for life followed by a general power is equivalent to an absolute gift if it is the best way of carrying out the testator's wishes: *Lamb* v. *Eames*, 19 W. R. 659, L. R. 6 Ch. App. 597.

He also referred to *In re Hutchinson and Tenant*, 26 W. R. 904; 8 Ch. D. 540, *In re Adam and Kensington Vestry*, 32 W. R. 883; 27 Ch. D. 394, *In re Williams*, 45 W. R. 519; [1897] 2 Ch. 12.

*Hughes, K.C.*, and *George Henderson*, for the nephews and nieces of the testator claiming under the trust, supported the widow's claim. The wishes are express and clear, and were communicated before the date of the will, and the court will give effect to them: *In re Stead*, 48 W. R. 221; [1900] 1 Ch. 237. Parol evidence is admissible to show what the trust is: *In re Fleetwood*. *In re Boyes* is distinguishable, but the principle of law is there clearly stated. In *McCormick* v. *Grogan*, 17 W. R. 961, L. R. 4 H. L. 82, the wishes were not communicated.

*R. J. Parker*, for the heir-at-law.—This case is outside of any case cited. The widow has a beneficial life interest with a power of appointment among an undefined class. If there is no trust, evidence is not admissible to show of whom the class consists, for if there is only a power with nothing to indicate a trust in default, there are no persons in whose favour the court could declare a trust.

*Hughes*, in reply.—Our evidence establishes a trust; it does not define or create a power. The words "I empower her by will or in her lifetime" only indicate the time at which the beneficial interest of the trust created by the words "I desire her" is to be taken.

July 15.—JOYCE, J.—In this case the testator, a gentleman of great wealth, having perfect confidence in his wife, and having probably arranged with her as to how his property should be disposed of, instead of giving, devising, and bequeathing everything to her absolutely with a request framed so as not to impose any obligation that she should dispose of the property as agreed between them, made a will, which, after appointing her sole executrix, proceeded in the following way: [His lordship read the clause in the will, and proceeded:]

Now, according to the true construction of the will, all that is thereby expressly given to the widow is a beneficial life interest; as to everything else she takes by virtue of her appointment as executrix, or otherwise she is trustee, after payment of the debts, &c., for the testator's heir-at-law and next-of-kin respectively. This, however, is subject to the clause, whatever may be its force and effect, "I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her." That clause purports to create a special power of disposition in the testator's wife, but not a general power

enabling her to do whatever she pleases with the property. Neither the objects of such power nor the limitations under which it is to be exercised are expressed in the will, but in order to ascertain and to find out what these are, we were referred—not to any document which can be identified, and possibly for purposes of probate treated as incorporated with the will, but—to wishes "verbally expressed" by the testator to his wife, and it was only in accordance with these wishes that the power was to be exercised. Nor is it even absolutely clear that the wishes referred to might not be wishes expressed between the date of will and the death of the testator, and unless these subsequently-expressed wishes are excluded by construction, I am of opinion that the clause I am considering is invalid for the reasons appearing in *Johnson* v. *Ball*, 5 De G. & Sm. 85. Even assuming that the testator must be taken to have referred only to the wishes expressed prior to the execution of his will, parol evidence is not, in my judgment, any more admissible to show what those wishes were than it would be to fill up a blank or to explain any patent ambiguity in the will. By the Wills Act no will can be valid unless it is in writing, executed by the testator, and attested as by the statute provided. To define or supply by parol evidence that which on the face of the will was left indefinite or unexpressed would be to make a material addition to the written will. Counsel for the parties desiring to support the validity of the power cited and urged me to follow the decision in *In re Fleetwood*, and it appears that Farwell, J., in a recent case of *In re Huxtable*, which I am told is under appeal,* felt himself somewhat reluctantly bound to recognise the authority of that decision. But Mr. Parker, arguing on behalf of the heir and next-of-kin, convinced me that the case of *In re Fleetwood* materially differed from the present, and that I should be extending the principle of that decision if I held that by the mode here adopted the testator created or could create a valid power of disposition on his widow. This is a case of an attempt to create a power and not of a definite trust for particular individuals attaching upon a gift of the subject-matter to a named legatee or devisee. If I held this power to be valid I should be going beyond *In re Fleetwood*, and introducing, in spite of the statute, what Kay, J., calls a serious innovation upon the law relating to testamentary instruments. I therefore hold the parol evidence to be inadmissible, and the clause purporting to create the form of disposition in question to be void for uncertainty. The consequence is, that subject to the life interest of the testator's widow the testator's real estate is undisposed of. The costs of all parties will be paid out of the estate.

Solicitors, *Finch & Turner; Burgess, Cosens, & Co.; J. E. Hetley.*

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Chan. Div.
Swinfen Eady, J. } Nov. 11, 12, 22.

*In re* FOTHERGILL'S ESTATE.
FOTHERGILL *v.* PRICE. (*a.*)

*Will—Construction—Vesting—Chattels given in trust for person entitled to "actual possession" of real estate—Other personalty given in trust for person for time being "entitled to possession" of real estate—Death of first tenant in tail in lifetime of tenant for life.*

*Chattels bequeathed as heirlooms upon trust to go along with and be enjoyed by the person for the time being entitled to the "actual" possession of settled real estate do not vest absolutely in a tenant in tail of the real estate who dies in the lifetime of the tenant for life.*

In re Angerstein, 44 *W. R.* 152, [1895] 3 *Ch.* 883, *followed.*

*Personalty given upon trust for the person for the time being entitled to the possession of real estate as far as the rules of law and equity will permit vests absolutely in the first tenant in tail at birth, unless there be a clear expression of intention that it shall not so vest, and words declaring the testator's general desire that the income of certain personalty shall go in keeping up the real estate, are not such an expression of intention as will prevent the personalty so vesting.*

Adjourned summons for the determination of the questions—first, to whom (subject to the interest of the tenant for life) belonged certain furniture specifically bequeathed by the will of the late Rowland Fothergill; secondly, to whom (subject as aforesaid) belonged a sum of £70,000, bequeathed by a codicil to the will upon the trusts declared in the will concerning the testator's residuary personalty.

The testator by his will, dated the 23rd of February, 1869, devised the freeholds called the Hensol estate to the present tenant for life, and after her death to her sons successively in tail, with remainders over.

He bequeathed certain furniture, &c., then in Hensol Castle (on the said estate) to trustees upon trust to permit the same to go along with and be used and enjoyed so far as the rules of law and equity would permit by the person who under the limitations above mentioned should for the time being be in the actual possession or entitled to the receipt of the rents and profits of the Hensol estate, in the same manner as if they had been freeholds of inheritance and had been included in the devise of the Hensol estate. He bequeathed his residuary personal estate to trustees upon trusts for sale, payment of debts, &c., out of the proceeds and investment of the surplus, and proceeded as follows: "Now I declare that the said trustees or trustee shall pay and apply the interest, dividends, rents, profits, and annual income of my residuary estate to or for the benefit of the person who for the time being shall under and by virtue of this my will be entitled to the possession or receipt of the rents of my Hensol estate, and shall otherwise hold my residuary estate upon such trusts that the annual income thereof shall as far as possible be enjoyed in like manner as if it had formed part of the rents and profits of the Hensol estate, it being my wish that the income of my residuary estate shall assist in keeping up and be in augmentation of the rents and profits of the Hensol estate."

By a codicil the testator bequeathed the sum of £70,000—such sum to be considered the first charge by way of legacy on his residuary estate and to be treated as payable on the day of his death—to his trustees upon the trusts declared in his will concerning his residuary estate.

The testator died on the 19th of September, 1871.

The present tenant for life had three children and no more—namely, the late Sir Rose Price; the present tenant in tail; and a third son, still an infant.

Sir Rose Price died on the 9th of June, 1901, a bachelor and intestate, and without having barred the entail, and letters of administration of his estate were taken out by his mother, the tenant for life.

The husband of the tenant for life had died on the 16th of April, 1899.

*Borthwick*, for the tenant for life and the third son,

* Now reversed on appeal, [1902] 2 Ch. 793.

(*a.*) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

argued that—subject to the life interest—the furniture, the residue, and the legacy of £70,000 had become absolutely vested in the late Sir Rose Price.

*Hewitt*, for the present tenant in tail.

*F. Thompson*, for the trustees.

*Cur. adv. vult.*

SWINFEN EADY, J.—The first question raised by this originating summons is whether the pictures, prints, and other chattels at Hensol Castle, specifically bequeathed to go along with the Hensol estate, vested absolutely in the late Sir Rose Price (who was killed in the South African War on the 9th of June, 1901), subject to his mother's interest therein; or whether the defendant, Sir Francis Cardor Rose Price, will become entitled to the same if he shall survive his mother.

This point depends upon the proper construction to be placed upon the will of the late Rowland Fothergill. [His lordship here read the specific bequest. Mr. Borthwick, who appeared for the plaintiffs, one of whom is the legal personal representative of the late Sir Rose Price, stated that, having regard to the expression "actual possession" contained in the will, he could not distinguish the present case from *Lord Scarsdale* v. *Curzon*, 8 W. R. Ch. Dig. 40, 1 Joh. & Hem. 40, and *In re Angerstein, Angerstein* v. *Angerstein*, 44 W. R. 152, [1895] 2 Ch. 883, and that as Sir Rose Price died in his mother's lifetime, and without ever having come into the possession of the estate, he could not contend that the specific chattels had become absolutely vested in him.

The other question raised by the summons is whether the trust funds representing the legacy of £70,000 given by the first codicil and the residuary estate of the testator vested absolutely, in the events which have happened, in the late Sir Rose Price. This depends upon the proper construction to be placed upon another portion of the will of the same testator. [His lordship here read the residuary gift in the will and the codicil giving the £70,000.]

The effect of these bequests is that the £70,000 and the residuary estate are held upon the same trusts (as far as possible) as the Hensol estate; the income of the personal estate including the rents of any real estate purchased, is to be applied as if they formed part of the rents and profits of the Hensol estate, and to assist in keeping up, and be in augmentation of the rents and profits of the Hensol estate, and this not for any definite or limited time, but in perpetuity.

The general rule is that a gift of personalty to the persons for the time being entitled to real estate, so far as the rules of law and equity permit, vests absolutely, not in a tenant for life of the real estate, but in the first tenant in tail at birth, whether he comes into possession or not: *Foley* v. *Burnell*, 1 Bro. Ch. Cas. 274, 4 Bro. Parl. Cas. 319; *Lord Scarsdale* v. *Curzon*. In *Cox* v. *Sutton*, 25 L. J. Ch. 845, 5 W. R. Ch. Dig. 26, Wood, V.C., affirmed the general rule in the clearest terms, although in that case, upon the special language of that will, he was able to arrive (not without difficulty) at the conclusion that the personalty was given as a contingent gift to a person who should answer a particular description at a particular date. If there be a direction that the personalty is not to vest in a tenant in tail dying under twenty-one, this will prevent the personalty from vesting in a tenant in tail by purchase dying an infant: *Christie* v. *Gosling*, L. R. 1 H. L. 279, 15 W. R. H. L. Dig. 30; *Harrington* v. *Harrington*, L. R. 5 H. L. 87, 20 W. R. H. L. Dig. 25; *Martelli* v. *Holloway*, L. R. 5 H. L. 532, 21 W. R. Dig. 278. And if the gift of personal estate be to the person actually seised at the death of the tenants for life or to the person seised of the actual freehold, which is defined as freehold in possession, or if there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded. In *Potts* v. *Potts*, 3 Jo. & Lat. 353, Lord St. Leonards said, at p. 368: "If a plain intention be expressed that no person shall take the chattels absolutely who does not live to become entitled to the possession of the real estate, the court must execute that intention."

Upon a careful consideration of the will and codicil I am unable to find any such intention expressed in the case before me, and as was said by Lord St. Leonards in *Potts* v. *Potts*, "It is firmly settled that the court will not introduce in such cases the restrictions which conveyancers know how to introduce with apt words."

The personal estate is given in the present case by reference to the real estate, the income of the personal estate being directed to go for an indefinite period with the rents of the real estate, and in my opinion the £70,000 and residuary personalty vested absolutely in the late tenant in tail, there not being contained in the will any sufficient direction to preclude such vesting, and to carry these interests to the next tenant in tail.

Indeed the present case appears to me to be a stronger one in favour of the first tenant in tail taking an absolute interest than *Martelli* v. *Holloway*. There the will contained a proviso that the personal estate should absolutely belong to such persons, &c., as should first attain twenty-one and become entitled to an estate in tail in possession in the real estate, and it was held that a person had become absolutely entitled to the personal estate, although he had only a vested estate tail in the real estate in remainder, expectant on his father's life estate.

The answer to the second question will therefore be that the late Sir Rose Price became absolutely entitled to the legacy and residuary personalty subject to the interest of the plaintiff Dame Isabella Elizabeth Price-Fothergill therein.

Solicitors, *Iliffe, Henley, & Sweet; Field, Roscoe, & Co.*

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K. B. Div. (Lord Alverstone, L.C.J.) } Aug. 4, 5; Oct. 27.

SHEFFIELD (CORPORATION OF) v. BARCLAY AND OTHERS. (*a.*)

*Company—Indemnity—Forged transfer of stock—Innocent transferee—Loss incurred by company—Liability as between company and transferee to bear loss—Sheffield Corporation Act*, 1883 (46 & 47 *Vict. c. lvii.*), *ss.* 27, 29, 30.

*The transferee of a forged transfer of corporation stock, innocently and without negligence presented such transfer to the corporation requesting them to register the transfer. The corporation, acting without negligence, accepted and registered the transfer, and in due course issued certificates to the transferee, one of the defendants, as holder and owner of the stock, thereby incurring liability to the real owner of the stock whose name had been forged, and in an action subsequently brought against them by the latter they were ordered to make good the loss sustained by him.*

*Held, that as between the corporation and the transferee, both innocent parties, the loss incurred by the former in acting on the forged transfer must be borne by the*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

*transferee who, although he had acted in good faith and without negligence, had sent the forged transfer to the corporation requesting them to act upon the same.*

*Opinion of* Lindley. J., *in* Simm *v.* Anglo-American Telegraph Co., 28 *W. R.* 290, 5 *Q. B. D.* 188,, *at p.* 195, *as to the liability of the transferee, dissented from.*

This was an action tried by Lord Alverstone, L.C.J., without a jury.

The action was brought by the lord mayor, aldermen, and citizens of the city of Sheffield against Messrs. Barclay & Co., bankers, to recover the sum of £11,487 17s. 5d., being the amount of principal and interest of certain corporation stock which belonged to two trustees, and was transferred to a nominee of the defendants under a transfer purporting to be executed by one of the said trustees, but which in reality was a forgery.

The question now raised was as to which of the two innocent parties should suffer for the fraud of the third party.

The facts of the case, as stated in the statement of claim and admitted in the statement of defence, were as follows:

On the 29th of March, 1893, Messrs. Timbrell and Honnywill were the owners and holders of £8,200 3½ per cent. 1883 Stock, redeemable 1915, in the Sheffield Corporation, and as such owners and holders were duly registered in the plaintiff corporation's stock register.

The defendants, with a letter addressed to the plaintiffs, dated the 15th of April, 1893, presented to the plaintiffs a deed of transfer dated the 11th of April, 1893. purporting to be duly executed by Messrs. Timbrell and Honnywill as a transfer by them to the defendant Edward E. Barclay of the stock, and by such letter the defendants requested the plaintiffs to register the transfer and in due course to issue certificates to the defendant Edward E. Barclay as holder and owner of the stock in accordance with the terms of the transfer.

The deed of transfer had not been executed by Honnywill, and in so far as it purported to have been executed by him was a forgery.

In an action brought in 1899 in the Chancery Division (by order of the 11th of January, 1901, transferred for trial to the Queen's Bench Division) by Honnywill against the Mayor, &c., of Sheffield (the present plaintiffs) Honnywill claimed that the defendants (the corporation) should be ordered to rectify their register by inserting therein his name as the holder and owner of the stock or should appropriate or purchase and register in his name the amount of the stock and shou'd pay to him such interest and dividends as had become payable from the date of the transfer, on the ground that he (Honnywill) had not executed the transfer, and that in so far as it purported to have been executed by him was a forgery and null and void.

By a letter of the 13th of November, 1900, the defendants agreed to be bound by the decision in the action of Honnywill against the corporation on the issue whether the signature of Honnywill to the deed of transfer was a forgery or not. The jury found that the signature was a forgery, and the defendants were now estopped from alleging the contrary.

In that action Honnywill recovered judgment dated the 13th of May, 1901, whereby, so far as was now material, it was ordered that the present plaintiffs (being the defendants in that action) should appropriate or purchase and register in the name of Honnywill £8,200 3½ per cent. Redeemable Stock of the plaintiff corporation, and deliver to Honnywill a certificate of that stock in his name, and further, that Honnywill should recover from the present plaintiffs (being the then defendants) a sum of money representing the dividends which from time to time would have accrued due and become payable to him upon the stock, with interest thereon at 3½ per cent., and costs to be taxed.

In compliance with this judgment the plaintiffs in this action, which was commenced on the 23rd of October, 1901, purchased the stock for £8,645 10s., and appropriated the same to Honnywill, and paid to him a sum of £2,524 1s. 2d. in respect of dividends and interest as ordered by the judgment, and also paid £318 6s. 3d., Honnywill's taxed costs of the action, and, further, became liable to pay their own costs.

Under the above circumstances the plaintiffs submitted as a matter of law that the defendants were liable to repay to them the moneys so paid as aforesaid, and to indemnify the plaintiffs in respect of the liabilities, and they claimed the above-mentioned three sums, amounting to £11,487 17s. 5d., and a declaration that they were entitled to be indemnified.

In their defence the defendants, while admitting the facts in the statement of claim, submitted that they disclosed no cause of action against the defendants; that the defendants were *bonâ fide* holders for value of the transfer, and had neither knowledge nor notice, nor any means of knowledge, that any part of the same was forged, but honestly believed that the same was a genuine transfer at the time when they sent to the plaintiffs the letter of the 15th of April, 1893, and that the plaintiffs had better opportunity of judging of the genuineness of the transfer than the defendants; and alternatively that the plaintiffs' claim (if any) was barred by the Statute of Limitations; and they also pleaded, as showing that the plaintiffs were estopped from asserting this present claim against the defendants, that the plaintiffs accepted the transfer to the defendant E. E. Barclay and duly registered him as the holder of the stock, and that he on the 28th of April, 1893, executed a fresh transfer to Messrs Young and Macdonald, and that this fresh transfer was accepted by the plaintiff who duly registered Young and Macdonald as the holders of £8,000 of the stock, and issued a certificate to them accordingly, as well as a certificate to a Miss Cockayne as the holder of the balance of £200 stock; that the plaintiffs took no steps to verify the genuineness of the transfer of the 15th of April, 1893, but continued to act on it as a genuine transfer and continued to pay Messrs. Young and Macdonald and Miss Cockayne the dividends due thereon, and that the defendants were thereby led to believe that the transfer was genuine and lost their remedies against the persons who had forged and delivered the transfer to them.

The Sheffield Corporation Act, 1883 (46 & 47 Vict. c. lvii.), provides as follows:

Section 27. Subject to the provisions of this part of this Act every corporation stockholder may transfer all or any part of his stock in books or by deed.

Section 29. (1) If and where the resolution for creation of any portion of corporation stock makes the same transferable by deed and not in books the provisions of this section shall apply and have effect but not otherwise. (2) Every transfer of corporation stock so transferable shall be by deed. (4) The deed of transfer when duly executed shall be delivered to and kept by the corporation or the registrar, and the corporation or the registrar shall enter a memorial thereof in a book to be called the Register of Transfers of Corporation Stock, and shall indorse on the deed of transfer a notice of that entry.

Section 30. (1) The corporation or the registrar before allowing any transfer of stock may, if the

circumstances of the case appear to them or him to make it expedient, require evidence of the title of any person claiming a right to make the transfer. (2) That evidence shall be a statutory declaration of one or more competent persons or of such other nature as the corporation or the registrar with the approval of the corporation may require.

*Danckwerts, K.C.* (*Bankes, K.C.*, and *H. T. Waddy* with him), for the plaintiffs.—The loss caused by the fraud of the third party ought to be borne by the defendants. The sending on of the transfer by the defendants to the plaintiffs was in law a representation by them to the plaintiffs that they believed the transfer to be a genuine transfer, and that they had the authority of the registered owner to do so, and the plaintiffs acted on the representation implied from the act of the defendants. The representation of the defendants was a request to the plaintiffs to do a lawful act. This the plaintiffs acted upon, and thereby sustained the loss which they now sought to recover. There is an implied promise by the defendants to indemnify the plaintiffs. In *Dugdale* v. *Lovering*, 23 W. R. 391, L. R. 10 C. P. 196, Lord Esher (then Brett, J.) said that the implication rested "merely on the fact of the plaintiff having done an act at the request of the defendant which was not manifestly illegal or tortious to his knowledge, but which exposed him to an action." In *Adamson* v. *Jarvis*, 4 Bing. 66, the principle is clearly stated by Best, C.J., at p. 73: see also *Humphrys* v. *Pratt*, 5 Bli. N. S. 154, and *Betts* v. *Gibbins*, 2 A. & E. 57. In *Toplis* v. *Grane*, 5 Bing. N. C. 636, Tindal, C.J., at p. 650, says: "Where an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, yet, if such act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiffs against the consequences thereof": see also American cases, *Brown* v. *Howard Fire Insurance Co.*, 42 Maryland, 384, and *Boston and Albany Railroad Co.* v. *Richardson*, 135 Mass. 473. It is true that in *Simm* v. *Anglo-American Telegraph Co.*, 28 W. R. 290, 5 Q. B. D. 188, Lindley, J., at pp. 190-6, expressed his opinion that it is the duty of the company in such cases as this to look after their own register, and that in the case of a forged transfer being innocently presented the loss must fall upon the company. But on that case going up to the Court of Appeal that view was expressly dissented from by both Bramwell and Cotton, L.JJ., 28 W. R. 290, 5 Q. B. D., at p. 201. Further, the plaintiffs' claim is not barred by the Statute of Limitations, for the cause of action did not arise in 1893, when the defendants requested the plaintiffs to register the transfer, but only when the plaintiffs were compelled to pay Honnywill: *Tunstall* v. *Bartlett*, 14 L. T. Rep. 400, 14 W. R. Ch. Dig. 121, and *Collinge* v. *Heywood*, 9 A. & E. 633. No cause of action arises until the damage or injury arises.

They also referred to *Collen* v. *Wright*, 6 W. R. 123, 8 E. & B. 647, and *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127, 34 W. R. Dig. 108.

*Haldane, K.C.* (*F. R. Y. Radcliffe* with him), for the defendants.—The plaintiffs' case can only rest on the doctrine laid down in *Collen* v. *Wright* or an implied representation as to genuineness. In *Brown* v. *Howard Fire Insurance Co.* no question as to the right to any indemnity was discussed, and *Boston and Albany Railroad Co.* v. *Richardson* turned on warranty of authority as based on *Collen* v. *Wright*. If the plaintiffs' case comes within the principle of *Collen* v. *Wright*, then their claim is barred by the Statute of Limitations, as the time would run from the breach of contract and not from the subsequent damage, and the subsequent damage would not take the case out of the statute: *Gibbs* v. *Guild*, 30 W. R. 407, 8 Q. B. D. 296, at p. 302, 30 W. R. 591, 9 Q. B. D. 59; *Short* v. *McCarthy*, 3 B. & Ald. 626. The question of indemnity or of a representation subsequently acted upon or fraudulent concealment does not arise here. The corporation were bound to keep their own register of shareholders: *In re Bahia and San Francisco Railway Co.*, 16 W. R. 862, L. R. 3 Q B. 584, per Cockburn, C.J. The defendants never represented that the transfer was genuine. They merely wrote the letter of the 15th of April, 1893, on a printed form enclosing the transfer. The corporation had the discretionary power of making such inquiry as they might think fit. In *Simm* v. *Anglo-American Telegraph Co.*, Lindley, J., says, 5 Q. B. D., at p. 195, "And it appears to me that a duty is thrown on the company to look to their own register . . . and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think the true view is this, that there being no negligence in the sense of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers between innocent parties, the loss must fall upon the company, and their claim for indemnity . . . fails." The law as to misrepresentation was considered in *Leather* v. *Simpson*, 19 W. R. 431, L. R. 11 Eq. 398, at p. 406; *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337; *Beattie* v. *Lord Ebury*, 22 W. R. 897, L. R. 7 H. L. 102; *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82; and in *Oliver* v. *Bank of England*, 50 W. R. 340, [1902] 1 Ch. 610. A misrepresentation is not actionable unless it is deceitful, or unless there is a special duty or obligation on the party to make it a representation. This action is only maintainable upon the ground of deceit or warranty of authority. It is admitted that there was no deceit; and there was no warranty of authority or any evidence to show that the defendants represented that they had authority.

The case of *Robinson* v. *Reynolds*, 2 Q. B. 196, and section 30 (1) of the Sheffield Corporation Act, 1883, were also referred to.

*Danckwerts, K.C.*, replied.

*Cur. adv. vult.*

Oct. 27.—Lord ALVERSTONE, L.C.J., read the following judgment: The question raised in this action is one of very great importance. The action was brought by the Corporation of Sheffield against Messrs. Barclay & Co., the well-known bankers, to recover the sum of £11,487 17s. 5d., being the amount of principal and interest of certain corporation stock which belonged to certain trustees named Timbrell and Honnywill, and was transferred to a nominee of the defendants under a transfer purporting to be executed by Honnywill, but which, for the purpose of this action, must be taken to have been a forgery. The facts may be very briefly stated. Prior to the 13th of April, 1893, £8,500 Sheffield Corporation Redeemable Stock was transferred to the names of A. A. Timbrell and A. O. Honnywill, who were, I understand, trustees of a certain estate. The certificate of the stock in these names bearing date the 13th of April, 1893, was produced before me. The stock had stood in the name of Sutcliffe from 1886, but had been transferred, as I was informed, on the change of trustees to Timbrell and Honnywill on the 29th of March, 1893, and on the 13th of April, 1893, a

certificate was issued in their names. Upon the 11th of April, 1893, a transfer of £8,200 of this stock to E. E. Barclay, a representative of the defendants, purporting to be executed by Timbrell and Honnywill, was handed to the defendants Barclay & Co. For the purpose of this case it must be taken that the signature of Honnywill to the transfer of the 11th of April was a forgery: see par. 5 of the statement of claim, and par. 1 of the defence. On the 15th of April, 1893, the defendants, Messrs. Barclay & Co., sent the transfer of the 11th to the corporation, enclosed in a letter in the following terms: "54, Lombard-street, London, E.C., 15th April, 1893. Messrs. Barclay, Bevan, Ransom, & Co., present their compliments to the registrar of the Sheffield Corporation and beg to send enclosed the transfer of £8,200 3½ per cent. 1883 stock, and will be obliged by his registering the same in the company's books in the new name of their Mr. E. E. Barclay, sending them the new certificates in due course. Messrs. Barclay & Co. also enclose the amount of the registration fee. The Registrar, Sheffield." This was followed by a letter of the 17th from Mr. Sarkas, the registrar, acknowledging the receipt, but pointing out that the registration fee had not been enclosed, and on the 18th of April Messrs. Barclay & Co. sent the registration fee. On the 28th of April, 1893, E. E. Barclay, the transferee named in the forged transfer of the 11th of April, executed a transfer of £8,000 of the stock to Messrs. Young and Macdonald, and upon the 12th of May, of the balance, £200, to Mary Florence Cockayne. Upon the 1st of June the plaintiffs issued certificates to Young and Macdonald for the £8,000 stock and to Mary Cockayne for the £200. In the year 1901 an action was brought by Honnywill against the corporation, claiming the rectification of the register by inserting his name as the holder of the £8,200 stock transferred to Barclay under the forged transfer and the interest and dividends paid thereon. In that action the jury found that the transfer was a forgery and had not been executed by Honnywill or with his authority, and for the purpose of this action it was agreed that the defendants were bound by that finding. The duties of the corporation in respect of the transfer of stock are controlled by sections 27 to 32 of the Sheffield Corporation Act, 1883. Reliance was placed by the plaintiffs upon the language of sub-section 4 of section 29, and by the defendants on sub-section 1 of section 30. There was no evidence before me either that the plaintiffs or their agents, or the defendants or the officials, were guilty of negligence, and I find as a fact that there was no negligence either on the part of the defendants or their agents, or on the part of the registrar or of any official of the corporation.

Before considering whether any of the above-mentioned statutory provisions have any material bearing upon the case I had better state my view of the law. The case for the plaintiffs was based on two main grounds which appear to me to involve the same considerations, although possibly somewhat different arguments may be used with regard to each ground. It was said first that the plaintiffs had done a lawful act at the request of the defendants, which lawful act had caused the plaintiffs damage, and that, therefore, the defendants were liable for the damage so caused to the plaintiffs. It was further contended on behalf of the plaintiffs that, even if the defendants were not liable because the plaintiffs had done an act at their request, the sending in of the transfer implied an undertaking by the defendants to indemnify the plaintiffs, or was a warranty by the defendants that the transferor had a right to transfer. A I have already said, it does not seem to me that the particular form in which the plaintiffs' claim is alleged is of much assistance in solving the question which has to be decided. The real question—and it is to my mind one of the greatest difficulty—is, what is the true nature of the request or representation, either made in fact or implied in law, from the act of sending in a transfer to be registered, or what is the nature of the transaction between the parties, and on whom should the loss fall as between two innocent parties if it turns out the transfer is forged? The plaintiffs relied strongly on the enunciation of the law contained in the judgment of Lord Esher in *Dugdale* v. *Lovering*, following *Toplis* v. *Grane*, and *Betts* v. *Gibbins*, to the effect that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, the defendant is bound to indemnify the plaintiffs against the consequences thereof. As I ventured to point out in the course of the argument before me, there are undoubtedly cases in which our law recognizes that a request so acted upon does involve the party making the request in the obligation to indemnify the party who so acted. Such cases arise in connection with warranty of agency, representations made with regard to the custody of goods, and no doubt other instances might be given. The difficulty in this case is to decide whether the representations made or implied by the sending in of a transfer fall within the rule as enunciated by Tindal, C.J., in *Toplis* v. *Grane* or not. For the defendants great reliance was very naturally placed upon the judgment of Lord Lindley, then Lindley, J., in the case of *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D., at p. 195. I have felt very much pressed by that opinion. It is that of a learned judge of very great experience in this branch of the law, and unusually qualified by that experience to lay down the rule. That the bearing of the opinion of Lord Lindley may be understood it will be convenient to make a brief statement of the facts which arose in the case of *Simm* v. *The Anglo-American Telegraph Co.* In that case a firm of the name of Burge, who stand in the position corresponding to that of Messrs. Barclay, presented to the Anglo-American Telegraph Co., through Messrs. Spurling and Skinner, acting on their behalf, a transfer purporting to be executed by one Coates, which was in truth a forgery. This transfer was registered by the company and the stock transferred into the names of Spurling and Skinner, who were in fact agents for Burge. The certificate of the stock, though prepared, had never been issued to Spurling and Skinner; so, as was pointed out in the Court of Appeal, no question of estoppel by the issue of the certificate arose, as in the cases of *In re Bahia and San Francisco Railway Co.*, and *Hart* v. *Frontino, &c., Gold Mining Co.*, L. R. 5 Ex. 111, 18 W. R. Dig. C. L. 57. Before the case went to the Court of Appeal, Burge & Co. were joined as plaintiffs, so that the real question between them and the Anglo-American Co. was whether they could demand the issue of a certificate. The other plaintiffs in the first action, Messrs. Simm and others, had purchased the stock from Messrs. Burge & Co., and claimed that Messrs. Burge, their transferors, should be registered as holders. The other action was brought by the company against Spurling and Skinner, who had acted as agents for Burge in handing in the forged transfer, for an indemnity. Upon these facts the opinion of Lord Lindley, then Lindley, J., was expressed in the following terms: "And it appears to me that a duty is thrown on the company to look to their own register, which involves, of course, the looking after the transfer of stock or shares standing in the names

of persons on the register; and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty or the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think the true view is this—that, there being no negligence in the sense of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers between innocent parties, the loss must fall upon the company, and their claim for indemnity against Spurling and Skinner or against Burge & Co. fails. The utmost which the company are entitled to say is this: 'It was your duty not to produce to us, to be acted upon, any transfer which you knew or suspected to have been forged.' I think that the duty of the persons bringing the transfer does not go beyond this. Can the claim against Skinner and Spurling be sustained by looking at it from what I call a broader point of view? The first of these actions is brought against the company, and the second is in reality brought against Burge & Co. Can it be said, even if the question be looked at as between Burge & Co. on the one side and the company on the other, that the loss ought to fall on Burge & Co. rather than on the company? I do not think it can. It appears to me that the case is analogous to the case of a forged cheque, and as a banker paying a forged cheque to an innocent holder for value cannot recover back its amount and is compelled to pay it twice over, so here the company must pay the amount of the stock twice over. The duty being cast upon the company to look after the register and the transfers; it appears to me that between two innocent parties the company are not entitled to claim compensation from Burge & Co., nor to resist at Burge & Co.'s expense the recognition of that title which they themselves have created by their own act. It appears to me that Burge & Co. are entitled to say, 'We did not deceive you; you made inquiries, and you accepted us as stockholders and put us on the register, and you cannot now turn round and say that as between you and us we do not hold that position which you have led us to believe that we are entitled to.'" This is no doubt a very strong expression of opinion, and a very clearly expressed view. It proceeds from one of the most able and distinguished judges that has ever adorned the English bench. If I had thought that that opinion had been delivered after the full consideration of the point raised before me, and if it had not been the subject of further examination in the Court of Appeal, I should have felt bound by that decision, and I need scarcely repeat that in differing from it, as I feel bound to do, I do so with the very greatest diffidence and hesitation. When the case of *Simm* v. *Anglo-American Telegraph Co.* was considered in the Court of Appeal, the particular judgment in which that opinion was delivered was not reviewed by the Court of Appeal. The action by the Anglo-American Co. was against an agent of the persons who stand in the position of Messrs. Barclay in this case. When, therefore, that case came to be considered in that court, inasmuch as the decision was in favour of the company as against Burge, the person on whose behalf the forged transfer, purporting to be executed by Coates, had been presented to them, the company did not press their appeal in the action they had brought against Spurling; and Bramwell, L.J., at p. 205, dealing with the action against Spurling, said: "I wish it to be distinctly understood that I do not express any opinion whether the second action would have been maintainable if any damage had accrued to the company; cogent arguments, no doubt, may be adduced in favour of either view; but the company are willing to pay the costs of the action brought by them rather than have a doubtful question discussed, and they are content that judgment be recorded against them, although technically they do not consent to it so as to preclude themselves from appealing, if it be wished to take the opinion of a higher tribunal." And the other Lords Justices expressed no opinion. I have, however, to consider how far the decision in *Simm's case* in the action brought by Simm against the company supports the plaintiff's claim in this case, or affords ground for questioning the principle of the decision laid down by Lord Lindley. It seems to me that the decision of the Court of Appeal did decide that as between two innocent parties, one of whom had innocently and without negligence handed in a forged transfer, upon which forged transfer the company were asked to act, the loss was to fall upon the person who handed in the transfer, or, in other words, that they brought that case within the rule to which I have referred, that when one of two innocent persons must suffer, the party who has innocently put forward the request upon which the other one has acted must bear the burden. If I am right in this view, then the opinion of Lindley, J., does not solve the question in this case, because he did not consider the case from the point of view of deciding which of two innocent parties must suffer the loss occasioned by the act done. It is to be noted in this case that, as pointed out by Mr. Bankes in the course of his argument, the damage occasioned by the defendants was not damage caused so much by the forged transfer having been sent in as by the defendants having themselves acted upon it and sent in the subsequent transfers to Macdonald and Cockayne. *Simm's case* decides that Messrs. Barclay could not have claimed to be registered—see judgment of Bramwell, L.J., at p. 203—so that the corporation were not estopped from denying that Barclay was a transferee until they had issued fresh certificates to Messrs. Young and Macdonald and Miss Cockayne: see *In re Bahia and San Francisco Railway Co.*, and *Hart* v. *Frontino, &c. Gold Mining Co.*

I therefore come to the conclusion that in this case, as between the two innocent persons, the plaintiffs and the defendants, the loss should be borne by the defendants, who innocently caused the plaintiffs to act upon an instrument which turned out to be invalid. Reliance was placed by Mr. Radcliffe upon the terms of the letter of the 15th of April. I do not base my judgment upon the express terms of that letter. It seems to me no more than an ordinary request to register, and in the same way the expression "duly executed" in sub-section 4 of section 29 does not, in my opinion, carry the case any further. With regard to sub-section 1 of section 30, relied upon by Mr. Haldane, I do not think it affords the defendants any defence—see the reasoning I have already referred to in the judgment of Bramwell, L.J., 5 Q. B. D., at p. 203—and, except as bearing upon a question of negligence, it does not seem to me that it affects the point which I have to decide. My attention was called by Mr. Danckwerts to two American cases, one that of the *Boston and Albany Railroad Co.* v. *Richardson and Others*, and the other that of *Brown* v. *Howard Fire Insurance Co.* The first of these cases is an undoubted decision in favour of the view presented by the plaintiffs, but I have not sufficient information as to the American law to say whether it is a direct authority, because it may be that the law as to innocent misrepresentation laid down by the House of Lords in *Derry* v. *Peek*, does not apply in that state of America. The case of

*Oliver* v. *Bank of England* does not appear to me to afford me much assistance. That case was based entirely on implied warranty, and the rule in *Coleln* v. *Wright* is undoubtedly left untouched by *Derry* v. *Peek*. Speaking for myself, I should not have decided in favour of the plaintiffs if it had been necessary to rely upon the doctrine of *Collen* v. *Wright*.

For the above reasons my judgment must be for the plaintiffs for the sum of £11,169 11s. 2d. As regards the other item, £318, unless some arrangement was made between the parties with regard to the costs of the action brought by Honnywill, I do not see how they can be recovered in this action; if, however, any arrangement was made, this can be set right before the judgment is finally entered.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Richard F. & C. L. Smith*, for *Henry Sayer*, Town Clerk, Sheffield.

Solicitors for the defendants, *Maples, Teesdale, & Co.*

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## Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) Dec. 17.

SMITH v. NORMANTON COLLIERY CO. (*a*.)

*Master and servant—Employers' liability—Accident—Compensation—Accident arising out of and in the course of the employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

*A workman employed in a colliery was suspended from work for the day and told to go to the bottom of the pit. If he had immediately gone to the bottom of the pit he could not have been taken out of the pit for nearly three hours. Instead of going to the bottom of the pit he went into a "pass-by" and remained sitting there. When he had been there a little more than two hours he was accidentally injured by a fall of mineral. In an arbitration under the Workmen's Compensation Act the county court judge held that the workman was not entitled to compensation, on the ground that, though he was not guilty of serious and wilful misconduct, the accident did not arise out of and in the course of his employment.*

*Held, that the county court judge was justified in so holding.*

Appeal from an award of the judge of the Alfreton County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a boy of the age of sixteen, and was in the employment of the respondent colliery company as a gang boy.

On the 2nd of June, 1902, he was at work in the respondents' pit with two other boys under a "corporal" named Taylor.

About 1.15 an altercation took place between the applicant and Taylor, the result of which was that Taylor told him to put his clothes on and suspended him from work for the day.

There was a conflict of evidence as to whether Taylor told him to go to the bottom of the pit.

From the place where the applicant had been working a tramway ran to the bottom of the pit, which was distant about 240 yards.

The applicant went into a "pass-by" to put his clothes on, and then remained sitting in the pass-by instead of going to the bottom of the pit. If he had immediately gone to the bottom of the pit he could not have been taken out of the pit till 4 o'clock. About 1.30 the deputy of the colliery, a man named Lane, saw the applicant in the pass-by, and, on hearing his account of what had happened, told the applicant to go to the bottom of the pit. The applicant still continued sitting in the pass-by till 3 40, when he was accidentally injured by a fall of mineral.

The county court judge found that the applicant had not been guilty of serious and wilful misconduct, for, in his opinion, it was not proved that the corporal, Taylor, had ordered him to the pit-bottom, and, although the deputy, Lane, had done so, still the order had not been given in such a distinct and peremptory manner as to make disobedience to it serious and wilful misconduct considering the nature of the order. But he found that the applicant had no business and ought not, after having been stopped from work, to have stayed in the pass-by, and that as the accident happened to him over two hours after he had stopped work for the day, and in a place where he had at the time of the accident no right to be, the accident did not arise out of and in the course of his employment. He accordingly made an award in favour of the respondents.

The applicant appealed.

*Hextall*, for the applicant.

*Ruegg, K.C.*, and *Appleton*, for the respondents.

COLLINS, M.R.—In my opinion the appeal fails. The applicant, in order to succeed, must show that the accident arose out of and in the course of his employment. The applicant was a gang boy employed in the respondents' colliery, and a dispute took place in the pit between him and the corporal, Taylor, which resulted in Taylor's dismissing him for the day. There was a question whether at the same time Taylor ordered him to go to the bottom of the pit, where he would have to wait for between two and three hours before he could leave the pit. He went part of the way in that direction, and then went into one of the refuges made by the side of the tramway and stopped there. After some time he was seen there by the deputy of the colliery, and was told by him to go to the bottom of the pit. Nevertheless he remained there for two hours, when part of the roof came down and injured him.

The county court judge came to a decision in favour of the respondents, having arrived at the following findings of fact. [His lordship read the findings of the county court judge as stated above.] The grounds of that decision are grounds of fact, and inasmuch as there was evidence on which the county court judge could fairly come to that conclusion, and he has not misdirected himself on any point of law, this court ought not to interfere. It must be a question for masters and men to determine when and under what circumstances work shall be considered to have stopped. There must come a time, after a man has been suspended from work, when he cannot any longer be said to be acting in the course of his employment. It may be difficult to draw the line, but it is a question of fact in each particular case. Here the county court judge found that the applicant had received an order which debarred him from remaining where he was, and that at the time of the accident he was loitering in a place where he ought not to have been. The appeal must therefore be dismissed.

ROMER and MATHEW, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the applicant, *Frank Osbaldeston & Co.*, for *Green & Williams*, Nottingham.

Solicitor for the respondents, *C. F. Elliott Smith*, Mansfield.

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) Dec. 12.

WAGSTAFF *v.* PERKS & SON.
FIRTH, THIRD PARTY. (*a.*)

*Master and servant—Employer's liability—Accident—Compensation—Indemnity—Sub-contractor—"Undertaker"—Sub-contractor to find labour only for all plastering work to house—Materials supplied by contractor—Workmen's Compensation Act,* 1897 (60 *&* 61 *Vict. c.* 37), *ss.* 4, 7.

*The contractor for the building of a house sublet the plastering work to F., who agreed to supply and control the labour only for it, the contractor to find the materials and plant for such work.*

*One of F.'s workmen, while engaged on the plastering work, met with an accident, and recovered compensation under the Workmen's Compensation Act,* 1897, *from the contractor.*

*The contractor appealed from that part of the award so far as it declared that he was not entitled to an indemnity from F.*

*Held, allowing the appeal, that F. had agreed to execute a substantial part of the work of construction, although only supplying and controlling the labour therefor; that he was consequently an "undertaker" in regard to that part, and that he was bound to indemnify the contractor.*

*Decisions in* Mason *v.* Dean, 48 *W. R.* 353, [1900] 1 *Q. B.* 770, *and* Cooper *v.* Wright, [1902] *A. C.* 302 (ante, *p.* 12), *explained and followed.*

This was an appeal by Messrs. Perks & Son from a decision of his Honour Judge Smyly, K.C., given at the Derby and Long Eaton County Court under the Workmen's Compensation Act, 1897, so far as it declared that they were not entitled to indemnity by the third party.

The applicant for compensation was a plasterer named George Wagstaff, in the employment of the third party, Handel Firth.

Messrs. Perks & Son had contracted to build a house in Acton-road, Long Eaton, and they entered into a sub-contract with Firth for the plastering work of the whole building for a fixed sum, the labour alone to be found by Firth, and all materials and plant to be supplied by Perks & Son. While employed on the plastering work, Wagstaff was engaged in punching the "skimming," a mixture of lime, sand, and water used for a finishing coat, through a sieve, when some of the lime flew up and permanently injured his eye.

Wagstaff took proceedings against Perks & Son to recover compensation under the Act of 1897, and Perks & Son claimed to be indemnified by Firth, whom they brought in as a third party, under section 4 of the Act. At the hearing Perks & Son and Firth were represented, and took part in the proceedings, and in the result the learned judge made an award in favour of the applicant as against Perks & Son for 15s. 7½d. a week, being half his average weekly earnings. Upon the claim of Perks & Son to be indemnified by Firth, the county court judge held that the sub-contractor to be liable to indemnify the contractors must be a sub-contractor for a defined and substantial part of the construction of the building, thereby becoming an "undertaker," and that a person supplying labour alone was not an undertaker. He accordingly held that Perks & Son were not entitled to an indemnity from Firth. From that part of the decision which held the third party not liable Perks & Son appealed.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*Hextall*, for the appellants.—The decision of the arbitrator was given before *Cooper* v. *Wright*, [1902] A. C. 302 (*ante*, p. 12), was reported. On that authority is it clear that Firth was an undertaker because he had agreed to execute a substantial part of the work of construction, and therefore by section 4 he became liable to indemnify the undertakers of the whole work: *Mason* v. *Dean*, 48 W. R. 353, [1900] 1 Q. B. 770; *Knight* v. *Cubitt & Co.*, 50 W. R. 113, [1902] 1 K. B. 31. The evidence shows that Firth was himself a contractor and not merely a workman. *Simmons* v. *Faulds*, 17 Times L. R. 352, and *Bush* v. *Hawes*, 50 W. R. 311, [1902] 1 K. B. 216, were also referred to.

The respondent Firth did not appear.

COLLINS, M.R., after stating the facts, said: The point here is whether Firth, the sub-contractor, is in these circumstances an "undertaker" within the meaning of the Workmen's Compensation Act, 1897. The claim of the appellants against the third party was made under section 4 of the Act of 1897, and the actual point now to be decided is whether Firth, the sub-contractor, from whom indemnity is claimed, ought to be held to be an "undertaker." That depends upon the definition of an "undertaker" in section 7 (2), which defines undertakers in the case of a building to mean "the person undertaking the construction, repair, or demolition." Having regard to *Cooper* v. *Wright* as decided in the House of Lords, Firth was an undertaker within the meaning of that term in the Act. The case of *Cass* v. *Butler*, 48 W. R. 309, [1900] 1 Q. B. 777, was overruled by the decision of the House of Lords in *Cooper* v. *Wright*. In *Mason* v. *Dean* it was decided by the Court of Appeal that the person who contracted with the building owner for the construction of a separate and special part of the building could be an undertaker, but that court stopped short of holding that a sub-contractor could be an "undertaker." Then the House of Lords decided in *Cooper* v. *Wright* that a sub-contractor might be an undertaker. Therefore, as to the particular parts of the work sub-contracted for, there might be two or more undertakers. That being so, the question now is, whether what this particular sub-contractor undertook to do constituted him an undertaker, considering he contracted to supply labour and do work in respect of a particular part of the building, though Perks & Son were to supply the materials and plant. I think it would be refining too much upon the decision in *Cooper* v. *Wright* if we were to hold that he was not an undertaker in respect of the plastering work. The contractors are therefore entitled to an indemnity over against the sub-contractor, and this appeal must accordingly be allowed.

*Appeal allowed.*

ROMER and MATHEW, L.JJ., gave judgment to the same effect.

Solicitors, *William Hurd & Son*, for *F. Berryman*, Nottingham.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) Nov. 4.

STUART v. FREEMAN. (a.)

*Insurance (Life)—Premium, payment of—Premium payable by quarterly instalments—Instalment becoming due during currency of policy—Payment during days of grace after death of assured—Liability on policy.*

*The premium on an annual policy of life insurance was payable by quarterly instalments on certain specified days or within thirty days after. One of the conditions in the policy provided that in case a claim should arise during the subsistence of the policy and before all the premiums, whether half-yearly or quarterly, for the then current year should have become due and been paid, the amount of such premiums should be deducted from the sum assured: and the policy should become void if at the time of the death of the assured any of the above-mentioned premiums were more than thirty days in arrear. The assured, having assigned the policy, died after the day on which one of the quarterly instalments for the current year became due, but before the expiration of the thirty days of grace, without having paid the instalment. The assignee, after the death of the assured, paid the instalment within the thirty days, both he and the insurers being unaware of the death of the assured. In an action on the policy by the assignee against the insurers to recover the amount of the policy moneys,*

*Held, that as the insurance was for a year, subject to a condition for forfeiture if any of the quarterly instalments were not paid within thirty days after they became due, the payment of the instalment within the thirty days of grace during the subsistence of the policy, though after the death of the assured, was a valid payment, and the assignee was entitled to recover.*

Pritchard v. Merchants' Life Assurance Society, 6 *W. R* 340, 3 *C. B. N. S.* 622, *discussed.*

Application by the plaintiff for judgment or a new trial in an action tried before Ridley, J., and a special jury.

The action was brought to recover £2,500 upon a policy of insurance granted by the General Life Assurance Co., of which company Mr. Freeman, the defendant, was the manager, upon the life of the Hon. Francis Charles Lawley. The policy, which was dated the 18th of November, 1899, was assigned to the plaintiff as security for a debt due to him. The policy stated that "in consideration of the Honourable Francis Charles Lawley"—describing him—"(hereinafter called the 'assured') having paid to the General Life Assurance Co. (hereinafter called the company) the sum of £105 on account of the premium for one year terminating on the 17th of November, 1900, for an assurance of the sum of £2,500 upon the life of the assured for the whole continuance thereof, the company hereby agree that in case the said assured shall die before or upon that day, or shall survive that day, and there shall be paid to the company a like premium before, upon, or within thirty days after the day above mentioned, and in every succeeding year during which the said assured shall be living, the capital, stocks, and funds of the company shall, according and subject to the provisions of the deed of settlement of the company and the conditions indorsed hereon, be liable to pay to the assured, his executors, administrators, or assigns, after proof satisfactory to the directors of the company of the age and death of the said assured, the sum of £2,500, but the assured shall not be entitled to participate in the profits of the company." The premium was stated to be, if paid annually, £404 11s. 8d. on every 18th day of November; if paid half-yearly, £207 7s. 11d. on every 18th day of November and 18th day of May; if paid quarterly, £105 on every 18th day of November, 18th day of February, 18th day of May, and 18th day of August. The material conditions indorsed on the policy were the following: "(1) The assured has the option of paying the premiums half-yearly or quarterly instead of annually, in which case such half-yearly or quarterly premium, as the case may be, shall be the amount, and be payable, on the days hereinbefore respectively mentioned. Provided nevertheless that in case a claim shall arise at any time during the subsistence of this policy, and before all the premiums, whether half-yearly or quarterly, for the then current year, commencing at a date corresponding with the commencement of this policy, shall have become due and been paid, then and in such case the amount of such half-yearly or quarterly premium so not having become due and been paid shall be deducted from the sum assured by this policy, and the remainder of such last-mentioned sum shall be alone payable to the assured, his executors, administrators, or assigns. Provided also that this policy shall, subject to the condition next hereunder appearing, be null and void and of no effect if at the time of the death of the person upon whose life this policy is granted any of the above-mentioned premiums, as well half-yearly or quarterly as annual, shall be more than thirty days in arrear." "(2) In the event of the lapse of this policy by non-payment of any premium within thirty days of its becoming due, it may be revived as follows: (*a*) When the surrender value at the time of its lapse shall equal or exceed such premium, the policy shall be revived upon the application of the assured, his executors, administrators, or assigns, within twelve calendar months from the lapse, without medical examination, and notwithstanding the death in the meantime of the person upon whose life the policy is granted, upon payment of the overdue premium, together with interest thereon at 5 per cent. per annum, and a fee at the rate of 2s. for each £100 assured, but any moneys owing to the company on the security of the policy shall be considered as a deduction from the surrender value in estimating the same for the purposes of this condition; (*b*) in cases not falling within the above regulation, the policy may be revived within twelve calendar months upon a medical report on the state of health of the person upon whose life the policy is granted satisfactory to the directors being furnished, and the payment of the overdue premium, together with interest and a fee at the above-mentioned rate." "(6) When a policy has been one year in force, and has had the age of the life admitted thereon, it shall thereafter, subject only to the punctual payment of the ordinary premium and extra premium (if any), be indisputable on any ground whatever, except fraud."

On the 17th of September, 1901, the quarterly premium due on the 18th of August had been in arrear thirty days. On the 18th of September the plaintiff paid and received a receipt for the premium then overdue. It appeared that Lawley died on the 18th of September before the premium was paid, though the fact of his death was unknown to both the plaintiff and the insurance company. The company refused to pay the plaintiff upon the policy, on the ground that at the time of the death of Mr. Lawley the policy had become void by reason of the premium being in arrear, and that the policy could not be revived after the death of the person insured. The jury found that before August, 1900, the plaintiff's clerk told a clerk of the insurance company

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

that it was difficult to obtain the premiums from Mr. Lawley, but that if Mr. Lawley did not pay the premiums within the thirty days' grace he would bring the money on the next day, and the insurance company's clerk assented to this course; and that the clerk had authority from the insurance company to make the above arrangement.

Ridley, J., held, upon the authority of *Pritchard* v. *Merchants', &c., Life Assurance Society*, 6 W. R. 340, 3 C. B. N. S. 622, that the payment of the premium after the death of the assured, though upon the findings of the jury it must be taken to have been made within the thirty days of grace, was not a valid payment binding upon the insurance company. He accordingly gave judgment for the defendant.

*J. E. Bankes, K.C.*, and *Arthur Powell, K.C.*, for the plaintiff.—According to the findings of the jury the insurance company agreed to accept the premium if paid on the day next after the expiration of the thirty days of grace as if it had been paid within the thirty days. The instalment of the premium in question must therefore be taken to have been paid within the thirty days, though after the death of the assured. In *Pritchard* v. *Merchants', &c., Life Assurance Society*, the premium was paid after the days of grace had expired and after the death of the assured, and in those circumstances the court held that the defendants were not liable. The observations of Willes, J., in that case, upon which Ridley, J., based his judgment, were merely *dicta*, and were in no way necessary for the decision. The policy in the present case was for a year, though the premium was payable by quarterly instalments. The policy, therefore, was a subsisting policy when the assured died, and there was no question here, as there was in *Pritchard* v. *Merchants', &c., Life Assurance Society*, as to the renewal of the policy for another year by the payment of the premium at the end of the year. The judgment was therefore wrong.

*Duke, K.C.*, and *Ellis Hill* (*A. W. Wills* with them), for the defendant.—In the event of the assured dying within the days of grace before payment of the premium, the days of grace were gone and the policy lapsed: *Simpson* v. *Accidental Death Insurance Co.*, 5 W. R. 307, 2 C. B. N. S. 257. Days of grace are allowed with reference to an insurance in the future, and if the assured dies within the days of grace and before payment of the premium there is no life to insure. The *dicta* in *Pritchard* v. *Merchants', &c., Assurance Society* are directly in the defendants' favour.

They also referred to *Want* v. *Blunt*, 12 East 183, and *Tarleton* v. *Staniforth*, 5 T. R. 695.

*A. Powell, K.C.*, in reply.—*Simpson* v. *Accidental Death Insurance Co.* was the case of an accident policy, and totally different considerations apply. That case has no application to the present.

COLLINS, M.R.—The jury have accepted the evidence of the plaintiff's witnesses as to the circumstances in which the premium came to be paid on the day in question and rejected that of the defendants' witnesses. The facts of the case are peculiar, because the premium was paid on the thirty-first day after it became due—that is to say, on the day after the expiration of the thirty days of grace—and the assured died on that very day before the payment was made, though this fact was not known at the time of payment either to the plaintiff or the insurance company. The question is whether in the circumstances that is a good payment of the premium so as to keep the policy alive. In my opinion there was evidence upon which the jury might reasonably find that the payment in question, which was the last of the quarterly instalments of the annual premium, was received by the insurance company's clerk on the thirty-first day under an arrangement with the plaintiff with the authority of the company. That makes the payment on the thirty-first day equivalent to payment within the thirty days of grace. That raises the question of law whether such a payment can be a valid payment, the assured being dead at the time.

Ridley, J., held, upon the authority of *Pritchard* v. *Merchants', &c., Life Assurance Society*, that it was not a valid payment. That case, so far as it touched upon this point, is not a decision of the court, but the observations are merely *dicta*, though no doubt very weighty *dicta*. The case, however, did not decide the point now before us. In that case there was an annual premium payable for an annual insurance at the beginning of each year of insurance, and one of the annual premiums was paid after the days of grace had expired and at a time when the assured was dead. The point was put most clearly by Willes, J., where, after stating the contention that the allowance of thirty days of grace was absolutely to extend the period for the payment of the premium, so that if the assured should die within the thirty days the company were bound to accept the money though the assured was dead at the time of payment, he proceeds (3 C. B. N. S., at p. 643): "The inclination of my opinion—if it be necessary to express one, and perhaps it is, for it has an important bearing on the case—is that the thirty days are given only with reference to insurance for future years, and that, notwithstanding the life has become less valuable, the company are bound to go on insuring future years provided the future premiums are paid within thirty days after the expiration of each period of insurance." Therefore the learned judge was there dealing with a premium payable annually for an annual insurance which had run out. There the provision in the policy as to the payment of the premium in future years entitled the assured to insure for the ensuing year at the same rate of premium. That, the court thought, did not get rid of the suggested fundamental condition that the assured must be alive at the time when the premium was paid. That was not decided in that case, but was merely the opinion of some of the learned judges. Those remarks, however, whether well founded or not, have reference to the payment of an annual premium for an annual insurance.

In the present case there is an annual premium payable by quarterly instalments, and the question arises here in respect of the payment of a quarterly instalment in the course of the year when some of the instalments for that year had already been paid, and not in respect of the first instalment of the premium for the insurance for the coming year. The introduction of the system of quarterly payments of the premium does not in any way affect or qualify the annual insurance. It was not, as in *Pritchard* v. *Merchants', &c., Life Assurance Society*, a premium paid for the renewal of the insurance for another year, which the court in that case seemed to think presupposed an existing life. The policy here is an annual policy, and the premium is an annual premium payable for that annual insurance by quarterly instalments. The scheme of the policy is that the insurance should continue for the year unless there was some default creating a forfeiture. In any ordinary case a policy runs out at the end of the year of insurance, and the premium is paid for the purpose of renewing the policy for the ensuing year, and not for the sake of avoiding a forfeiture of the policy during the current year of an existing policy. In the present case the policy had not run out, and the payment of the quarterly instalment of the premium within the days of grace was made in order to avoid a

forfeiture of the policy, and not for the purpose of renewing the policy for another year. The appeal must, therefore, be allowed, and judgment must be entered for the plaintiff.

ROMER, L.J.—I am of the same opinion. The findings of the jury, which we ought not to disturb, make the payment of the quarterly instalment of the premium as if it had been made within the thirty days. The question thus arises whether the insurance company are free from all obligation to pay the insurance moneys. For my part I prefer to decide this question upon the wording of the policy. I by no means say that the reasoning upon which I base my judgment may not be applicable to other policies. In my opinion the moneys have become payable under the very words of the policy, and I can see no reason why the words should not be adhered to. There is an express provision in the policy for the payment of the renewal premium on or before the last day of the first or any succeeding year or within thirty days after that day, and in that case the policy is to continue in force. The first condition in the policy seems to me to be decisive of this case. By that condition the assured has the option of paying the premiums half-yearly or quarterly instead of annually, and the proviso at the end is as follows: "Provided also that this policy shall, subject to the condition next hereunder appearing, be null and void and of no effect if at the time of the death of the person upon whose life this policy is granted, any of the above-mentioned premiums, as well half-yearly or quarterly, as annual, shall be more than thirty days in arrear." Presumably, therefore, the policy was to be continuing and valid, covering the case of the assured dying within the thirty days of grace, even though the half-yearly or quarterly premium had not been paid. I refer now to a most important provision immediately preceding that which I have just read: "Provided, nevertheless, that in case a claim shall arise at any time during the subsistence of this policy, and before all the premiums, whether half-yearly or quarterly, for the then current year, commencing at a date corresponding with the commencement of this policy, shall have become due and been paid, then, and in such case, the amount of such half-yearly or quarterly premium so not having become due and been paid shall be deducted from the sum assured by this policy, and the remainder of such last-mentioned sum shall be alone payable to the assured, his executors, administrators, or assigns."

I have already pointed out that the policy was a subsisting policy during the whole of the thirty days of grace. A death occurs during the thirty days before the premium, whether half-yearly or quarterly, has been paid. In such a case there is an express provision that there shall be deducted from the moneys payable under the policy the amount of the unpaid half-yearly or quarterly premium, and the balance shall be payable to the assured's representatives. The case comes within the very words of the policy, and the appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. It has been said that the true effect of the clause allowing the premium to be paid within thirty days after the day on which it becomes due is that it is merely an offer by the insurance company to renew the policy upon payment of the premium within the thirty days. That point seems to have been glanced at rather than decided in *Pritchard* v. *Merchants', &c., Life Assurance Society*. The policy in the present case was for a year, and the premium in question was a quarterly instalment of the annual premium which fell due during the currency of the policy. I am unable to accept the suggestion that the provision as to the days of grace merely amounts to a continuous offer by the insurance company to renew the policy upon payment of the premium within the days of grace. Not a single case can be found in the books in which this contention has been set up by an insurance company. In my opinion the true meaning of the days of grace is that if the premium is paid within that time it must be taken to have been paid on the day when it fell due. This appeal must be allowed.

*Appeal allowed.*

Solicitors for the plaintiff, *George S. Warmington & Co.*

Solicitors for the defendant, *Gush, Phillips, Walters, & Williams.*

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## High Court of Justice.

Chan. Div.
Farwell, J. } Nov. 11-14

BOURNE v. SWAN & EDGAR. (a)

*Trade-mark — Old mark — Registration — Lapse — Re-registration — Action for infringement — Motion to expunge — Delay — Costs — Application for certificate that right to mark has come in question in an action — Patents, Designs, and Trade-Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 77a, 79, *and Patents, &c., Act,* 1888 (51 & 52 *Vict. c.* 50), *ss.* 10, 18.

*Words, &c., to be registered under section* 64, *sub-section* 3 (*ii.*) *of the Patents, &c., Act,* 1883, *amended by the Patents, &c., Act,* 1888, *must not merely have been "special and distinctive" at some previous time, but must be so at the date of registration.*

Quære, *whether a word which has been applied to an article because it is apt to describe that article can be distinctive of manufacture or sale by a particular person.*

*The jurisdiction to order a trade-mark to be struck out of the register is given for the protection of the public and not of the applicant only. Accordingly an application for this purpose will not be refused for delay (or other conduct) on the part of the applicant, unless such delay has made it unduly hard for the respondent to produce evidence. But an applicant who, with knowledge of the registration, has delayed unduly will not, if successful, get his costs.*

*The question whether there is such a resemblance between two designs, or names, or the get-up of two articles, or the like, as is calculated to deceive customers, is not to be determined by the testimony of the witnesses, but is a question for the judge himself, viewing the exhibits or considering the names, in the light of the evidence as to the circumstances in which they are used.*

London General Omnibus Co. *v.* Lavell, [1901] 1 *Ch.* 135, 49 *W. R. Dig.* 144. *considered.*

*When the plaintiff and the defendant in an action have each succeeded in part and failed in part, and there is likely to be great difficulty and dispute in apportioning the different items of costs as between the different issues, the judge at the trial will order the costs to be taxed as a whole and paid by the parties in such proportions as he may think fit.*

*A certificate, under section* 77a *of the Patents, &c., Act,* 1883, *that the right to the exclusive use of a trade-mark has come in question in an action, will not be*

(a.) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

*given when the right, though put in issue, has not been investigated in such a manner as to enable the court to form an opinion about it.*

Action for infringement of two trade-marks; motion by defendants to strike trade-marks off the register.

The plaintiff and the defendants in the action were ladies' outfitters, and dealt in corsets.

The plaintiff was the registered proprietor of two trade-marks used in connection with corsets. One of these was a device, the other consisted of the word "Swanbill."

It was alleged that the defendants had infringed both trade-marks.

The defendants gave notice of motion to rectify the register of trade-marks by striking out both marks. The action and the motion were tried together.

At the trial the defendants abandoned their motion so far as it related to the device, but persisted in it so far as regarded the word "Swanbill."

The facts in regard to the "Swanbill" mark were as follows: Some time before 1875 the plaintiff's predecessor in title introduced into this country a corset with a particular shape of busk. He gave this corset the name of "Swanbill" as being descriptive of the shape of the busk, and in 1876 he registered this name as a trade-mark.

Certain fees payable in respect of this registration remained unpaid for many years, and in the course of 1892 the Comptroller of Patents addressed a communication to the plaintiff calling his attention to the fact and to the provisions of section 79 of the Patents, &c., Act, 1883, under which the comptroller is empowered to remove a mark from the register when fees remain unpaid fourteen years after registration.

By some mischance this letter never came into the plaintiff's hands till some months later, and in the meantime the comptroller had removed the mark from the register.

When at last the comptroller's communication came to his notice, the plaintiff went immediately to the Patent Office desiring to pay the fees and protect the registration of his mark, but was informed by the comptroller that the only course now open to him was to effect a fresh registration of the word "Swanbill" as an old mark under sub-section 3 (ii.) of section 64 of the Patents, &c., Act, 1883, as amended by section 10 of the Patents, &c., Act, 1888.

The plaintiff accordingly so registered the word "Swanbill" on the 13th of December, 1892.

The last-named provision of the Patents, &c., Act, is as follows: "Any special and distinctive word or words . . . used as a trade-mark before the 13th day of August, 1875, may be registered as a trade-mark under this part of this Act."

There was evidence that, notwithstanding the original registration of the word "Swanbill" in 1876, the word had in 1892, and for some years previously, come to be used and understood in the trade as descriptive of a particular shape of corsets, and not as distinctive of corsets manufactured or sold by the plaintiff. This, however, was disputed.

The defendants had for some time before the bringing of this action been aware of the registration of the word "Swanbill" by the plaintiff, and had in no way asserted a right to have the register rectified.

*Upjohn, K.C.*, and *Sebastian* (*T. F. C. Tomlin* with them), for the defendants in the action.—The evidence shows that the word "Swanbill" was not at the time of the registration in 1892 "special and distinctive"—that is, distinctive of the plaintiff's goods.

*Jenkins, K.C.*, and *Peterson*, for the plaintiff in the action.—The evidence shows the contrary. But in any case such a motion must be made as "speedily as possible": per Jessel, M.R., in *In re Hyde & Co.'s Trade-Mark*, 26 W. R. 625, 7 Ch. D. 724, cited by Bacon, V.C., in *Ransome* v. *Graham*, 51 L. J. Ch. 897, 31 W. R. Dig. 198.

*R. J. Parker*, for the Comptroller of Patents.—The power of the court to remove an entry from the register is a power to be exercised in the interests of the public and not of the individual applicant.

*Upjohn, K.C.*, in reply.—The passage cited from the judgment of Jessel, M.R., in *Hyde's case* is *obiter dictum*. The contention of the Comptroller of Patents is supported by the expressions of Lindley, M.R., in *In re Batt & Co.'s Trade-Mark*, 46 W. R. 459, [1898] 2 Ch. 432, and by *Eno* v. *Dunn*, 15 App. Cas. 252, 30 W. R. Dig. 200. This being so, "the merits or demerits of the applicant are irrelevant," as was said by Chitty, J., in *In re Hill's Trade-Mark*, 10 Rep. Pat. Cas. 113. Moreover, the applicant's delay in such a case is no hardship to the person whose mark is to be removed from the register. So none of the reasons why delay is in certain cases made a bar to equitable relief apply in this case.

*Jenkins, K.C.*, replied to *R. J. Parker*.

FARWELL, J., after stating the facts, said: *In re Wood's Trade-Mark*, 32 Ch. D. 247, 34 W. R. Dig. 199, makes it clear that section 64 of the Patents Act must be taken as requiring that the word or words to be registered shall be "special and distinctive" at the date of the registration, and shall not merely have been "special and distinctive" at some previous time. Now, in this case, on the evidence before me, I have no difficulty in finding that the word "Swanbill" was not, at the date of registration in 1892, and for some time previously had not been, "special and distinctive." As one of the witnesses put it, the name signifies the shape—that is, it does not signify the maker. It is, therefore, however much I regret it (for the plaintiff has been very unfortunate), imperative on me to hold that he did not fulfil the requirements of the Act, and that the registration cannot be supported. Indeed, it is doubtful whether a word which, like this, is admittedly invented to describe a shape, can ever be also special and distinctive of one person's manufacture: see per Fry, L.J., in *In re Leonard & Ellis's Trade-Mark*, 32 W. R. 530, 26 Ch. D. 288. It has been said, however, that the applicant is disentitled to this relief through his delay. Now, delay might in such a case as this be sufficient to prevent an applicant from succeeding, but only when the respondent had thereby been put at a disadvantage in bringing evidence to prove his title. But in this case the respondent has been at no such disadvantage. Moreover, the success of the application is in this case not the applicant's own affair alone, but the affair of the public, whose interests ought not to be prejudiced by his delay. The considerations of general principle which have been adduced in this connection relate to cases which have no true analogy with this case. They apply to cases where the auxiliary jurisdiction of courts of equity is invoked. When an application for specific performance is refused for delay, the claimant has still his common law remedy. Moreover, in such cases a consideration of the position of third parties comes in, but here that consideration tells only against the respondent. I have, then, no option but to rectify the register by directing that the plaintiff's registered trade-mark of the word "Swanbill" be struck out as regards corsets. Under the circumstances, however, and having regard to the defendants' delay, I shall not give them costs. But the comptroller is entitled to his costs, and these, I under-

stand, the other parties agree to divide between them.

The action then proceeded with regard to the alleged infringement of the plaintiff's remaining trade-mark.

The facts are stated in the judgment.

*Jenkins, K.C.*, and *Peterson*, for the plaintiff.

*Upjohn, K.C.*, and *Sebastian* (*T. F. C. Tomlin* with them), for the defendants.

*Jenkins, K.C.*, in reply.

FARWELL, J.—The plaintiff, Mr. Addley Bourne, is the registered proprietor of a trade-mark—namely, a swan swimming with two cygnets with a background of bulrushes. He used this trade-mark in connection with the sale of ladies' corsets. He brings this action to restrain Messrs. Swan & Edgar from infringing this trade-mark. The alleged infringement is contained in an advertisement of a corset which appeared in the Ladies' Field and in a catalogue issued by the defendants, and consists in a representation of a lady not otherwise than comely wearing a corset with her back to a mirror and with two swans holding in their bills a scroll with the words "Swan Corset" imprinted on it. The question which I have to determine is whether these swans are calculated to mislead customers into buying goods of the defendants under the impression that they are the goods of the plaintiff.

I have first to observe that it is not now, and, whatever may have been the old law, has not been, since *Millington* v. *Fox*, 3 My. & Cr. 338, necessary to prove fraud in a case of this kind. The injury to the plaintiff is the same whether the defendant knowingly causes the public to be deceived or whether he does it in the honest belief that he is doing nothing misleading: compare *Orr, Ewing, & Co.* v. *Johnston & Co.*, 28 W. R. 330, 13 Ch. D. 434. Fraud, therefore, is not at all necessary, and it is only fair to say that in this case there is not the smallest evidence of it, nor has it ever been charged.

Secondly, it was not necessary in the old Court of Chancery, and is not now necessary, to prove that any person has actually been deceived. Of course, the fact, if proved, that a person of ordinary intelligence has been deceived is very material to assist the court. But even the evidence that some one person has been deceived is not conclusive. Malins, V.C., in *Civil Service Supply Association*, 13 Ch. D. 512, disregarded the evidence of a witness who said he had been actually deceived: see also per Lord O'Hagan in *Singer Manufacturing Co.* v. *Wilson*, 26 W. R. 664, 3 App. Cas. 376, at p. 395. Moreover, in many cases the question arises when the plaintiff finds that the defendant is about to flood the market with labels to which he objects, and before there can have been actual deception.

Thirdly, it is a question of some little interest what evidence is admissible. There may be no evidence of any person being actually deceived, and this is not necessary. It has been laid down in the House of Lords in *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83, 47 W. R. Dig. 192, see per Lord Halsbury, at p. 85, and is finally settled, that it is not a proper question to put to a witness whether the thing complained of is calculated to deceive. One ground for this is that that question is the very question in issue. It appears to me that there are also other reasons for it. How can you call expert evidence as to what is human nature, and what, therefore, the witness thinks the rest of the world would be likely to believe? And, apart from this difficulty, there is in most people a certain proneness to think that other people are more foolish than they really are. Carlyle is not alone in thinking that mankind are mostly fools. It only remains that one should call the evidence of people who will say that they themselves would have been likely to be deceived, and nobody likes to give evidence of his own foolishness. It results, therefore, that unless the matter is left to the eye or ear of the judge, there can be no evidence.

I have said this because of a recent decision of the Court of Appeal which has been thought to be to the contrary effect—viz., *London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135, 49 W. R. Dig. 144. But before I discuss that decision I wish to refer to certain earlier cases which show that the test in these cases is the eyesight or the hearing of the judge. Malins, V.C., in the case of *Civil Service Supply Association*, to which I have already referred, disregarded the evidence of a witness who said that he had himself been deceived. In an earlier case in the House of Lords, *Holdsworth* v. *McCrea*, 16 W. R. 226, L. R. 2 H. L. 380, which was a case of copying a design for ornamenting woven fabrics, Lord Westbury, L. R. 2 H. L., at p. 388, says that in such a case "the appeal is to the eye." In *The Hecla Foundry Co.* v. *Walker, Hunter, & Co.*, 14 App. Cas. 550, 38 W. R. Dig. 65, Lord Herschell, 14 App. Cas., at p. 555, says: "It seems to me that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side and asking whether they are the same or whether the one is an obvious imitation of the other." And in *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (*Limited*), which was a case of similarity of names, Lord Halsbury, in the judgment to which I have already referred, says, [1899] A. C., at p. 85, that for his own part he would not have required such evidence as had been called to show the deceptive effect of the appellant company's name, for when he found well-known names associated together as that of a new company he would himself have jumped to the conclusion that the two old companies were amalgamating together. *Payton* v. *Snelling*, [1901] A. C. 308, 49 W. R. Dig. 177, was a case of alleged copying of the get-up of the plaintiff's canisters. Lord Macnaghten in that case said [1901] A. C., at p. 311, that the question whether a customer was likely to be deceived, was not a matter for a witness, but for the judge. "The judge," he said, "looking at the exhibits before him, and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness." I now come to the case of the London General Omnibus Co., which has been referred to as being to the contrary effect. In my opinion that case has no bearing on passing off. The Court of Appeal, whether rightly or wrongly it is not for me to say, treated that case as an action of deceit. In the beginning of his judgment, and twice in the course of the argument, the Lord Chief Justice explicitly calls the action an action of deceit, and throughout the Court of Appeal appear to have treated it from that point of view. That point of view is not relevant in a passing off case. For this distinction between the common law action of deceit and the equitable remedy in cases like the present is old. I may refer, in addition to the cases of which I have already spoken, to *Edelsten* v. *Edelsten*, 11 W. R. 328, 1 De G. J. & S. 185, a case before Lord Westbury, and to the judgment of Lord Blackburn in *Singer Manufacturing Co.* v. *Loog*, 31 W. R. 325, 8 App. Cas. 15. These cases make it obvious that the Court of Appeal dealt with the *London General Omnibus Co.'s case* as an action of deceit, for, if not, it would have been im-

possible for them to exclude the eyesight of the judge. They cannot have intended to overrule these Lord Chancellors in the House of Lords, and, if they had, they would themselves have been overruled by the House of Lords case of *Payton* v. *Snelling*.

Coming now to the facts before me, no suggestion of intentional deceit has been made against the defendants. I have had before me the artist who designed their advertisement, and he has explained that he put in these swans entirely of his own idea. They are, to my mind, as distinct from the plaintiff's swans as swans can be. I cannot believe that any reasonable person would be led by this pretty picture to believe that in buying the defendants' goods he was buying those of the plaintiff. The action must therefore be dismissed.

On the question of costs, the plaintiff has failed in his action, and the defendant has failed as to part of his motion, and, as to the other part, has succeeded, but not got his costs; the parties are not prepared to agree as to the order that should be made. Now it will be difficult for the taxing-master to decide how the various costs incurred in this litigation should be distributed. I have a jurisdiction to settle the matter myself while the state of the evidence is fresh in my mind, and to save the taxing-master from difficulty, the parties from expense, and the court from future trouble, I accordingly direct that the plaintiff should pay to the defendants two-fifths of the entire costs of the plaintiff and defendants of the motion and the action together. It has already been agreed that the plaintiff and the defendants should bear the costs of the comptroller in equal shares.

*Jenkins, K.C.*, asked for a certificate under section 77a of the Patents, &c., Act, 1883, that the right of the plaintiff to the exclusive use of the trade-mark, as to which the defendants had not proceeded with their motion, had come in question in an action.

FARWELL, J.—I cannot give this certificate. The defendants gave notice of motion to expunge this mark, but have not proceeded with it, and the question of the plaintiff's right on this point has not been tried. I am therefore unwilling to make an order, the effect of which would be to mulct in solicitor and client costs any person against whom the plaintiff may hereafter successfully bring an action for infringement of this trade-mark.

Solicitors, *Drake, Son, & Parton; Buxton, Ashton, & Son; The Solicitor to the Board of Trade.*

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Chan. Div. }
Buckley, J. } Dec. 11, 12.

*In re* REDGATE.
MARSH v. REDGATE. (*a.*)

*Power — Appointment — Real estate — Legal estate in trustees of instrument creating power—Execution—Devise to trustees of will on trust for sale and appointment of proceeds among objects.*

*The principle of* Kenworthy *v.* Bate, 6 *Ves.* 793, *that a power of appointing real estate authorizes a devise to trustees for sale and an appointment of the money produced by the sale, applies to a case where the legal estate is vested in the trustees of the instrument creating the power.*

*A deed contained a limitation of real estate to the use of trustees upon trust to convey the same to such issue of the donee of the power, and "for such estate or estates, manner, and form" as she should by will appoint.*

*Held, that the power was well exercised by a devise by the donee, of the real estate to trustees of her will upon trust for sale and division of the proceeds among objects of the power.*

Action with witnesses.

By indentures of lease and release, dated respectively the 25th and 26th of December, 1834, certain hereditaments were limited to Henry Attenborough and George Eddowes, their heirs and assigns, upon trust as to one moiety (after certain prior estates and interests which have long since determined) to "convey and assure" the same "unto such one or more child or children or issue of the body of Elizabeth Redgate, and for such estate or estates, manner and form, as she" by will, notwithstanding coverture, should "give, devise, or dispose of the same, and in default of such gift, devise, or disposition in trust to convey and assure" the same moiety unto the child or children of the said Elizabeth Redgate and the heirs of their respective bodies as therein mentioned, with remainder as Elizabeth Redgate should by will, notwithstanding coverture, appoint.

By her will, Elizabeth Redgate, who died in 1873, bequeathed her personal estate to a trustee upon trust for conversion and investment and to apply the income in the same manner as was therein mentioned with respect to the rents of her real estate. And in exercise of the power contained in the deed of 1834, and of every other power enabling her, she devised and appointed all "her" real estates and hereditaments, shares of real estates, and also any other over which she had any power of appointment, to a trustee upon trust to receive the rents thereof, and to hold the same in trust for her two grandchildren, John William Redgate and the defendant, in equal moieties, as and when they should respectively attain the age of twenty-one years. The will contained a direction that immediately after the younger of her two grandchildren should attain that age her trustee should sell the said real estate, and should hold the proceeds upon trust to divide the same equally between them.

John William Redgate and the defendant attained the age of twenty-one years in 1881 and 1884 respectively.

John William Redgate died in 1887, intestate, leaving a widow, Lucy Emily Redgate, but no issue, and leaving the defendant his heir-at-law. The defendant took out letters of administration to J. W. Redgate, and is also the present sole trustee under the will of Elizabeth Redgate.

The real estate comprised in the deed of 1834 has not been sold, but an action is now proceeding for sale thereof in lieu of partition. No new trustees of that deed have ever been appointed.

Lucy Emily Redgate died in 1902, and the plaintiffs are her executors.

In the present action the plaintiffs claimed a declaration that the trust for sale contained in the will of Elizabeth Redgate was a valid trust for sale of the real estate appointed by such will, and effected a conversion of such real estate as from the date when the defendant attained his majority.

The defendant denied this, and contended that, even if this was the case, the subsequent conduct of John William Redgate and the defendant had shown an election on the part of each to retain the property as real estate, that it was thereby reconverted, and that, consequently, on the death of J. W. Redgate his moiety devolved as real estate.

The question as to conversion was first argued.

*Astbury, K.C.*, and *E. Ford*, for the plaintiffs.—A

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

power to appoint real estate is well executed by a devise to trustees to sell and an appointment of the money produced by the sale: Theobald on Wills (5th ed.), p. 227, *Kenworthy* v. *Bate*, 6 Ves. 793; *In re Paget*, 46 W. R. 328, [1898] 1 Ch. 290. It is immaterial that the legal estate is outstanding in the trustees of the original settlement. The testatrix has in fact exercised the power in that manner, and consequently there was a conversion as from the time that the defendant attained the age of twenty-one years.

*Buckmaster, K.C.*, and *H. M. Humphry*, for the defendant.—It is only where the limitations are legal that the power can be thus executed; for in such a case a power to appoint to a use includes a power to deal with the legal estate. In the absence of a power to appoint the legal estate, a trust for sale is inoperative, because it cannot be executed without the concurrence of the trustees of the settlement, and they have no power to convey the legal estate without the consent of their *cestui que trust*: *Biggs* v. *Peacock*, 31 W. R. 148, 22 Ch. D. 284. The principle of *Kenworthy* v. *Bate*, therefore, does not apply; testatrix has imposed on the estate a trust which it will not bear, and hence there has been no conversion.

*Astbury, K.C.*, in reply.—If the legal estate is outstanding in trustees, the donee of the power can compel them to concur, for the appointment is good in equity: *Thornton* v. *Bright*, 2 My. & Cr. 230.

The following cases were also cited: *Roberts* v. *Dixwell*, 1 Atk. 607; *Fowler v Cohn*, 4 W. R. 412, 21 Beav. 360; and *Cowx* v. *Foster*, 1 Joh. & Hem. 30; 9 W. R. Ch. Dig. 55.

BUCKLEY, J.—In *Thwaytes* v. *Dye*, 2 Vern. 80, the limitation was legal—to the use of such children as J. S. should appoint. It was held that the donee of the power could charge the land with a sum of money to be paid to the children, and that he was not limited to naming a person to take the estate. That was in 1688. In 1802, in *Kenworthy* v. *Bate*, the limitations were again legal—"to the use of such child or children of" the donee of the power and his wife as he should by will "direct, limit, and appoint." It was held that the power was well exercised by a devise to trustees upon trust to sell, and an appointment of the money produced by the sale. At the conclusion of his judgment Grant, M.R., says: "Does not a power to give include a power to sell for the purpose of giving the money instead of the land?" In 1860 Page Wood, V.C., in *Cowse* v. *Foster*, held that a limitation "to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisos, and declarations" as the donee of the power should by will appoint, "so only that every such appointment be made in favour of a child or children," was well executed by a devise upon trust to sell and divide the proceeds among her children. In *Fowler* v. *Cohn* the limitations were again legal—"to the use of" such children, "for such estates" and "in such manner and form" as A. B. should appoint. It was held that they authorized an appointment to trustees to sell and divide the proceeds between the objects. Romilly, M.R., said: "I find it quite settled by the authorities that a general power of disposition of the whole property includes a power of sale, and consequently the power of sale is incidental to the power of disposition of the property in such manner and form, although the original will does not expressly include a direct power of sale."

In all the cases to which I have referred there was a legal limitation. The deed of 1834, with which I have to deal, leaves the legal estate in trustees; the limitation is "to the use of trustees," followed by a trust of the rents for the lives of certain persons, and then on the death of the survivor of two persons on trust that the trustees should convey and assure one moiety of the hereditaments and premises thereby granted "unto such one or more child or children or issue of the body of the said E. Redgate, and for such estate or estates, manner and form" as she should by will "give, devise, or dispose of the same." The argument is, that it is not competent to her to give the property by means of a trust for sale and division of the proceeds. First, on the language of the deed, you cannot give effect to the words "manner and form," unless they are contrasted with the words "estates or estate." I think that the words include a power to do something other than give an estate to children—that she may give to a child in some manner and form an interest in the property which shall not be the estate in the property itself.

Secondly, apart from the form of the language of the deed, is there any variance to show an impossibility of conversion, and distinguishing this case from *Kenworthy* v. *Bate*? I should have thought that the inference was rather the other way. When the limitations are legal the donee takes the legal estate by virtue of the language of the power, and you find that the settlor intended that he should take the land as land. Under these limitations the original deed does not convey the legal estate under the Statute of Uses, but there is a trust to convey it. Under *Kenworthy* v. *Bate* the donee gets it by virtue of the limitations contained in the settlement itself. In this case he gets it through the execution of the trust to convey to him by the trustees in whom the legal estate is vested by the settlement. I should have thought that this was an *a fortiori* case in favour of the possibility of conversion and a trust for conversion followed by a gift of the proceeds. I am told that this cannot be so, because the trustees of the will cannot effect a sale, because they have not got the legal estate, and have to go to the original trustees of the settlement, in whom it is vested. I do not see that that makes any difficulty; for if they execute the trust they can carry out the sale, and complete the conveyance by calling on the trustees of the legal estate to concur. I think, therefore, that this case is governed by the principle of *Kenworthy* v. *Bate*, and that the trustees of the deed are bound, if called upon, to convey the legal estate in accordance with the appointment.

[His lordship then held, on the construction of E. Redgate's will, that she had in fact converted this property, on the ground that the words "my real estate" referred to real estate which was hers by way of power as well as by way of property; and that subsequently, between 1884 and 1887, J. W. Redgate and the defendant had elected to take the property as real estate, and that in consequence there had been a reconversion.]

Solicitors, *G. Featherstone Johnston*, for *Burton & Briggs*, Nottingham; *Gribble, Oddie, Sinclair, & Johnson*, for *Johnstone & Williams*, Nottingham.

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Chan. Div.
Swinfen Eady, J. } Dec. 3.

*In re* SMITH'S SETTLEMENT.
WILKINS *v.* SMITH. (*a.*)

*Settlement — Marriage settlement — Construction — Children—Wife's next-of-kin—Words "died intestate and without ever having been married."*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

*By a marriage settlement the trust property was settled, in default of children attaining a vested interest and in default of appointment. for such person or persons of the blood and kindred of H. S., as under the statute for the distribution of the estates of intestates would have been the next-of-kin of the said H. S. in case she had died intestate and without ever having been married.*

*Held, on the construction of the settlement that the issue of the marriage were excluded by the words "without ever having been married."*

Originating summons.

The question arising on this summons was, as to whether the persons entitled to a trust fund comprised in a marriage settlement, were the persons representing the estates of the children, or the wife's next-of-kin excluding the children.

The facts are set out in the judgment of Swinfen Eady, J.

*Frederic Thompson*, for the trustees.

*Northcote*, for a person representing the estates of the children. referred to *Wilson* v. *Atkinson*, 4 De G. J. & Sm. 455, 13 W. R. Ch. Dig. 77; *Upton* v. *Brown*, 28 W. R. 38, 12 Ch. D. 872; *Emmins* v. *Bradford*, 28 W. R. 531, 13 Ch. D 493; *In re Arden*, [1890] W. N. 204; *Stoddart* v. *Saville*, 42 W. R. 361, [1894] 1 Ch. D. 480; *In re Forbes*, [1899] W N. 6; *In re Mare*, [1902] 2 Ch. 112, 50 W. R. Dig. 157; *In re Watson's Trusts*, 55 L. T. Rep. 316, 35 W. R. Dig. 220; *Hardman* v. *Maffett*, 13 L. R. Ir. 499; *In re Deane's Trusts*, [1900] 1 Ir. R. 332.

*Rolt*, for the wife's next-of-kin, excluding children.

SWINFEN EADY, J., in giving judgment, said: The question arising upon this summons is, who is entitled, in the events that have happened, to a fund comprised in a marriage settlement dated the 15th of February, 1882. The settlement was upon the marriage of Miss Harriet Smith with George William Cook—that is to say, the marriage of a spinster, and it was a sum of £3,000 which ultimately became payable upon certain trusts to husband and wife and the children of the marriage, who being a son should attain twenty-one or a daughter should attain that age or marry. Then the ultimate gift over was in these words: "Provided also, and it is hereby declared and agreed that if there shall be no child of the said Harriet Smith who being a son shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry, then subject and without prejudice to the trusts hereinbefore declared the said trustees shall stand possessed of the said trust funds and the annual income thereof or so much thereof respectively as shall not have become vested or been applied under any of the trusts or powers herein contained; upon trust if the said Harriet Smith shall survive the said George William Cook, for herself, her executors, administrators, and assigns, but if the said Harriet Smith shall die in the lifetime of the said George William Cook then upon trust to transfer and pay the same to such person or persons for such estate or estates, and with, under, and subject to such powers, provisions, and declarations as the said Harriet Smith, notwithstanding her coverture, shall by her will direct or appoint, and in default or any such direction or appointment, and so far as any such (if made) shall not extend, upon trust for such person or persons of the blood and kindred of the said Harriet Smith as under the statute for the distribution of the estates of intestates would have been the next-of-kin of the said Harriet Smith in case she had died intestate and without ever having been married."

Now, it appears that there were two children of the marriage. The wife died on the 6th of June, 1885, in the lifetime of her husband. Of the two children, one, a son, died very shortly after the mother's death, within a few weeks, the child being then just a few weeks old. Then, on the 28th of December, 1899, the husband died, and in October, 1901, the second child died. There is no issue of the marriage living, and no issue ever took a vested interest under the provisions of the settlement in favour of the sons and daughters of the marriage; and the question now is, whether the wife's children took in default of any appointment by her, or whether the wife's children are excluded from the division by the language of the instrument. If the children took, then in the events that have happened the husband would take the share of the son who died in the husband's lifetime, and the share of the other child, who died after the husband's death, would go to that child's next-of-kin, the person entitled under the Statute of Distribution; on the other hand, if the children are excluded, then the property in question would go to the persons entitled to the wife's property under the Statute of Distribution, excluding the children.

Now, on the language of this instrument itself, apart from authority, I have no difficulty whatever in coming to a conclusion. The language appears to me to be absolutely clear, and as free from any ambiguity as possible. In default of there being children taking a vested interest, sons attaining twenty-one and daughters attaining that age or marriage, then the property is to go to a class mentioned under the Statute of Distribution as if the wife had died intestate and "without ever having been married." Those words clearly exclude any children, because by our law, if the lady had not been married she could not have had any lawful issue. It seems to me, therefore, that these words must have that interpretation unless I am bound by a rule of construction to say that in this settlement, being a settlement on marriage, these words, "without ever having been married" have a fixed and definite technical meaning different from what the words would have in their ordinary and natural signification. If there is any such technical rule of construction I must give effect to it; but if I am not bound by any such rule, then I have no difficulty whatever in arriving at the true construction of the instrument in question.

Now such a rule is said to have been established by a case of *Wilson* v. *Atkinson*. The words of the settlement were, in case the lady "should die in the lifetime of Richard Wilson Simpson, her intended husband," then the fund was to be in trust "for such person or persons as under the statute for the distribution of the effects of intestates would have become entitled thereto on the decease of the said Jane Wilson if she shall die possessed thereof, and without having been married, such persons if more than one to take as tenants in common and in the shares in which they would have taken under the same statute." The settlement in that case was the settlement of a widow who had an illegitimate daughter, and the settlement contained a provision that the illegitimate daughter should, for the purposes of that trust, be deemed to be the lawful child of the said Jane Wilson—that is, the lady. Knight-Bruce, L.J., said the point for decision was "whether the words 'without having been married' in that instrument ought to be read as signifying 'without having been married to anyone' or 'without having a husband living at her death' or 'without having been married to her then intended husband,'" and he said: "The context forbids the first of these constructions." The first construction was "without having been married to anyone," and then

he goes on to say: "The context forbids such a construction, and this I think even independently of the following declaration." Then he reads the declaration with regard to the child being treated as the lawful child, and he says that provision "constitutes an effectual and binding provision to the benefit of which the appellant (the child) was entitled. Both provisions read together certainly give the appellant a right to the fund. She appears to me accordingly entitled to succeed." In other words, he does not purport to lay down any general rule of construction that in a marriage settlement the words "without having been married" are always to receive one fixed definite construction, and certainly does not lay down that those words, or words like them—because in the present case the words that I have to consider are "without ever having been married"—in every marriage settlement, no matter what the context, and no matter whether it provides for the issue of the intended marriage or not, are to receive this certain definite construction. In *Wilson* v. *Atkinson*, the settlement contained no express provisions for children or issue. Then Turner, L.J., who agreed with Knight-Bruce, L.J., reversing the decision of the Master of the Rolls, said that the trust in question in that case could not be construed without taking into account the declaration immediately following—the declaration with regard to the illegitimate child—and that there would be no meaning in that declaration if lawful children in themselves could not have taken under that trust; and then he adds: "that declaration must therefore, being taken in connection with the trust for the next-of-kin, be considered to explain the latter to refer to children as well as other next-of-kin." So that, as regards the determination of that case, both Lords Justices decided it upon the context of that particular instrument, and I do not understand either of them as laying down any general rule for the construction of all marriage settlements irrespective of the nature of the provisions in them.

Now, I should arrive at that conclusion on the consideration of that case alone. But if there have been subsequent decisions which compel me to take a different view of *Wilson* v. *Atkinson* I shall have to consider them. But the decisions are not uniform.

In *In re Ball's Trusts*, 27 W. R. 409, 11 Ch. D. 270, and in *Upton* v. *Brown*, Fry, L.J., felt himself constrained to decide as he did in those cases by *Wilson* v. *Atkinson*, but almost immediately afterwards the late Master of the Rolls, Sir George Jessel, in *Emmins* v. *Bradford*, felt himself at liberty to come to an entirely different conclusion. In the first of these two cases, *In re Ball's Trusts*, before Fry, J., there was no provision for the issue of the marriage in the settlement. It was not, as in the case I have to consider, a gift in default of children taking a vested interest; and in the second case before Fry, J., *Upton* v. *Brown*, where the person taking was the son of the former marriage, one of the reasons that Fry, J., gave 12 Ch. D. at p. 878 for the conclusion that he came to was this. He said: "Moreover, if I were to hold that this child is excluded, I must equally have held those children were excluded if he had married and died under twenty-one leaving children, and I must equally have excluded children of a third marriage of the mother, for whom the settlement makes no express provision." That reason which seems to have influenced him I am unable to appreciate, because there could have been no third marriage; and on the death of that husband of the second marriage the fund was, if the lady should survive her husband, to be in trust for her absolutely, so that the children of the marriage would not have been excluded from participating in their mother's property any more than the children of any marriage are. Of course there is a possible explanation, but I do not think that was in the mind of the learned judge.

Then, those two cases before Fry, J., being one way, there followed *Emmins* v. *Bradford*, before Sir George Jessel, which is a very clear and distinct authority the other way. At 13 Ch. D., p. 498, Sir George Jessel said: "I rest my decision upon this, that the words are free from ambiguity, and there is no context whatever to control it." The decision in *Emmins* v. *Bradford* was a very strong one, because the effect of it exclude children of the wife who were living—was to children by a former marriage; and Sir George Jessel, after considering the meaning of the word "unmarried" and referring to *Clarke* v. *Colls*, 9 H. L. Cas. 601, 11 W. R. H. L. Dig. 10, in the House of Lords, to which I will refer presently, and referring to *Wilson* v. *Atkinson* and Fry, J.'s, decisions upon it, said that "until some higher court lay down some new general principle of construction I shall not interfere with unambiguous words." It cannot, therefore, be said that the decisions following *Wilson* v. *Atkinson* are uniform.

Now, *Emmins* v. *Bradford* has been twice followed in Ireland in cases to which Mr. Northcote has referred; but in England, Chitty, L.J. (then Chitty, J.), in *Stoddart* v. *Saville*, followed Fry, J. It will be observed that in that case there was no trust for the issue of the marriage. The lady had left one child of the marriage, and the trust there was not a trust in default of a child attaining a vested interest, as it is in the case I have now to deal with.

In addition to the case of *In re Arden*, to which reference has been made, there is a recent decision of Kekewich, J., in *In re Mare*, [1902] 2 Ch. 112, 50 W. R. Dig. 157, in which he considered himself bound by *Wilson* v. *Atkinson* as governing the whole question, and said it was a clear decision of the Court of Appeal covering the exact case. He conceived that it covered the exact case before him, and he followed it. The authorities are certainly conflicting.

Then, when you come to the text-writers, it has been pointed out that Mr. Davidson's view is that the present clause excluded the husband and children. Mr. Wolstenholme's view is that the object of all conveyancers is to exclude the husband, not only from taking in his own right, but also to exclude the husband as the person entitled to the children's share as next-of-kin of the children; his view is that that object fails by the use of the words in question.

Now in that state of things the decision in *Clarke* v. *Colls* seems to me of considerable importance, because if there is a conflict of authority certainly any rule laid down there would prevail. In *Clarke* v. *Colls* the actual words were "as if the wife had died possessed thereof intestate and unmarried," and the contest was as to what the meaning of the word "unmarried" was. Lord Cranworth states it may have one or two meanings. He says: "What is the meaning of the word 'unmarried'? It may, without any violence to language, mean either 'without ever having been married'—those are the precise words in this case—or 'not having a husband living at her death.' If the former construction be adopted—that is to say, if the word means 'without ever having been married,' then if the wife should survive her husband, and afterwards marry and have children, her collateral relatives would take the fund to the exclusion of her own issue." In other words, he considers that the words "without ever having been married" in a marriage settlement would exclude the issue, which they obviously do according to their ordinary meaning.

Then one other case was referred to, before Chitty, J., which was a case of construction of a will, *In re Watson's Trusts*. There Chitty, J., came to the conclusion that the same words "without ever having been married" were clear and unambiguous, and that effect must be given to them by directing that the lineal descendant of the titular person, the testator's mother, was excluded in favour of her next-of-kin. Chitty, J., dealt with the difference between a will and settlement in this way. After referring to the cases which have been cited to me to-day, he says: "Those cases were all cases of construction upon marriage settlements, where the court is guided, in interpreting a gift, by the existence of a presumption that the parties intended to benefit the issue."

Now, where you have a settlement dealing in terms with a certain class of issue, that is such issue for which it is intended to provide, sons at twenty-one, daughters at twenty-one or marriage, with a gift over in default of there being any such issue, it seems to me to be very difficult to say that it was the intention nevertheless of the settlement to provide for issue who do not take a vested interest within the words of the settlement. But there is also this further observation to be made. It is said that the intention of this clause is to exclude the husband, and that a particular interpretation has been put upon those words with that object. But if that be so, it seems that the very interpretation so put upon them defeats the object, and does not give effect to it; because the object being to exclude the husband as well in his own right as in respect of the children's right, giving the construction to those words which has been contended for on behalf of the children, would, in effect, be to let in the husband—not to exclude the husband, but let him in—in the only event which we are dealing with, where there are children, but who fail to take a vested interest. It seems to me a case in which, if I were to decide as Mr. Northcote invited me to do, I should be departing from the plain path, the natural ordinary meaning of the words, with the view of giving an effect to a supposed intention, and at the very same time defeating that intention by enabling the property to devolve through children to the husband, the very person whom it was the object of the settlement to exclude.

Under these circumstances I am of opinion that I am not in the present state of the authorities compelled or prepared to interpret the words of this settlement in any other than their ordinary and natural meaning, and accordingly I decide that the issue of the marriage are excluded by the words "without ever having been married." I accept what Mr. Bolt said at the conclusion, that Mr. Northcote's argument gives no effect to these latter words, "without ever having been married," because the husband is already excluded by the preceding words. There will therefore be a declaration accordingly.

Solicitors, *Field, Roscoe, & Co.*, for *Griffiths, Ryland, & Co.*, Cheltenham.

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Chan. Div.
Swinfen Eady, J. } Oct. 28; Nov. 6.

*In re* COZENS.
MILES *v.* WILSON. (*a.*)

*Will—Class—"My own nephews and nieces"—Half-blood—Husband's nephew described as "my nephew"—Great-niece described as "my niece."*

(*a.*) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

*When there is no context to the contrary, a gift to persons of a certain degree of relationship to the donor includes those of the half-blood.*

*The inaccurate use of a term of relationship in describing a particular person may, but need not, lead to the inference that the same term when used in the same instrument to designate a class includes that person and others to whom it may be equally applicable.*

*A testatrix gave a gift unto and among "my own nephews and nieces." In another part of the same will she had referred to a person who was her great-niece as "my niece," but in yet another part she had described her correctly as "the daughter of my nephew X." She also referred in her will to a nephew of her husband once by his name alone and once as "my nephew."*

*Held, that the words "my own nephews and nieces" excluded not only the husband's nephews and nieces but the testatrix's great-nephews and great-nieces, not excepting the great-niece who had been called "my niece."*

Adjourned summons for the determination of the question who were entitled to take under a gift, in a will, to "my own nephews and nieces."

The testatrix in this case bequeathed one moiety of her residuary real and personal estate upon trust for Alexander Duncan for life, and after his decease upon trust "for my own nephews and nieces, with the exception of Mary Ann, the sister of William Moore." In an earlier part of her will the testatrix had given the proceeds of sale of twenty-two cottages to "Mary Jane Cozens, Ellen Cozens, James Cozens, Louisa Howe, and Catherine Norriss, the nieces and nephews of my late husband, George Cozens, and my nieces Emma Moore and Sarah Metcalf in equal shares."

Emma Moore was a great-niece of the testatrix, and was elsewhere in the will described as the daughter of "my nephew William Moore."

Sarah Metcalf was the daughter of an illegitimate nephew.

Alexander Duncan, the nephew of the testatrix's husband, was in a passage in the will described as "my nephew."

The testatrix died on the 6th of July, 1889, and Alexander Duncan died on the 4th of May, 1900.

In addition to nephews and nieces of the whole blood the following claimed to share in the gift to my own nephews and nieces: Nephews and nieces of the half-blood; Emma Moore and Sarah Metcalf on the ground that they were described as "my nieces"; other great-nieces and great-nephews, on the ground that some of their class were described as nieces.

The husband's nephews and nieces were not made parties owing to the difficulty of tracing them.

*A. M. Begg*, for the trustees.

*Clare*, for nephews and nieces of the half-blood, cited *Grieves* v. *Rawley*, 10 Hare 63.

*T. T. Methold*, for Emma Moore and Sarah Metcalf.

*Harry Greenwood*, for great-nephews and great-nieces other than Emma Moore, cited *In re Jodrell*, 38 W. R. 721, 44 Ch. D. 590, and [1891] A. C. 304, 40 W. R. Dig. 281.

*Harry Johnston*, for nephews and nieces of the whole blood, cited *Smith* v. *Lidiard*, 3 K. & J. 252; *Wells* v. *Wells*, 22 W. R. 893, L. R. 18 Eq. 504; and *Merrill* v. *Morton*, 29 W. R. 394, 17 Ch. D. 382.

SWINFEN EADY, J.—As there are no words in the will pointing to the exclusion of the children of the testatrix's half-brother they are entitled to share, in accordance with *Grieves* v. *Rawley*.

As to the claims of Emma Moore, Sarah Metcalf, and other great-nephews and great-nieces, cases

have been cited which are said to establish the proposition that great-nephews and nieces are necessarily excluded from a gift to nephews and nieces notwithstanding that in another part of the will they may have been described as nephews and nieces. On the other hand, *In re Jodrell* has been cited to show that there is a rule that when once a legatee has been referred to by an inaccurate description the same description, if afterwards used to designate a class, must be taken to include that legatee and all other persons to whom the same inaccurate description is equally applicable—that is, who stand in the same degree of relationship to the testator. But in that case Lord Halsbury in the Court of Appeal repudiated laying down any canon of construction which went beyond that particular case, and Lord Herschell in the House of Lords said that a word used in several contexts in a will must in each case be read according to the context. I am of opinion that both the propositions which have been contended for are too wide, and that there is no hard and fast rule that nephews and nieces cannot include great-nephews and nieces; nor, on the other hand, any hard and fast rule requiring the court, when a person has once been referred to as a niece to construe that word everywhere else in the will as including her. The true rule is that the court must determine the question by looking at the language and contents of the whole will.

Now, looking at the contents of this will, I observe that the testatrix gives shares in the proceeds of sale of certain cottages to two named persons whom she describes as "my nieces," of whom one was the daughter of an illegitimate son of her sister, and the other was her great-niece; but that one of these persons is elsewhere referred to, and is then correctly described as "the daughter of my nephew William Moore."

I observe, further, that there is a gift of 30s. a week to "my nephew Alexander Duncan," who was really the husband's nephew, so that if *In re Jodrell* laid down the wide rule of construction which has been contended for, not only all the great-nephews and nieces, but all the husband's nephews and nieces must share.

Lastly, I come to the gift in question—namely, a gift "unto and among my own nephews and nieces" with an exception. It has been suggested that the words "my own" exclude only the husband's nephews and nieces. I cannot adopt that suggestion, and in my opinion the words restrict the class to the children of the testatrix's brothers and sisters whether of the whole or of the half-blood.

Solicitors, *Burton, Yeates, & Hart*, for *Belne & Belne*, King's Lynn; *Andrew, Wood, Purves, & Sutton*, for *Collin & Adams*, Saffron Walden.

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K. B. Div. (Ridley, J.) } Nov. 22; Dec. 1.

HEALING v. HEALING AND ANOTHER. (a.)

*Lunacy—Maintenance of lunatic's children—No committee appointed—Sale of lunatic's business while lunatic was under restraint—Application of lunatic's estate, with consent of wife, by third party for maintenance and education of lunatic's children—Refusal of lunatic on his release to ratify this expenditure—Right to recover proceeds of sale of business.*

*The plaintiff, who had carried on a draper's business, was confined in a lunatic asylum from* 1882 *to* 1894, *but no committee of his estate had been appointed. In* 1883 *the plaintiff's business was sold by the defendant, and the proceeds of the sale were with the authority and consent of the plaintiff's wife expended by the defendant in the maintenance of the plaintiff's children (not of tender years) while he was in the asylum. The plaintiff upon his release in* 1894 *refused to ratify what had been done, and brought an action against the defendant to recover the proceeds of sale of the business:—*

*Held, that the plaintiff not being legally liable to maintain the children while in the asylum, and no committee having been appointed of his estate who might have sanctioned such expenditure, the plaintiff could recover the proceeds of the sale of his business as money had and received to his use.*

Further consideration, in an action in which the plaintiff claimed £200 for money lent, and alternatively that sum, as money had and received to the plaintiff's use, tried before Ridley, J., and a common jury.

The plaintiff, Samuel Healing, had a business at Lambeth. In 1882 he was confined in a lunatic asylum, but no steps were taken to appoint a committee. In 1894 the plaintiff escaped from the asylum, and having evaded the authorities for fourteen days, the order on which he had been detained consequently lapsed; and he was then allowed to go free as cured. On his escape he found that his business had been sold, that his wife was living in adultery with his brother William, by whom she had had two children. He obtained a divorce in 1897, with £500 damages, against William Healing, which were not paid, and in the course of the divorce proceedings, alleged he first discovered that Charles Healing, another brother, had disposed of the business for £200, which sum had eventually been paid over by Charles to William. Samuel Healing on the 7th of March, 1900, brought the present action against William Healing, and Charles was added as a defendant on the 30th of May, 1900. By way of defence, William pleaded that, with the consent of the plaintiff's wife as his agent while he was under confinement, he had spent the money derived from the sale of the business on the maintenance and education of the plaintiff's three children—who, however, were not of tender years; and he also claimed for various necessary payments made on the plaintiff's behalf, the chief item being £276 for the maintenance and education of the children between 1884 and 1890. The defendant Charles Healing pleaded the Statute of Limitations.

The trial took place on the 20th and 21st of November, with the result that on the findings of the jury, judgment was entered for the defendant Charles on his plea of the Statute of Limitations, and the consideration of the legal effect of the jury's findings on question left them with regard to William's liability, was reserved for further argument on the 22nd of November.

*Rawlinson, K.C.*, and *Schultess Young*, for the plaintiff.

*Colam* and *Craig Henderson*, for the defendant William Healing.

*W. B. Allen*, for the defendant Charles Healing.

Dec. 1.—RIDLEY, J., in giving judgment, said: This action was brought to recover the sum of £200 as money had and received, or, in the alternative, recoverable, owing to fraud alleged against the defendants, but this latter allegation was not pressed by the plaintiff's counsel at the hearing. Shortly stated, the facts are that the plaintiff in 1881-82 was in business as a draper in the south of London. He had a wife and

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

three children, and in July of 1882 he became a lunatic and was taken care of in an asylum as such, until the 8th of March, 1894. It appeared that on his becoming a lunatic no committee was appointed; the account which stood in his name at the London and Westminster Bank was closed, and a fresh account was opened in the name of his two brothers, the defendants Charles and William. Into that account was carried the sum of £8 8s. 11d. from the former account, and £50 provided by Charles. For a year or thereabouts the business continued, but in 1883 it was sold by William, with the consent of the plaintiff's wife, and the net proceeds were handed to Charles. These were returned by him to her within about a month, amounting in all to about £200. The wife maintained herself and the children on this fund for a time, but lent £150 out of it to the defendant William, and it was arranged between them that he should maintain the children (who were not then of tender years) out of this fund, receiving back from her the bills he had given for the loan. At some period not precisely known, improper relations began to exist between William and his brother's wife, and two illegitimate children were born in 1888 and 1890 respectively. After the plaintiff regained his liberty he obtained a divorce, with £500 damages against William as co-respondent.

The present action was brought by Samuel Healing to recover the proceeds of the sale, £200, or, at all events, the £150 handed over to the defendant William. With regard to the defendant Charles, as the writ dated the 7th of March, 1900, was not originally directed against him, and his name was only first added as a defendant on the 30th of May, 1900, the Statute of Limitations furnished him with a defence, unless there was by him a concealment of the facts from the plaintiff, which the jury found there was not. William, however, could not rely on this defence, the writ as against him being dated the 7th of March, 1900. With regard to him the jury found, in answer to questions, as follows: (1) That the plaintiff was told when he came out of the asylum of the arrangement, but that he did not accept it; (2) that the sale money was paid to the plaintiff's wife and was used with her authority for the maintenance of the children; (3) that the maintenance of the children cost over £200.

Mr. Rawlinson contended that, as no proceedings were ever taken for the appointment of a committee, all that was done by William, whether the plaintiff's wife consented or not, was illegal, that it was in fact spent on the children without the plaintiff's authority, and that for such a purpose the defendant William had no right in law to spend it, and that if the money was once traced to his hands he could not set up a right to keep it, in whatever way it may have been disposed of. On the other hand, Mr. Henderson said that, though the administration of a lunatic's estate should be carried on by a committee properly appointed, yet that the case of *Read* v. *Legard*, 6 Exch. 636, shows that the wife of a lunatic can pledge her husband's credit for necessaries supplied to herself, and that the principle applies to necessaries furnished to the children; that the finding of the jury showed that William applied the money as he did with an authority which had power to pledge the credit of the plaintiff, and that William was therefore entitled to judgment, whether a committee was appointed or not.

It appears to me on consideration that the argument of the plaintiff prevails. There is, indeed, authority for the principle that a husband is liable for necessaries supplied to his wife during the period of his lunacy: *Read* v. *Legard*. That is so because the wife has authority by law to pledge her husband's credit for necessaries, and, if necessaries be supplied to a lunatic, there is an implied obligation on his part to pay for them out of his own property: *In re Rhodes*, 38 W. R. 385, 44 Ch. D. 94. But the obligation which rests on a parent to provide for his children (not of tender years) is a moral and not a legal one, and there is no liability on him to pay for debts incurred by the child, unless he has given the child authority to incur them or has contracted to pay them: *Mortimore* v. *Wright*, 6 M. & W. 482. The case of the wife is quite different from that of the children. That being so, the spending by the defendant William of this money on the children in no way makes the plaintiff liable to repay him. It occurred to me that, if a committee had been appointed during the detention of the plaintiff in the asylum, he would have been called upon to allow for money expended on the children previous to his appointment, and that, in a similar way, it might be argued here that it should be allowed to the defendant. But the answer is that in such a case the committee would have had legal authority as representing the lunatic, and that he could ratify the preceding obligation if he thought fit to do so, whereas here the jury found that the plaintiff refused to ratify what had been done. The court can and does meet moral obligations which the lunatic might have met if of sound mind, but the defendant here had no authority to do so, for the wife could give him none, nor did the plaintiff ratify. There may be some doubt whether the full sum of £200, the proceeds of the sale, ought not to be recovered, but, as it appears that the sum actually paid to the defendant was only £150, I think it safer to enter the judgment for that sum with costs. I desire to add that the counterclaim is dismissed with costs.

*Judgment for the plaintiff.*

Solicitor for the plaintiff, *W. J. Hart.*

Solicitors for the respective defendants, *W. Archer & Son* and *T. H. Aldous.*

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K. B. Div. (Bigham, J.) Nov. 28.

*In re* WILLIAMS AND THE LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE CO.'S ARBITRATION. (a.)

*Insurance—Accident—Master and servant—Notice of accident—Delay by employer to give notice until notice of claim by workman was sent in—Award in favour of workman under Act of* 1897—*Insurance company's liability to indemnify employer.*

*The appellants took out a policy of insurance against liability in respect of injury to any workman in their employ under* (inter alia) *the Workmen's Compensation Act,* 1897, *with the respondent company.*

*Clause* 3 *of the policy provided that the employer was "to give immediate notice to the company of any accident causing injury to a workman," and that "time should be the essence of this condition." At the foot of the policy there was a notification that every notice to be given by the assured should be in writing sent by post to, or delivered at, the head office of the company.*

*An accident having happened to a workman of the appellants on the* 10*th of October,* 1900, *on the* 16*th of October the appellants notified the fact of the accident by telephone to the person who had introduced the insurance company to them. The appellants received a notice in writing from the workman of his intention to claim com-*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*pensation on the 1st of December, 1900, and they forwarded that notice to the respondent company on the 4th of December.*

*An award under the Act of 1897 having been made in favour of the workman, the appellants, the employers, claimed to be indemnified by the insurance company.*

*Held, that the giving of immediate notice of the accident was a condition precedent to the employers' right to indemnity under the policy, that the communication to the person who had introduced the appellants to the company was no notice to the company at all, and that under the circumstances the company were not liable.*

Case stated on a point of law for the decision of a judge sitting for a Divisional Court.

The case stated by the arbitrator raised the question as to the construction to be put upon a policy of insurance against (*inter alia*) liability under the Workmen's Compensation Act, 1897.

On the 28th day of November, 1899, Messrs. Williams & Thomas who were employers, entered into a policy of assurance with the Lancashire and Yorkshire Accident Insurance Co. (Limited), whereby the company agreed, subject to conditions therein expressed, to pay such sums as the employers should become liable to pay in respect of injury to any workman whilst employed on their works in South Wales under or by virtue of (*inter alia*) the Workmen's Compensation Act, 1897.

On the 10th day of October, 1900, while the policy was still in force, a workman of the employers met with an accident, and on the 16th of that month his employers communicated that fact by telephone to the person who had introduced them to the defendants and had received commission for the introduction. The workman gave the employers notice of his claim on the 1st of December, 1900, and within three days the employers gave written notice of this claim to the defendants, the Insurance Co. The workman obtained compensation against the employers in the Pontypridd County Court, but when the employers made a claim for indemnity under the policy, the defendants denied liability, on the ground that immediate notice of the accident in accordance with clause 3 of the policy had not been given them.

Clause 3 of the policy was as follows: "The employer shall give immediate notice to the company of any accident causing injury to a workman. The employer shall also forward to the company every written or other information as to any verbal notice of claim received, within three days after the receipt of such notice, and shall give all necessary information and assistance to enable the company to settle or resist any claim as they may think fit. . . . Time shall be deemed to be the essence of this condition."

At the foot of the policy, but not among the numbered clauses of the agreement, was the following notice: "Every notice and communication to be given or made by the employer shall be in writing and shall be sent by post to or be delivered at the head office of the company. No notice or communication otherwise given or made shall be recognized for any purpose whatsoever."

The arbitrator found as a fact that the employers could have given, but did not give immediate notice to the company of the accident, but that they did forward to the company within three days of its receipt the written notice of claim in respect thereof. He held that the failure by the employers to give to the company immediate notice of the accident under clause 3, having regard to the true construction of all the terms of the policy, exonerated the company from liability, and he directed that the applicants, the employers, should pay the company their costs of the arbitration and the costs of the award.

The question for the opinion of the court was whether, having regard to the true construction of all the terms of the policy, the failure by the employers to give to the company immediate notice of the accident under clause 3 exonerated the company from liability or not.

*Hugh Sturges*, for the employers.—The question is, whether, having regard to the true construction of clause 3 of the policy, the company is exonerated from liability. The arbitrator held that an "immediate notice" referred to in the policy meant immediate notice of the accident; whereas we say that an "immediate notice" of a claim of the workman to compensation was the notice that had to be given immediately in order to render the company liable to make good an award. It is not disputed here that as such notice was sent to the defendants within three days after the appellants themselves received it from the workman there has been any delay, if, as we submit, this is the true construction. The object of giving notice was that the company should have time "to settle or resist any claim as they may think fit," and the notice sent was sent in time to enable them to consider the matter. So that, even if the giving of immediate notice is a condition precedent to the employers' right to indemnity, which, on the true construction, is at least questionable, such notice was in fact given.

*Bailhache*, for the respondents, was not heard.

BIGHAM, J.—In this case my judgment must be for the insurance company. Clause 3 of the policy stipulated that the employer should give the company immediate notice of any accident causing injury to a workman, and the arbitrator has found as a fact that immediate notice was not given. What was immediate notice must depend upon the circumstances of each case, and indeed is practically always a question of fact to be tried by the jury or the arbitrator. The arbitrator found that the employers could have given, but did not give, immediate notice of the accident, and he found, consequently, that immediate notice was not given. I think the arbitrator was quite right, as although the accident occurred on the 10th of October, and the employers were aware of the accident by the 17th of October, no notice was sent to the company until the 4th of December. I say no notice was given till the 4th of December, because the communication of the fact that the accident had occurred to the person who introduced the appellants to the respondent company was no notice to the company at all. That finding, in my opinion, decides the case. But it was said that the giving of immediate notice was not a condition precedent to the employers' right to indemnity under the policy. I do not agree with that view, and I have no hesitation in saying that the giving of immediate notice was intended to be a condition precedent. Clause 3 ends thus: "Time shall be the essence of this condition," and I cannot when I read the whole of the clause, and remember how essential it is that the circumstances under which a claim might be made should be speedily brought to the knowledge of the insurance company, accept the view put forward by the appellants' counsel.

Solicitors, *Williamson, Hill, & Co.*, for *Ingledew & Sons*, Cardiff; *Martyn & Martyn*, for *Leigh & Horley*, Cardiff.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) Oct. 28.

BROOKS (*Appellant*) *v.* MASON (*Respondent*). (*a.*)

*Criminal law—Sale of intoxicating liquor to child under fourteen—Delivery in vessel improperly corked and sealed—Intoxicating Liquors (Sale to Children) Act,* 1901 (1 *Ed.* 7, *c.* 27), *ss.* 2, 5.

*Where the holder of a licence to sell intoxicating liquor sells or delivers, save at the residence or working place of the purchaser, any such liquor to a child under the age of fourteen years for consumption by any person on or off the premises in a vessel not corked and sealed as required by the Intoxicating Liquors (Sale to Children) Act,* 1901, *he is guilty of an offence under section* 2 *of that Act, notwithstanding that at the time he sold and delivered such liquor he honestly believed that the vessel was properly corked and sealed in accordance with the requirements of the Act.*

This was a case stated by E. T. d'Eyncourt, Esquire, Metropolitan police magistrate.

An information was laid on the 28th of January, 1902, by the respondent, an inspector of police, against the appellant, the licensed occupier of 152, Essex-road, Islington, under the Intoxicating Liquors (Sale to Children) Act, 1901, for that the appellant, being the holder of a licence, within the intent and meaning of the Licensing Acts, 1872 and 1874, and of the Intoxicating Liquors (Sale to Children) Act, 1901, did unlawfully and knowingly deliver otherwise than at the residence or working place of the purchaser a certain description of intoxicating liquor to one James Cousins, a person under the age of fourteen years, for consumption by any person on or off the premises, such intoxicating liquor not being sold or delivered in a corked and sealed vessel in a quantity not less than one reputed pint for consumption off the premises only.

The said information was heard on the 20th of February, 1902, whereupon the magistrate convicted the appellant and fined him 10s. and 2s. costs.

Upon the hearing of the information the following facts were proved or admitted:

The appellant holds a licence to sell beer by retail for consumption off the premises in respect of 152, Essex-road, Islington.

On Sunday, the 19th of January, 1902, one James Cousins, a boy of about eleven years of age, had been sent by his parents to the appellant's premises to obtain some beer to be drunk off the premises, and there was delivered to him by the appellant one pint of beer in a bottle supplied by the appellant. The bottle was fitted with a glass stopper, having round it a ring of cork. Over the top of such stopper from one side of the neck of the bottle to the other side the appellant, before delivery, stuck a gummed label previously moistened by him. The label was about three inches in length, and bore the words "Caution. This label must not be tampered with."

After affixing the label, a portion of sealing-wax was placed by the appellant on one side of the neck of the bottle, partly on the glass and partly over one end of the paper label. In that condition the bottle containing beer was delivered by the appellant to the boy James Cousins.

A police officer stopped the boy and took from him the bottle. The gum on the label was then wet. The constable took hold of the label by the end opposite that on which the sealing-wax was, and turning it back detached the label, which came off the bottle intact, the sealing-wax also coming whole off the bottle with the label.

The learned magistrate found as a fact that the bottle was corked and closed with the stopper, but that the paper label had not been secured with a substance without the destruction of which the stopper could not be withdrawn; also that the appellant knew that James Cousins was under the age of fourteen years, but that the appellant had, at the time he delivered the bottle to James Cousins, honestly believed that he had in manner before mentioned by the gummed label and the sealing-wax secured the stopper in conformity with section 5 of the Intoxicating Liquors (Sale to Children) Act, 1901.

On the part of the appellant it was contended upon the above facts that under section 2 of the statute a person commits no offence against that section who honestly believes at the time of sale or delivery that the stopper has been secured in accordance with the said section; and that the word "knowingly" in that section refers to the knowledge of the seller as to the condition of the corking and sealing of the vessel in which the intoxicating liquor is sold or delivered as well as the knowledge by the seller of the age of the person to whom the intoxicating liquor is sold or delivered.

The magistrate held, however, upon the above facts that the appellant had been guilty of an offence against the statute, and thereupon convicted him as aforesaid.

The question for the opinion of the court was whether the magistrate came to a correct determination and decision in point of law.

The Intoxicating Liquors (Sale to Children) Act, 1901 (1 Ed. 7, c. 27), enacts as follows:

Section 2.—"Every holder of a licence who knowingly sells or delivers or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only, shall be liable to a penalty not exceeding forty shillings for the first offence, and not exceeding five pounds for any subsequent offence; and every person who knowingly sends any person under the age of fourteen years to any place where intoxicating liquors are sold or delivered or distributed, for the purpose of obtaining any description of intoxicating liquor, excepting as aforesaid, for consumption by any person on or off the premises, shall be liable to like penalties."

Section 5.—"The term 'corked' means closed with a plug or stopper, whether it is made of cork, or wood, or glass, or some other material.

"The expression 'sealed' means secured with any substance without the destruction of which the cork, plug, or stopper cannot be withdrawn."

*Danckwerts, K.C.* (*Bruce Williamson* with him), for the appellant.—The decision of the magistrate was wrong. The appellant did not commit any offence under the statute. Section 2 creates the offence charged in this case. The words in the section "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only" are part of the definition of the offence created and the word "knowingly" applies to them. The word "knowingly" covers the whole question. That is clear on looking at the latter part of the section; there the words used must mean, not that a person is guilty of the offence who sends a

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

child under fourteen to obtain liquor, but that he is guilty of the offence if he knowingly sends such child to obtain liquor in uncorked and unsealed vessels. There must be a *mens rea* in order to establish a criminal offence unless the statute expressly provides otherwise.

He referred to the judgment of Day and Wright, JJ., in *Sherras* v. *De Rutzen*, 43 W. R. 526, [1895] 1 Q. B. 918.

*Craies* (*H. Avory, K.C.*, with him), for the respondent.—The magistrate was right. The word "knowingly" applies to the sale and delivery of the liquor supplied and to the age of the person to whom the liquor is supplied; it does not apply to the exception in the section. The gist of the offence is knowingly serving intoxicating liquor to children under the age of fourteen. The offence created by section 2 is that which is defined in the first part of the section down to the word "excepting." The exception in that part of the section is not part of the definition of the offence, but is merely a defence which may be set up. This argument also applies to the second part of the section. It is not necessary in the case of an offence under this section to prove *mens rea*.

He referred to *Reg.* v. *Tolson*, 37 W. R. 716, 23 Q. B. D. 168, and *Cundy* v. *Le Cocq*, 32 W. R. 769, 13 Q. B. D. 207.

*Danckwerts, K.C.*, in reply, referred to *Miller* v. *Justices of Dudley*, 46 W. R. 606.

Lord ALVERSTONE, L.C.J.—This case, to my mind, is not without difficulty. In a very great many criminal cases there can be no doubt that it is necessary to prove *mens rea*, and in dealing with offences under many statutes if such proof is not necessary you must show that the particular statute does not require it. But this case cannot be decided simply on that principle. I think that in deciding this case we must look at the statute which creates the offence we are dealing with, and in construing section 2 we must look to see whether the word "knowingly" applies to the words which we there find before or after the word "excepting"; whether, in fact, that part of the section beginning with the word "excepting" forms a part of the definition of the offence, or is intended, if proved, to constitute a defence to the offence. [The learned judge here read section 2.] In my opinion the intention of the Legislature here was to stop the sale of intoxicating liquor to children under the age of fourteen. But the Legislature seem to have thought that in some cases where there was a sale to a child under that age the sale might not be to the child for its own consumption but for that of the person who sent the child to purchase the liquor, and the Legislature therefore made the exception as to intoxicating liquors sold or delivered in corked and sealed vessels.

It has been argued on behalf of the appellant that the words constituting this exception form part of the definition of the offence, and that the word "knowingly" applies to the whole of the section, and that, therefore, there is no offence under the section if the child is supplied with intoxicating liquor in a vessel which the holder of the licence honestly believes to be corked and sealed in accordance with the requirements of the Act. The other view is that an offence under the statute is committed merely if such liquor is delivered not so corked and sealed; and that the word "knowingly" does not apply to the exception. I have come to the conclusion, though not without hesitation, that the Legislature did not intend to read into the exception the word "knowingly." I think they only intended to except intoxicating liquors delivered in vessels which are in fact corked and sealed as required by the statute, and not intoxicating liquors delivered in vessels which, the vendor merely believed to be so corked and sealed. The exception refers to matters of defence which if proved, in fact negative the alleged offence. For these reasons I am of opinion that the decision of the magistrate was right and that this appeal must fail.

WILLS, J.—I am of the same opinion.

CHANNELL, J.—I agree, though I also think there may be doubt on the point.

*Appeal dismissed.*

Solicitors for appellant, *Maitlands. Peckham, & Co.*

Solicitors for respondent, *Wontner & Sons.*

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## House of Lords.

From C. A. (England). Aug. 5, 1902.

HILDER AND OTHERS *v.* DEXTER. (*a.*)

*Company—Shares—Commission—Underwriters—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 8, *sub-section* 2.

*Where directors of a company limited by shares are acting in good faith, and within the discretion vested in them by the articles of association, there is nothing to prohibit them from agreeing to grant an option to persons subscribing or underwriting shares entitling such persons by way of brokerage or commission to purchase at par within a certain time unissued shares of the company. Section* 8, *sub-section* 2, *of the Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *does not render such an agreement unlawful.*

*Decision of the* Court of Appeal *reversed.*

Burrows *v.* Matabele Gold Reefs Co., 49 *W. R.* 500, [1901] 2 *Ch.* 23, *discussed.*

Appeal from an order of the Court of Appeal (Rigby, Collins, and Romer, L.JJ.) affirming a decision of Byrne, J. They followed a previous case of *Burrows* v. *Matabele Gold Reefs Co.*, 49 W. R. 500, [1901] 2 Ch. 23.

The facts are set out at length in Lord Davey's judgment.

The short question was whether (having regard to section 8 (2) of the Companies Act, 1900) it was lawful for a company limited by shares to agree with persons subscribing or underwriting shares to grant to them an option whereby they were entitled by way of brokerage or commission to purchase at par within a certain time unissued shares of the company.

The company issued one-sixth of its nominal capital, and applied to certain people, of whom one, the appellant, asked for and was allotted shares upon the following terms: "For each share allotted, in accordance with this application, a subscriber shall have the option, during the period of one year, of taking up at par a further ordinary share of £1, and in the event of this share being taken up under the option, a further option during a period of two years of taking up at par a further ordinary share of £1 in the initial capital of the company."

The object of the action was to restrain the company from carrying out this contract, and an injunction had been granted by the court below restraining the directors from doing so.

Against this order the present appeal was brought.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

*Haldane, K.C.*, and *Kirby*, for the appellant Hilder.

*W. F. Hamilton, K.C., K. G. Metcalfe*, and *Stanley Latham*, for the other appellants.

*Levett, K.C.*, and *Clauson*, for the respondents.

Earl of HALSBURY, L.C.—I have more than once had occasion to say that in construing a statute I believe the worst person to do so is the person who is responsible for its drafting, because he is very much disposed to confuse what he intended to do with the language which has in fact been employed; at the time of the drafting, at all events, he may have been under the impression that he had given full effect to what was intended; and he might make a mistake in construing the statute afterwards, just because what was in his mind was what was intended, though perhaps it was not expressed. For that reason I abstain from giving any judgment myself in this case. At the same time I desire to say that I have read the judgments about to be delivered by my noble and learned friends, and I entirely concur with every word of them. I believe that the construction at which they have arrived was the intention of the statute—I do not say my intention, but the intention of the Legislature. I was largely responsible for the language in which the statute was expressed, and for that reason I do not write a judgment myself.

Lord SHAND had expressed his concurrence.

Lord DAVEY.—The United Gold Coast Mining Properties (Limited) was incorporated on the 17th of December, 1900, with a capital of £200,000 divided into 200,000 shares of £1 each. In January, 1901, the directors determined to issue 33,333 shares, or one-sixth of their nominal capital. They did so by applying to a number of persons, of whom the appellant, Charles Martin Hilder, was one, to subscribe. The last-named appellant applied for and was allotted 6,975 shares upon the following terms: "For each share allotted in accordance with this application a subscriber shall have the option during the period of one year from the 3rd day of January, 1901, of taking up at par a further ordinary share of £1 in the initial capital of the company, and in the event of such last-mentioned share being taken up under such option a further option during the period of two years from and after the said 3rd day of January, 1901, of taking up at par a further ordinary share of £1 in the initial capital of the company." The whole 33,333 shares forming the first issue were applied for by fourteen persons, and allotted to them upon these terms. The shares are now selling on the market at a premium, and the appellant has elected to exercise his option.

The object of the action is to restrain the directors from carrying out the company's contract. There is nothing whatever in the case to throw doubt upon the good faith of the directors in selecting this mode of issuing the shares of the company in preference to offering them for public subscription in the ordinary way, or to impeach their exercise of the discretion vested in them by the articles. It appears from the affidavits that the scheme was to raise the necessary working capital by the issue of one-half of the share capital for cash, the other half being used for the purpose of payment in, shares credited as fully paid up, for the concessions to be purchased by the company."

But it was said that this mode of raising the sum required for working capital is prohibited by section 8 (2) of the recent Act of 1900, and is therefore beyond the power of the company. This is the only question which has been argued at the bar. Now before construing the words of the section which is relied on, your lordships are entitled to consider the state of the law before the section was passed with a view to ascertaining the mischief to which the enactment is directed. It was decided by this House in *Ooregum* v. *Roper*, 41 W. R. 90, [1892] A. C. 125, that a stipulation or agreement that a less cash sum than the nominal amount of the share shall be accepted as payment for the share is repugnant and void. On the other hand, there was authority for saying that the payment of a commission to brokers or others who undertook to procure subscriptions, or in default to subscribe for a certain number of shares, was legitimate. That doctrine, however, did not meet with universal acceptance, although it had the support of Buckley, J., in his valuable work on the Companies Acts (7th ed., pp. 609, 610). It was thought by some that such a payment when made out of capital was a misapplication of the company's capital, and was therefore *ultra vires*. There were, therefore, two points for consideration—first, that shares could not be issued at a discount—*i.e.*, subject to an agreement that the shareholder should pay less to the company than the nominal value of the share; and, secondly, the question whether the payment out of capital moneys or by means of shares credited as fully or partly paid up of what is called an underwriting commission was within the powers of a company.

From a perusal of the 8th section of the Act of 1900 your lordships will infer that the Legislature was desirous of enabling remuneration to be paid for services rendered in placing or procuring subscription of the company's capital, and it appears to have hit upon what may be termed a compromise. By the first sub-section a company is empowered, upon any offer of shares to the public for subscription, to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company subject to certain defined conditions as to amount and disclosure. This sub-section therefore permits a limited application of the company's capital in payment of a commission. Then follows the 2nd sub-section, on which the question before your lordships turns. It is in the following terms: "(2) Save as aforesaid no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise." And the 3rd sub-section provides that nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay.

The first words to be construed are "apply any of its shares or capital money." I think that those words naturally mean, apply its capital, either in the form of shares before issue when they may be described as potential capital, or in the form of money derived from the issue of its shares. "In payment of any commission, discount, or allowance"; I think this means payment by the company. The words "discount or allowance" seem to mean the same thing—viz., a rebate on what would justly be due from the subscriber on his shares. The advantage which the appellant

will derive from the exercise of his option is certainly not a "discount or allowance," because he will have to pay 20s. in the pound for every share. Nor is it, in my opinion, a commission paid by the company, for the company will not part with any portion of its capital, which is received by it intact, or indeed with any moneys belonging to it. But the words relied on are "either directly or indirectly," and the argument seems to be that the company, by engaging to allot shares at par to the shareholder at a future date, is applying or using its shares in such a manner as to give him a possible benefit at the expense of the company in this sense, that it foregoes the chance of issuing them at a premium. With regard to the latter point it may or may not be at the expense of the company. I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide. But the point which, in my opinion, is alone material for the present purpose is that the benefit to the shareholder from being able to sell his shares at a premium is not obtained by him at the expense of the company's capital. The prohibited application of the shares may be direct by allotting them as fully or partly paid up to the person underwriting the shares, or by allotting them in some other way with the intention that they shall ultimately find their way to such person or be applied in payment of his commission. It may be that in some particular case a contract such as that which your lordships have before you would be open to impeachment as improvident or an abuse, or in excess of the powers of management committed to the directors. In this case the question is as to the powers of the company itself, and not as to the due exercise of the directors' powers. I have come to the conclusion from a consideration of the language of section 8, sub-section 2, that the prohibition therein contained extends only to the application, direct or indirect, of the company's capital in payment of a commission by the company, and that the transaction impeached in this case is not within it. It is satisfactory to find that the conclusion to which I have come will not have the effect of extending the prohibition to transactions which were legitimate before the Act, and not, so far as I am aware, open to objection on any other ground. I am of opinion the appeal should be allowed.

Lord BRAMPTON, whose judgment was read by Lord Lindley, after stating the facts, said: From first to last I find no allusion to any contract or stipulation for either commission, discount, or allowance. Hilder's allotment of 6,975 out of the first issue of shares was accepted by him and fully paid for at par as a pure speculation. If it turned out badly his £6,975 might have been totally lost, and he would have had to bear his loss alone, and not one penny could have been claimed by him as commission, discount, or allowance. I do not think this could be contested. Now as to the remaining 66,667 shares, which I will call the optional shares. What was the state of things on the 8th of January, 1901, the day when the contract for the options of them was made? The directors, under article 9 of the articles of association, had control of all the shares representing the capital of the company, with power to allot or otherwise to dispose of them to such persons, on such terms and conditions, either at a premium or otherwise, at such times as the directors might think fit. All the shares then stood at par, and the par value being £1 per share; there was no obligation on the directors to offer any of them to the public, and they might have issued and allotted the whole 100,000 at that price, at one and the same time, had they so pleased. There was, however, then no certainty that any of the shares would attain and maintain a premium value in the future; and the success of the mines and the development of their worth could only be ascertained by means of the working capital immediately to be raised by the allotments to the fourteen selected gentlemen I have referred to. Mr. Hilder represents the case of all. He was willing to apply for and to risk the money he paid for his shares in the first issue on condition, but only on condition, that the options offered by the directors in the invitation to him were made to form part of his contract. By the first allotment accepting his condition the directors were bound to give him those options at the price they were offered, and when he exercised them by his notice he became bound to take and pay for the shares at that price, and at once was placed in the same position as if he had applied for them, and they had been allotted to him with the first issue when par was their true value. It is not contended that the contract would have been illegal before the Act of 1900, and I do not think it is, so far as regards the question before us, affected by the Act. It seems to me to have been a very reasonable and prudent contract to make when it was entered into, and in carrying it out the company will have raised, without deduction of any kind, the whole of their authorized share capital of £200,000 as contemplated on their incorporation; the shares they deliver will be applied, not in payment of commission, but purely in fulfilment of the agreement of the directors for good consideration to allot them to Mr. Hilder, who will pay for them the price fixed when the contract was made. I do not think that the *Matabele case* (if rightly decided) is applicable to the present. It is materially distinguishable in this, that there the 15,000 shares in question were expressly agreed to be allotted at a price below the then market premium value in order to satisfy an agreed commission. I think, for the reasons I have expressed, this appeal should be allowed, with costs.

Lord ROBERTSON concurred.

*Appeal allowed.*

Solicitors, *Travers Smith, Braithwaite, & Robinson*; *Spreat & Johnson.*

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## Court of Appeal.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Jan. 13.

*In re* HIGHETT AND BIRD'S CONTRACT. (*a.*)

*Vendor and purchaser — Leaseholds — Open contract— —Breach of covenant to repair—Dangerous structure —Knowledge of purchaser — Last receipt for rent produced—London Building Acts,* 1894 (57 *&* 58 *Vict. c. cxxiii.*) *and* 1898 (61 *&* 62 *Vict. c. cxxxvii.*)—*Conveyancing Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 3, *sub-section* 4.

*On an open contract for the sale of leaseholds the purchaser is not precluded by section* 3, *sub-section* 4, *of the Conveyancing Act,* 1881—*which makes the production of the last receipt for rent evidence that the covenants in the lease have been observed, unless the contrary appears—*

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law

*from proving breaches of covenant by the vendor, even though the purchaser was aware of those breaches. That sub-section only throws on the purchaser the burden of proving breaches of covenant.*

Barnett *v.* Wheeler, 7 *M. & W.* 364, *followed.*

*Decision of* Swinfen Eady, J., 50 *W. R.* 424, [1902] 2 *Ch.* 214, *affirmed.*

This was an appeal from a decision of Swinfen Eady, J. (reported 50 W. R. 424, [1902] 2 Ch. 214).

The facts were as follows:

In June, 1901, Alfred J. Bird made a written offer to William Highett to purchase from him the leasehold house, 142, Friern-road, East Dulwich, at the price of £350. Highett replied that £365 was the lowest price that he could take, to which Bird replied by increasing his offer to £360, adding, "I shall be glad to hear that you will accept this, as no doubt you are aware that the house requires sundry repairs." This offer was declined, but on the 1st of July, Bird agreed to purchase for £365, and subsequently it was agreed between the parties that the purchase should be completed on the 27th of September, Bird, however, stipulating that he was to be at liberty to complete at any earlier date.

On the evening of the 27th of September, the tenant of the house brought to Highett, the vendor, a notice in writing, dated the 26th of September, which had been signed on behalf of the London County Council as the local authority under the London Building Act, and left on the premises. This notice required the owner and occupier of the house forthwith to take down, underpin, or otherwise render secure the front bay; also to shore up the structure immediately.

The notice not having been complied with, the police magistrate at the Lambeth police-court made an order under the London Building Acts on the 1st of November, requiring the owner to take down or underpin or otherwise render secure the front bay, to the satisfaction of the district surveyor, within fourteen days from the service of the order.

The order was served on the vendor's solicitor and on the vendor himself on or about the 8th or 9th of November.

The house was held on a lease, of which about eighty years were unexpired, at a ground-rent of £7 per annum, and the receipt for the last payment of ground-rent was produced to the purchaser by the vendor.

The lease contained a covenant to keep the buildings in good and substantial repair and condition. A dispute having arisen between the vendor and the purchaser as to the question by whom the expenses of complying with the order of the police magistrate were to be borne, this summons was taken out under the Vendor and Purchaser Act to determine it.

Swinfen Eady, J., held, on the evidence, that the purchaser inspected the property before agreeing to purchase and saw some cracks there, which cracks afterwards increased to such an extent that by the 21st of September, 1901, the premises were in a dangerous condition, and remained so until after the 6th of November. His lordship held, on the authority of *Barnett* v. *Wheeler*, 7 M. & W. 364, that the purchaser's knowlege of the state of the property was not material, and that section 3 (4) of the Conveyancing Act, 1881, making the production of the last receipt for rent evidence of the performance of the covenants in the lease unless the contrary appeared, did not protect the vendor, as in this case "the contrary" did appear; and that the expenses must therefore be borne by the vendor.

Section 3, sub-section (4) of the Conveyancing Act, 1881, is as follows: "Where land sold is held by lease . . . on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants . . . of the lease have been duly performed up to the date of actual completion of the purchase."

The vendor appealed.

In May, 1902, after the decision in the court below, the purchase was completed.

*Eve, K.C.*, and *E. Ford*, for the appellant.—At the date fixed for completion the liability under the London Building Acts was not actually in existence; at all events, there was not then any pecuniary liability. If the governing date is the giving of the notice by the county council, all the argument in *Tubbs* v. *Wynne*, [1897] 1 Q. B. 74, 45 W. R. Dig. 168, was unnecessary: see also *Stock* v. *Meakin*, 48 W. R. 420 [1900] 1 Ch. 683. The outgoings ought to be ascertained when the works are completed. And the purchaser's attitude is inequitable, for he has bought the property at a lower price on account of its bad state and then turns round and claims that the vendor must pay for putting it in repair. There was no contract by the vendor that the property was in good repair. With regard to section 3 (4) of the Conveyancing Act, the purchaser knew of the state of the premises and the production of the last receipt for rent is proof as against him that the provisions of the lease have been complied with. Whether the purchaser would have had a right of action formerly or not, the law has been altered now by that section, which was intended to protect vendors against such a case as this.

*P. O. Lawrence, K.C.*, and *W. M. Spence*, for the purchaser, were not called on.

COLLINS, M.R.—In this case the controversy is as to whether the vendor or purchaser shall pay the expenses incurred in consequence of the action of the local authority, the London County Council. [His lordship stated the facts, and continued:] There was an argument before Swinfen Eady, J., and there has been one also before us, as to the rights of the parties with regard to those expenses under the provisions of the London Building Acts and whether at the time fixed for completion the obligation under the Acts had ripened into an obligation to pay a sum of money. It has been contended for the vendor that at that date the expenses had not become outgoings. It is, however, not necessary for us to decide that point. Swinfen Eady, J., did not decide the case on it, and I am not at present prepared to give an opinion on it, nor is it necessary for me to do so. Swinfen Eady, J., decided the case on the ground that the premises were in such a state of disrepair as to show breaches of covenant by the vendor as against his lessor, continuing down to the completion of the contract. He held, on the authority of *Barnett* v. *Wheeler*, that the purchaser of leasehold property, even though he knew of the condition of the premises, would have had a right of action against the vendor on the ground that he could not show a good title, since the lessor could have intervened. It is said that *Barnett* v. *Wheeler* is not applicable here, because the law has been changed by section 3 (4) of the Conveyancing Act, 1881. Is that so? The sub-section is as follows: [His lordship read it, and continued:] How far does that modify the principle laid down by *Barnett* v. *Wheeler*? I think only to this extent, that by it the burden of proving breaches of covenant is thrown on the purchaser, the vendor's production of the last receipt for rent being made *primâ facie* evidence of compliance

with the conditions of the lease. But the section says in terms "unless the contrary appears," and the purchaser cannot be barred from going into the circumstances and proving that the contrary does appear. If he does prove it, he brings himself within the principle of *Barnett* v. *Wheeler*, that on an open contract the purchaser has a right of action if there are breaches of covenant by the vendor, on the ground that the vendor has not shown a good title, and this, even though the purchaser knew the condition of the premises. No ingenuity can avoid the necessity on the part of the vendor here of arguing as though "*primâ facie*" meant "conclusive." The law remains unaltered, except that it has been modified with regard to the burden of proof, and this appeal must be dismissed. I should not have dealt with the matter at such length except out of respect for the arguments which have been addressed to us.

ROMER, L.J.—I am of the same opinion, and wish only to add, with regard to the suggestion that this is a case of hardship on the vendor, that we have not here to deal with a claim for specific performance. Very likely the purchaser could not have enforced specific performance when he had contracted to buy the property at a small price on the footing that it was in bad repair. A court of equity might not enforce specific performance in a case of hardship, but we have not to deal with specific performance here.

COZENS-HARDY, L.J.—I agree. We are really asked to construe the sub-section of the Conveyancing Act as though the words were "although the contrary appears." I express no opinion on the question arising under the London Building Acts.

*Appeal dismissed.*

Solicitors, *J. Bartlett; J. T. Anthony.*

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From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) Dec. 12, 13, 15.

*In re* JAQUES.
HODGSON *v.* BRAISBY. (*a.*)

*Will—Ademption—Purchase of house and land for legatee by testator in his lifetime—Codicil directing advances or moneys lent to be brought into hotchpot—Construction—Presumption against double portions.*

*A testator by his will gave one-third of his residuary estate to a daughter, who afterwards married. By a codicil, made after the marriage, the testator directed the amount of all "advances or moneys lent" by him to the daughter or her husband, or either of them, to be brought into hotchpot. Shortly after making the codicil the testator purchased a house and some land, which were conveyed by his direction to the daughter and her husband respectively.*

*Held, that these did not constitute "advances" within the meaning of the codicil. The law relating to the presumption against double portions based on* Holmes *v.* Holmes, 1 *Bro. Ch. C.* 555, *has not been changed by* In re Lawes, 30 *W. R.* 33, 20 *Ch. D.* 81.

*Observations of* North, J., *in* In re Vickers, 36 *W. R.* 545, 37 *Ch. D.* 525, *on the judgment of* Jessel, M.R., *in* In re Lawes, *disapproved.*

*Decision of* Buckley, J., *affirmed.*

This was an appeal from a decision of Buckley, J.

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

The facts were as follows:

John Jaques, of Hull, by his will, dated the 31st of March, 1897, after certain other devises, devised certain dwelling-houses in Hull upon trust for his daughter, Elizabeth Jaques, during her life, to whom he also gave an equal third part or share of the net proceeds of sale of his residuary real and personal estate. He further directed that on the death of each of his daughters the real estate devised in her favour during her life should be held on trust to pay out of the income arising therefrom, an annuity of £50 to her husband, if any, during his life or until remarriage, assignment, or bankruptcy, and subject thereto on trust for all the children of such daughter on attaining twenty-one in equal shares.

In August, 1898, Elizabeth Jaques married John Robert Braisby.

By a codicil dated the 26th of May, 1899, the testator, after referring to the marriage of his daughter Elizabeth, directed his trustees to hold her share of residue on the trusts declared by his will as to the real estate devised to her, except as to the payment of an annuity to her husband, and declared that she should have no power of anticipation. The codicil then proceeded as follows: "I declare that the said Elizabeth Braisby or the persons claiming the real estate specifically devised and the share of and in my residuary real and personal estate bequeathed by my said will in her favour, or by this codicil, directed to be held in trust for her during her life, shall not nor shall either or any of them participate in the benefit of such devise and bequest, direction, or trust without first bringing into hotchpot as part of my residuary personal estate the total amount of any advances or moneys lent by me to the said Elizabeth Braisby and her said husband or either of them since their marriage."

In June, 1899, the testator purchased a piece of land, with house and farm buildings, for £520, and caused it to be conveyed to Mrs. Braisby in fee; and in April, 1900, he purchased another piece of land for £60, and caused it to be conveyed to Mr. Braisby in fee.

The testator died on the 27th of March, 1901, and this summons was taken out by the surviving executor and trustee of his will for the determination (*inter alia*) of the question whether the purchase-moneys for these hereditaments or any part of them ought to be regarded as advances or moneys lent and to be brought into hotchpot.

The defendants to the summons were Mr. and Mrs. Braisby and their two infant children, and Mrs. Todd, another daughter of the testator, to whom another third share of residue was bequeathed by the will.

Buckley, J., held that none of the purchase-moneys ought to be regarded as advances or money lent or be brought into hotchpot.

Mrs. Todd appealed.

*Upjohn, K.C.*, and *A. H. Jessel*, for the appellant.—This was in effect a gift to a daughter on her marriage, and is therefore an advancement which must be brought into account. The testator clearly intended to provide for equal division of his property among his descendants. And apart from construction the case is clearly within the rule against double portions. *Holmes* v. *Holmes*, 1 Bro. C. C. 555, has been overruled; see *In re Lawes*, 30 W. R. 33, 20 Ch. D. 81, and the observations on Jessel, M.R.'s, judgment in that case made by North, J., in *In re Vickers*, 36 W. R. 545, 37 Ch. D. 525. The law nowadays tends to include in the rule such advances as these.

They also cited or referred to *Ex parte Pye*, 18 Ves. 140, at p. 151; *Pym* v. *Lockyer* 5 My. & Cr. 29;

*Montefiore* v. *Guedalla*, 8 W. R. 53, 1 De G. F. & J. 93; *Bengough* v. *Walker*, 15 Ves. 507; *Lacon* v. *Lacon* 39 W. R. 514, [1891] 2 Ch. 482; *Chichester* v. *Coventry*, 15 W. R. 849, L. R. 2 H. L. 71; *Taylor* v. *Taylor*, 23 W. R. 719, L. R. 20 Eq. 155; and *Auster* v. *Powell*, 1 De G. J. & S. 99, 11 W. R. Ch. Dig. 138.

*Warrington, K.C.*, and *E. S. Ford*, for Mr. and Mrs. Braisby's infant children.—This is entirely a question of construction, and the rule against double portions has no application. The testator was thinking of payments of money, not of gifts in kind like these.

*R. J. Parker*, for Mr. and Mrs. Braisby.

Dec, 15.—VAUGHAN WILLIAMS, L.J., after stating the facts, continued: The sole question is whether this real estate must be taken to be "advances" within the words of the codicil. I think we cannot construe these words so as to make them include real estate. I cannot but give weight to the fact that the direction to bring advances and money lent into hotchpot follows words showing that the testator had in mind the distinction between real and personal estate, for he refers to his "residuary real and personal estate." Mr. Upjohn pressed upon us the argument that if we did not construe "advances" so as to make it include real estate we should give no meaning to the word, and should only make it equivalent to "moneys lent." But a separate meaning can be given to it if we include moneys paid at the request of a child; and there is nothing to show that the moneys laid out on real estate were moneys paid at the request of the daughter or her husband. The transaction was carried out by the direction of the testator alone. The case really turns on the construction of this codicil. But it has been so strongly urged upon us that there has been a great change in the law relating to the presumption against double portions on account of the decision in *In re Lawes*, and of the observations upon the judgment of Jessel, M.R., in that case made by North, J., in *In re Vickers*, that I feel bound to say I cannot assent to this view. I think that in *In re Lawes* Jessel, M.R., did not intend to overrule *Holmes* v. *Holmes* or the old doctrine based on it, but to affirm it. He discusses it, and says (20 Ch. D., on p. 87): "It is said that that case decided that a share in stock-in-trade was not a satisfaction of a pecuniary legacy, and taking the report as it stands it is impossible to say that it was not so decided. Still, I am not prepared to say that even a share in a stock-in-trade, if declared to be taken at a specific value, would not be a satisfaction of a portion; but I cannot discover from the report, which is very brief, what the facts really were." Then he proceeds to discuss *Bengough* v. *Walker*, and says that he thinks that he can find out what Sir W. Grant really meant in that case. A father gave to his child a share of a mill, and directed it to be made up to the value of £10,000, and it was held that that was a satisfaction of a portion of £2,000. The question argued was whether a share of a mill could be a satisfaction of a legacy, because a legacy must be satisfied by something of the same kind. What Sir W. Grant says, after referring so some authorities, is this: "But it is to be observed that in none of those cases did the party making the advance or the bequest ever make either, with reference to a definite amount to which he intended it should reach. They are all cases in which the testator, without reference to the pecuniary value of the thing he was giving, has given it; and the question was, whether, if upon entering into a computation of the value of the thing given, it turned out equal to the portion or the legacy, it should be taken as a satisfaction; the testator not having indicated any idea of his own whether it was or was not correspondent in value to the debt which he owed or the legacy which he gave. Those cases, therefore, would not precisely apply." Then Jessel, M.R., commenting upon that, said in *In re Lawes*: "The true meaning of that is, that where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value the presumption of satisfaction may arise." In his judgment in *In re Vickers*, North, J. (37 Ch. D., at p. 534), quotes these words of Jessel, M.R., and says: "Now, what I understand him to be doing is to be commenting on the meaning of language used by a former judge in a case decided at a time when it was considered that a gift of something to go in ademption of a legacy must be something that would satisfy the legacy altogether and not *pro tanto*, and he is not expressing his own view of the law at the time he was speaking. The view of the Master of the Rolls, and of the whole court in that case, was that a gift of a share in a business, in that case more valuable than a legacy, was of itself sufficient to adeem the legacy, and that the rule that there is a *primâ facie* presumption against double portions applied, and that in that case there was nothing to rebut it." But with all deference to North, J., the plain basis of the decision in *In re Lawes*, was that the share in that case was valued at a fixed amount. This is clear if one looks at the judgment of the court. Lush, L.J., says (20 Ch. D., at p. 89) "it was equivalent to the father saying, 'I will give you £19,000 in money if you will agree to put it into the business;'" and Lindley, L.J., says "the father gives his son £19,000. He gives it in money—not in cash, but in what is to be taken as so much money. There is no question as to the value of what he gives; it is to be taken by the son as that amount of cash. Then why does not the presumption of satisfaction arise? I see no reason for saying it does not." I think that in *In re Lawes*, Jessel, M.R., did not mean what North, J., in *In re Vickers* considered that he meant, and this view leaves untouched the statement of the law in Williams on Executors (9th ed., p. 1197) based on *Holmes* v. *Holmes*.

STIRLING, L.J.—I am of the same opinion. The case turns on the construction of the codicil, and especially on that of the word "advances" in it. We were asked to read this in the sense of advancements by portion, the expression which is to be found in the marginal note to the Statute of Distributions. The word "advances" is susceptible of this meaning, and has been so used by various judges—for instance, by Lord Eldon in *Ex parte Pye*—and by text-writers, for instance, on p. 464 in the last edition of Lewin on Trusts. But this is not the only, or the natural, sense of the word "advances." The natural sense of it is advances of money; an advance of a house or land would not be understood without explanation by anyone but an expert. Therefore, unless the context so requires it, I think we ought not so to construe it here; and the context goes the other way, for the testator speaks of his residuary real and personal estate before he speaks of his residuary personal estate, and speaks of the amount, not the value, of advances. I agree also that we do not make the word "advances" ineffectual by putting this limited construction on it; and this limited sense is illustrated by *Austen* v. *Powell*. I agree also with what Vaughan Williams, L.J., has said as to the suggested change in the rule relating to double portions; and I cannot read Jessel, M.R.'s, judgment in *In re Lawes* in the sense put upon it by North, J., in *In re Vickers*.

COZENS-HARDY, L.J.—I entirely agree as to the

construction of the codicil, on which the case really turns, and have nothing to add as to that. In my opinion the rule against double portions has no application here, but I entirely agree with the remarks of Vaughan Williams, L.J., as to the decision in *In re Lawes*, and North, J.'s, criticism of it in *In re Vickers*. I cannot adopt this criticism, though no doubt North, J.'s, own decision in that case was correct.

*Appeal dismissed.*

Solicitors, *McDiarmid & Hill*, for *Richard Davis*, Hull; *Rollit & Sons*, for *Shackles & Dunkerley*, Hull.

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## High Court of Justice.

Chan. Div. } Kekewich, J. } Dec. 11.

*In re* SMILTER.

BEDFORD *v.* HUGHES. (*a.*)

*Will—Construction—Trust for issue, including an illegitimate son—Intention to legitimate for all purposes.*

*A testator gave estate A to trustees upon trust for G. F. S. for life or until assignment, and upon failure of such trust in his lifetime upon discretionary trusts for the wife and issue of G. F. S., "including S. S. R. hereinafter named," and subject thereto upon trust for sale, and to hold the proceeds upon trust for the issue of G. F. S, "including S. S. R., the illegitimate son of" G. F. S., and if there should be "no child of the said G. F. S., including the same S. S. R.," then over. The testator gave estate B upon trusts for M. S. for life, and subject thereto, in events which happened, upon trust for* (inter alios) *the issue of G. F. S., but without expressly including in such class the said S. S. R.*

*Held, that S. S. R. had been legitimated for all the purposes of the will, and was entitled to share in estate B.*

Adjourned summons.

W. L. S. by his will dated the 9th of April, 1880, devised freehold property in Bank-street, Sheffield, upon the following among other trusts—viz., "to pay the net income thereof to my said nephew G. F. S. during his natural life or until he shall assign the same . . . and after the failure or determination of the trust lastly hereinbefore mentioned . . . in his lifetime . . . to pay or apply the same . . . for or towards the maintenance and personal support of my said nephew G. F. S. and his wife and issue, whether children or more remote, for the time being in existence, including S. S. R., hereinafter named . . . and subject to and on the expiration of the trust aforesaid I direct my trustees or trustee for the time being to sell my said freehold property and hold the net proceeds arising from such sale . . . upon trust for all and every the children or child of my said nephew living at my death or born afterwards . . . including amongst such children or child S. S. R., the illegitimate son of my said nephew, provided always and I declare that if there shall be no child of my said nephew including the same S. S. R. living at my death or born afterwards . . . to hold such proceeds upon trust for such of . . . (eight named nephews and nieces) as shall be living at the decease of my said nephew, and the issue, living at the decease of my said nephew G. F. S., of such of my said other nephews and nieces as shall die in the lifetime of my said nephew G. F. S. leaving issue in equal shares as tenants in common," such issue taking their parents' shares *per stirpes*.

By the next following clause of his said will the testator devised other freehold property in Regent-street, Sheffield, "upon trust to pay the income thereof to my said niece M. S. during the term of her natural life," and subject thereto to sell and hold the net proceeds upon trust for the child or children of M. S., and in default of such, "upon trust for such of my nephews and nieces, the said G. F. S. and . . . (the eight other nephews and nieces so named as aforesaid) . . . as shall be living at the decease of my said niece M. S. and the issue living at the decease of my said niece M. S. of such of my said other nephews and nieces as shall die in the lifetime of my said niece M. S. leaving issue, in equal shares as tenants in common," such issue taking the parents' shares *per stirpes*.

The testator died in 1883, and his will was duly proved by his widow (since deceased) and the plaintiffs.

The niece M. S. died in 1902 without ever having been married.

The nephew G. F. S. died in 1897, leaving issue one illegitimate son only—viz., the said S. S. R.

This summons was taken out to determine whether upon the true construction of the will, S. S. R. was entitled to a share in the Regent-street property as well as in the property in Bank-street.

*Kenyon Parker*, for the summons.

*R. J. Parker*, for the illegitimate son S. S. R., submitted that the testator having named S. S. R. in some places must be taken to have defined a class including S. S. R., and that wherever the class was afterwards mentioned S. S. R. was impliedly a member of it.

He cited *In re Wood, Wood* v. *Wood*, 50 W. R. 695, [1902] 2 Ch. 542; *In re Parker, Parker* v. *Osborne*, 45 W. R. 536, [1897] 2 Ch. 208; and *In re Walker, Walker* v. *Luiyens*, 45 W. R. 647, [1897] 2 Ch. 238.

*P. O. Lawrence, K.C.* (*Everard* with him), and *Peterson*, for other beneficiaries.—The testator has not himself made a dictionary; there is a distinction between "namely" and "including," the latter obviously means an addition to a class of someone who would not otherwise be included. The testator has been careful to include S. S. R. in certain places, and the proper inference is that when he does not mention him he does not intend to include him.

They cited *Meredith* v. *Farr*, 2 Y. & C. Ch. Cas. 525.

KEKEWICH, J., in giving judgment, said the case was very near the line, but on the whole there was a sufficient indication in the will of an intention to include S. S. R. in the class of issue of G. F. S. for all purposes. The case of *Meredith* v. *Farr* was a different case, for there there were two illegitimate children, one of whom was only once mentioned, and Knight-Bruce, V.C., although a very broadminded judge, thought it was too dangerous to include her. Moreover, in 1843 the view which the court took of the claims of natural children was a very different one from that now taken, and "issue" then only included persons *justis nuptiis procreati*, unless there was something very strong indeed to show the contrary intention; the whole trend of modern decisions had been in favour of the claims of illegitimates to be included, and the court would take hold of anything reasonably possible in the will as a foundation upon which to base their inclusion. [His lordship cited the several *loci* in the will where S. S. R. was mentioned, and continued:] I am therefore of opinion that this

(*a.*) Reported by A. C. NESBITT, Esq., Barrister-at-Law.

testator, being well aware that S. S. R. was illegitimate, has yet manifested an intention to make him the son of G. F. S. for all the purposes of his will and to include him in the class wherever the class is mentioned.

*Declaration accordingly.*

Solicitors, *Geare & Pease*, for *Wake & Sons*, Sheffield; *Peacock & Goddard*, for *Vickers, Son, & Brown*, Sheffield.

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Chan. Div. Buckley, J. — Aug. 2, 1902.

*In re* LOVERIDGE.

DRAYTON *v.* LOVERIDGE. (*a.*)

*Mortgage—Mortgagee in possession—Equity of redemption barred—Intestacy of mortgagee—Devolution of mortgaged land.*

*Testator, for three years before his death, was mortgagee in possession of freehold land, and died leaving all his real and personal property to his widow for her life, but made no disposition of the remainder expectant upon the widow's decease. The widow, as life tenant, continued in possession of the mortgaged land for many years, and during her possession the mortgagor's equity of redemption in the mortgaged premises became barred by lapse of time. Upon the widow's death, in an action for administration of the estate of the testator, the mortgagee,*

*Held, that the mortgaged land must be treated as personalty for the purposes of devolution from the mortgagee, and passed as personalty to the next-of-kin of the testator.*

Administration action.

The question for determination in this case was whether mortgaged freehold land of which the mortgagee had taken possession, and the equity of redemption in which had become barred by the Statutes of Limitation after the death of the mortgagee, devolved as realty or personalty of the mortgagee.

By an indenture, dated the 26th of May, 1831, certain real estate was mortgaged to James Loveridge to secure £1,075 and interest.

In 1861 the mortgagee entered into possession of the property, and so remained until his death in December, 1864. By his will, dated the 7th of February, 1863, James Loveridge devised and bequeathed his residuary real and personal estate, subject to certain annuities, to his widow during widowhood, and appointed her executrix, but he died intestate as to the reversion. After his death his widow (who never remarried) went into possession as tenant for life, and so continued until she died in February, 1900.

Anna Drayton, who was the executrix of the widow, brought this action to administer the estate of the testator for the purpose of determining whether the mortgaged estate was to be treated as realty or personalty.

The heir-at-law of the testator was his brother, Isaac Loveridge, who had since died, leaving his daughters, the defendants, as co-heiresses of the testator. The persons entitled as next-of-kin to the personal estate of the testator at the time of his death were the testator's widow and Isaac Loveridge.

An order for the administration of the testator's estate was made on the 7th of May, 1900; and by the chief clerk's certificate, filed on the 22nd of April, 1902, the question was reserved whether the mortgage debt and the land comprised in the mortgage remained personalty, or whether the fact of entering into and retaining possession of the mortgaged property required it to be treated as realty of the mortgagee.

*H. Charlton Hawkins*, for the plaintiff Anna Drayton.—The testator's widow was entitled to a moiety of the testator's personal estate, as to which he died intestate. The test is, what was the nature of the mortgaged property at the mortgagee's death: Williams on Executors (9th ed.), vol. 1, p. 602. At that time the equity of redemption had not become barred, and therefore the mortgagee's interest in the land was only personalty. It must therefore devolve as personalty, and the mortgagee's heir-at-law can only take it as trustee for the next-of-kin: *Canning* v. *Hicks*, 1 Vern. 412; *Tabor* v. *Grover*, 2 Vern. 367. At all events, the next-of-kin are entitled to a charge on the land for the amount of the mortgage debt and interest: *Awdley* v. *Awdley*, 2 Vern. 192.

*H. F. F. Greenland*, for the next-of-kin of Isaac Loveridge, supported the plaintiff's contention, and cited *Earl of Carlisle* v. *Gober*, Nelson 52; *Ellis* v. *Guavas*, 2 Ch. Cas. 50; *Attorney-General* v. *Vigor*, 8 Ves. 256, see Lord Eldon's *dictum* at p. 277; and *Flack* v. *Longmate*, 8 Beav. 420.

*Fossett Lock*, for the co-heiresses.—It is a question of intention on the part of the mortgagee whether the property is to be considered realty or personalty: *Noys* v. *Mordaunt*, 2 Vern. 581. When a mortgagee enters into possession he shows an intention to take the mortgaged property as land, subject only to the liability of being redeemed by the mortgagor; and as the mortgagor's right to redeem has become barred by time, the land devolves as realty: *Attorney-General* v. *Bowyer*, 3 Ves. 714; *Garrett* v. *Evers*, Mos. 364; *In re Alison, Johnson* v. *Mounsey*, 27 W. R. 389, 11 Ch. D. 284. At all events, the next-of-kin are only entitled to a charge on the land: *In re Woodhead* [1884] W. N. 174; *Clerkson* v. *Bowyer*, 2 Vern. 66.

*Greenland* replied.

*Cur. adv. vult.*

Aug. 2.—BUCKLEY, J.—James Loveridge, the testator in this cause, died on the 28th of December, 1864, having by his will, dated the 7th of February, 1863, devised and bequeathed his residuary real and personal estate to his wife during her widowhood, subject to certain annuities. Subject to those gifts he died intestate. He appointed his wife executrix. The testator was entitled to a mortgage debt of £1,075, secured upon certain messuages and lands by deed dated the 26th of May, 1831. In 1861, three years before his death, he went into possession and remained in possession of the mortgaged property until his death in December, 1864. After his death his widow went into possession, and so remained until her death on the 15th of February, 1900. She never married again. She was therefore tenant for life from 1864 until 1900. The plaintiff Anna Drayton is executrix of the widow. The persons entitled under the statutes of distribution to James Loveridge's personal estate at the time of his death were the widow and a brother of the testator named Isaac Loveridge. The certificate reserves the question whether the mortgage debt and the land comprised in the mortgage remain of the nature of personalty, or whether the possession of the mortgaged property is to be treated as making it realty. The plaintiff argues that it is personalty. The defendants argue that it is realty. The plaintiff does not

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

argue that the possession of the widow was on her own behalf. The mortgage was by way of trust for sale, but no contention is raised by the plaintiff on that ground: see *In re Alison, Johnson* v. *Mounsey*.

The whole question to be determined is whether after possession for three years by the testator, followed by possession by the widow, the property is for the purposes of devolution from the testator to be treated as realty or personalty. Regarding this matter upon principle, it seems to me that the property is for the purposes of devolution to be treated as personalty. The testator at the time of his death was entitled to the mortgage debt, which was personalty, and, by way of security, the land was vested in him subject to redemption. The estate in the land descended to the heir, but at the moment of the testator's death the heir was, as it appears to me, only a trustee for the legal personal representative who was entitled to the debt and to the beneficial interest in the land in respect of the debt. After the lapse of many years the equity of redemption became barred, and the estate of the heir was no longer subject to redemption, but I see no reason why the estate of the heir, of which he was up to that time trustee for the legal personal representative, became at that date or at any time his own property. Someone at the testator's death became entitled to the property. Unquestionably, as regards the mortgage debt, that person was the legal personal representative. The right against the land by way of security was the property of that same person, and, although at a later date the right in respect of the land became enlarged from a right subject to redemption to a right free from redemption, that can have no effect in discharging the legal owner of the land from his trusteeship for the owner of the debt.

Passing to authority, I find that in *Attorney-General* v. *Vigor*, 8 Ves. at p. 277, Lord Eldon says this: "Where a person dies entitled to a mortgaged interest, that is personalty at that time; and although afterwards a mortgagor may be barred, that would not convert the property as between the representatives at the time of his death from personal to real; but the person taking it as real would be a trustee for the persons entitled to it at the death of the testator such as it was. But if that person, alone entitled at the death of the testator, remains in possession, in the same manner as his ancestor was, without any act as between him and the mortgagor, there being a clear option in a question with himself to determine, whether it shall be real or personal estate, if he lets it become real, no one has a right to say it shall be personal." The former sentence of the above exactly fits, as it seems to me, the present case; the latter means, I think (applying it to the facts of the case before me), that, if the widow had alone been entitled at the testator's death to the mortgage debt (which she was not, for the brother Isaac was entitled to a moiety), then for the purposes of devolution from her the property would have been realty. Again, *Flack* v. *Longmate*, seems to me to be a clear decision in favour of my view. In that case, interest on the mortgage had been paid down to 1816. Flack died in 1830, so that the mortgagor's claim was not barred at his death. His widow claimed dower out of the estate. It was held that she was not entitled to dower. Lord Langdale said that it was necessary to consider what estate the husband had at the time of his death; that, in order to consider whether the widow was dowable, it was necessary to look at the matter as it stood at the husband's death, and not at subsequent events. He concluded his judgment by saying: "It may appear that nobody is to redeem; but did this state of things exist at the death of the husband? Though the husband might have considered it as his own at his death, and though I may not now consider it subject to any claim to redemption, yet the quality of the estate in the consideration of this court, at the decease of the husband was not such as to give a right to dower." I can see no distinction for the present purpose between a case in which the question is whether the beneficial interest in the property descends upon the heir and a case where the question is whether the widow is entitled to dower. For the proposition that the heir is trustee for the legal personal representatives, the cases of *Ellis* v. *Guavas*, *Clerkson* v. *Bower*, and *Awdley* v. *Awdley* are authorities. In *Ellis* v. *Guavas*, "administrator of a mortgagor" in the second line is, I think, a misprint for "administrator of a mortgagee." The case is not intelligible without that alteration, and the matter is made plain, I think, seven lines down by the passage: "The land shall go to the administrator because the money would have gone to her." The administrator in that connection can only be the administrator of the mortgagee to whom the money was to be payable.

But then it is said that, where the equity of redemption is released or foreclosed or the estate becomes irredeemable after the testator's death, the heir may be entitled to pay off the mortgage debt to the personal estate and retain the land. For this there was cited a case before Bacon, V.C., of *In re Woodhead*. The rule used to be that cases ought not to be cited from the Weekly Notes, and I think that, in this instance at least, the rule is deserving of observance. The reasoning of the Vice-Chancellor is not given, and the note is not easy to follow. The one thing which does appear is that no authorities were cited. It may be that the decision rested upon the fact that there was a devise of mortgage estates, and that it was to persons other than those to whom the residuary real and personal estate were given. However this may be, I do not think that the note of that case can prevail as against the authorities to which I have referred. I hold, therefore, that this property devolved upon the legal representative as personalty.

Solicitors, *Bridgman & Willcocks*, for *Hillman & Bond*, Lyme Regis.

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K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) April 24, 25, 1902.

MACKENZIE v. HAWKE. (*a*.)

*Gaming — Betting — Coupon competitions — Advertisement—Use of newspaper office for betting by advertiser —Liability of proprietor of newspaper—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

*M., the proprietor of a newspaper called* Football Chat, *was the occupier of an office in Bedford-street, Strand, where his newspaper was published. T. had an office at Middelburg, in Holland, where he conducted sporting coupon competitions, which, by agreement between T. and M., were advertised week by week in the latter's paper. The advertisements contained offers of money prizes for correct guesses as to the winners of football matches, and offered coupons at certain rates to intending competitors. Appended to the advertisements were coupon sheets, which might be filled up, and were directed to be sent, with postal order, to* Football Chat, *Middelburg, Holland. M. was paid by T. for these advertisements a much higher price than the ordinary rate charged for advertisements, and was also paid at the ordinary rate*

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

*for publishing the names of the prize-winners; but M did not share in the profits of the coupon competition. The postal orders were returned to England and collected by a bank and placed to the credit of T.*

*Held, that there was evidence that T. was a person using the office of M's newspaper for the purpose of money being received by T as the consideration for a promise to pay money on the event of a game within the meaning of section 1 of the Betting Act, 1853, and that M. was a person knowingly and wilfully permitting his office to be used as aforesaid within the meaning of section 3 of the said Act.*

Case stated.

This was an appeal from the decision of R. H. B. Marsham, Esq., metropolitan police magistrate, sitting at Bow-street police-court, convicting Donald Mackenzie, the appellant, upon two charges on two informations under the Betting Act, 1853.

The first information, under section 3, charged that the appellant, being the occupier of a certain office or place situate at 23, Bedford-street, Strand, did, on the 12th of November, 1901, unlawfully knowingly and wilfully permit the said office to be used by one H. T. Terry, a person using the same for the purpose of money or valuable things being received by or on behalf of the said Terry as and for the consideration for an undertaking or promise to pay or give thereafter money, on events or contingencies of or relating to football contrary to the form of the statute.

The second information, under section 1, charged that the appellant, being such occupier, on the date and at the place aforesaid unlawfully did open and keep and use the said office or place for the purpose of money or valuable things being received by or on behalf of the said Terry, a person using the said office for the like purpose.

The magistrate convicted the appellant on both informations.

At the hearing the following facts were admitted or proved before the magistrate:

On the 12th of November, 1901, the appellant was the occupier of an office situate at 23, Bedford-street, Strand. He was also the registered proprietor of a weekly newspaper called *Football Chat and Athletic World*, and this office was the principal place at which the newspaper was published and the business thereof conducted. The person H. T. Terry mentioned in the informations was a person having an office at Middelburg, Holland, and was, at the period mentioned, to the knowledge of the appellant, conducting certain competitions known as "Sporting Coupon Competitions." These competitions were by agreement between Terry and the appellant advertised week by week in *Football Chat and Athletic World*, for which advertisements the appellant received pecuniary consideration amounting to about £27 in each issue of the newspaper; in addition to this the names of the prize-winners were periodically published in lists of different lengths, and were paid for at the same rate, and the advertisements which were headed "*Football Chat* Competitions" contained the rules and conditions subject to which the competitions were conducted.

Part of such advertisements consisted of coupon sheets on which intending competitors could fill in their selections. It was not obligatory on competitors to fill in their selections in such coupon sheets; they were at liberty to use plain paper. All the moneys remitted by competitors in respect of the competitions were in the form of postal orders, and they with their sender's selections were, in accordance with the advertised conditions, addressed by post to *Football Chat* at Middelburg. The postal orders were returned to this country for collection by the London and Westminster Bank, and the proceeds thereof placed to the credit of one B. W. Blydenstein (agent of the said H. T. Terry), who paid the appellant by Terry's instructions for the advertisements.

The appellant stated in his evidence that he had not received any benefit from the coupon competitions other than that accruing to him as payment for the insertion of the advertisements in his newspaper. H. T. Terry had no interest in the newspaper *Football Chat* other than that accruing to him through advertising the coupon competitions therein, and it appeared that he never made any personal use of the above office except that he once called there.

The magistrate held that H. T. Terry was a person using the office, 23, Bedford-street, and that he used the same for the purpose of money being received by himself on the consideration for his promises to pay money on the result of football matches. He also found that the appellant permitted the said user by H. T. Terry, and that he opened and kept the said office for the purpose of such user by H. T. Terry. He also found that the appellant derived benefit from the insertion of the coupon advertisements and list of winners, for which he received considerably more than for ordinary advertisements, but that he did not share in the profits of the coupon competitions. He accordingly convicted the appellant, and fined him £100 on the first information and 1s. on the second information, and ordered him to pay twenty guineas costs.

The question for the opinion of the court was whether the magistrate was right in law, and, if not, what should be done in the premises.

The advertisement in the issue of the 12th of November, 1901, was headed:

"H. T. Terry's, Middleburg, Advertisement.—*Football Chat* Football Skill Competition.—£150 for ten correct results or next best, and £50 in fifty consolation prizes of £1 each. Ten coupons for sixpence. Twenty-four coupons for one shilling postal orders."

Then followed:

"Coupons for matches played Saturday, Nov. 16."

The coupon contained a list of the football matches to be played, and lines indicating where the coupon was to be cut out for the purpose of being sent, and stated that:

"Coupons must be addressed to *Football Chat*, Middelburg, Holland."

At the end of the advertisement was the statement:

"Printed and published by the Proprietors of the Bedford Publishing Press, at 23, Bedford-street, Strand, London, W.C. (Tuesday, 12th Nov.)."

The Betting Act, 1853 (16 & 17 Vict. c. 119), provides:

"Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies: For the suppression thereof, be it enacted . . . as follows:

Section 1. No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to

pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

"Section 3. Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the nonpayment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months.

*C. W. Mathews* (*G. H. Stutfield* with him), for the appellant.

*Avory, K.C.* (*J. K. Mackay* with him), for the respondent.

The arguments of counsel sufficiently appear in the following judgments.

*Stoddart* v. *Hawke*, 50 W. R. 93, [1902] 1 K. B. 353; *Powell* v. *Kempton Park Racecourse Co.*, 47 W. R. 585, [1899] A. C. 143; *Reg.* v. *Cook*, 32 W. R. 796; *Reg.* v. *Stoddart*, 49 W. R. 173, [1901] 1 K. B. 177; *Hornsby* v. *Raggett*, 40 W. R. 111, [1892] 1 Q. B. 20, were cited.

Lord ALVERSTONE, L.C.J.—This is one of four cases stated by a metropolitan police magistrate under the Betting Act, 1853. Three of them to a large extent involve the same point. I will deal with them in their order, indicating so far as is necessary what are the distinctive features of one from the other.

In this case the magistrate convicted the appellant Mackenzie on two summonses which are set out in the case, for permitting the office at Bedford-street to be used by Terry, who was a person using the same for the prohibited purposes, and for opening, keeping, and using the office for the purpose of money being there received by or on behalf of Terry for the like consideration. The facts may be shortly summarized in this way: At that office there was published by the appellant a newspaper which was called *Football Chat and Athletic World*, and which contained on the last page that which is called an advertisement: "H. T. Terry's, Middelburg, Holland, Advertisement. *Football Chat* Football Skill Competition." It is not necessary to say more about the competition than that it clearly comes within the class of cases held to be illegal in many decisions in which these questions have arisen. The coupon was, when cut out, filled up and sent with money, addressed to "*Football Chat*, Middelburg, Holland." There were certain coupon rules from which it appeared that the names of the winners, as the result of the competition, would be advertised in the paper and the prizes remitted on a certain day, and everybody claiming to be a prize winner whose name did not appear in that list was required to send in a remonstrance or claim before a certain day. The sole address was said to be "*Football Chat*, Middelburg, Holland," and there appears below, "Printed and published by the proprietors, Bedford Publishing Press, at 23, Bedford-street, Strand." It was stated before the magistrate—but he has not found it one way or the other as a matter of fact—that the appellant had no interest in the competitions, and we do not proceed upon any view that there is any finding upon which we could act that the competition itself was on behalf of the appellant. It was stated that the appellant received a considerable amount more for the advertisements than the ordinary rate; that the moneys with the coupons were remitted to Holland and were returned, not, of course, passing through the hands of the appellant again. Upon that state of facts it was contended for the appellant that there was no user by Terry of the office at 23, Bedford-street for an illegal purpose, and that, if there were no user by Terry, there could be no permission by the appellant that Terry should so use it. I think it is extremely important to read the finding of the magistrate, and to see what it amounts to. [His lordship read the findings of the magistrate as set out in the case, and proceeded:] It is scarcely necessary to say that that finding of the office being opened and kept for the purpose of such user by Terry, and of Terry using the office for the purpose of these competitions, if there is evidence to support it, brings the case within one or more previous decisions. It is said by counsel on behalf of the appellant that there is no evidence on which that finding could properly be supported, because all that was done was that the coupons were printed and sent out from that office. In my opinion there was evidence upon which the magistrate could come to that conclusion. The coupon, and the receipt of the money by Terry with the coupon, is really of the essence of the scheme. The coupon goes out in order that the person may fill it up and may send it to Terry. It seems to me that that operation carried out at Bedford-street, where the paper could be obtained, was evidence of a user by Terry of that place for the carrying out of an essential part of his scheme, and therefore I think there was evidence upon which the magistrate could rightly find that Terry himself used this office, and that the appellant permitted Terry so to use it. It is to be noticed that there is no finding here of what I may call any independent newspaper undertaking; and, if it were an independent newspaper undertaking, it is difficult to understand why the money should be sent to *Football Chat* at Middelburg, and why the competition should be spoken of as "*Football Chat* Football Skill Competition." If it were a mere case of an ordinary innocent advertisement, a very different state of things would prevail. I have only to add with reference to this case that in the case of *Stoddart* v. *Hawke* this court decided that the money need not be received at the place. The substantial finding, as the court there pointed out, and the material finding, was that the place is used as a part of the essential machinery for the receipt of the money for the illegal purpose. Holding, as I do, that the findings of facts by the magistrate in this case can be justified by the evidence, I think he has come to the right conclusion, and that this appeal must be dismissed.

DARLING, J.—I am of the same opinion. It appears to me to be found by the magistrate, and upon

evidence which cannot be disputed, that the appellant permitted Terry, who had the office at Middleburg in Holland, to advertise in the paper *Football Chat*, and in that paper to issue the coupons which were procured at the office of the newspaper. Counsel for the appellant has argued that this sheet of *Football Chat* was nothing but an advertisement. He spoke of it as an advertisement, and as though all we were dealing with was an advertisement in the newspaper as to where one might go and get some information as to betting. But it is to be noticed that the real thing that was issued was much more than an advertisement. What was issued there was the series of coupons. They were issued as a part of the paper, but none the less they were coupons which people used for the purpose of betting; and the coupons that were issued from that office of *Football Chat* were a part of the machinery by which Terry carried on the business of betting with people who affected to choose, according to his system, what football clubs would win certain matches. When we have to consider whether he used the place for the purpose of betting with persons, clearly Terry used the newspaper for those purposes, and the newspaper was published at the office of *Football Chat*, and issued therefrom with the coupons attached. That possibly might alone be enough to bring this office within the statute. It is not necessary to decide that in this case, and I will not say whether I think it would be enough to bring it within the statute or not. I do not affect to decide that, and it is not necessary to do so, because the magistrate has here found that the appellant permitted the user of the office by Terry, and that he opened and kept the office for the purpose of such user by Terry, and that he derived a profit from it; that he charged considerably more than he charged for ordinary advertisements; he charged Terry for the privilege of putting these coupons into his paper considerably more than the ordinary charge. That being so, it seems to me that Terry did use this office for an illegal purpose within the meaning of this Betting Act, and that he used it by the permission of the appellant in the way which has been pointed out, and that therefore the appellant was also guilty within the Act for permitting the illegal thing to be done, which illegal thing Terry did. Therefore I am also of the same opinion as my lord.

CHANNELL, J.—I agree. I also wish to say that I found my judgment entirely on the finding in this case, which I think is a finding absolutely justified, and I have not the slightest doubt that it is absolutely true that this office was opened and kept by the appellant Mackenzie for the express purpose of this thing being done. The whole object of this paper called *Football Chat and Athletic World* beyond all doubt was for the purpose of working this coupon competition and scheme. The magistrate has found that, and, as he has found that, it seems to me it brings the case absolutely and entirely within our previous decision in the case of *Stoddart* v. *Hawke*. If it had not been for that finding I should have had some difficulty, because I think the argument for the appellant was right to a considerable extent—namely, that there must be something like a physical user of the office. The whole object of this Betting Act of 1853 is to prohibit betting offices within the meaning which the Legislature put on that word; and it is necessary that a person to be held liable for using the place must be a person who uses it either in the character of owner, keeper, or manager, or conductor of the business. If he is a person who has not that character, then he must be some other person who is analogous to and is of the same genus as the owner, keeper, and occupier, as we see by one portion of the judgment of the Lord Chancellor (Lord Halsbury) in *Powell* v. *Kempton Park Racecourse Co.* It must be the use by some person having some kind of dominion or control over the place, or conducting his business there. Consequently, if this really were the case of two independent persons, one carrying on a newspaper and the other having a scheme for receiving money by himself in Holland which he desired to advertise, and if this were a *bonâ fide* advertisement in a *bonâ fide* newspaper, I should think that the mere use of the newspaper was not the use of the office of the newspaper within the meaning of this statute. But on the findings, which, as I have said, are perfectly justified, that question does not really arise, and I therefore agree in dismissing this appeal.

*Appeal dismissed.*

Solicitor for the appellant, *Edward M. Lazarus.*

Solicitors for the respondent, *Malkin & Co.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) April 24, 25, 1902.

HAWKE v. MACKENZIE (NOS. 1 AND 2). (a.)

*Gaming—Betting—Coupon competition—Advertisement—User of newspaper office by advertiser for betting—Publication of information or advice with respect to betting—Betting Act.* 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 7—*Betting Act,* 1874 (37 & 38 *Vict. c.* 15), *s.* 3, *sub-section* 1.

*M., the proprietor of a newspaper, and the occupier of the office thereof in England, published an advertisement in the said paper whereby it appeared that such office was used for the purpose of a coupon competition conducted by another person abroad, in the carrying out of which money was received by such person abroad, as the consideration for a promise to pay money on the event of a football match.*

*Held, that M. was liable to be convicted upon a summons under section 7 of the Betting Act,* 1853.

*M. also published an advertisement in his paper whereby it appeared that two other persons, whose addresses were given, respectively would, on application, give information for the purpose of or with respect to certain bets, wagers, events, or contingencies mentioned in the Betting Act,* 1853.

*Held, that M. was liable to be convicted of an offence under section* 3, *sub-section* 1, *of the Betting Act,* 1874.

Reg. *v.* Stoddart, 49 *W. R.* 173, [1901] 1 *K. B.* 177, *followed.*

Stoddart *v.* Argus Printing Co., 49 *W. R.* 666, [1901] 2 *K. B.* 470, *overruled.*

HAWKE *v.* MACKENZIE (No. 1).

Special case.

This was an appeal by special case stated by R. H. B. Marsham, Esq., metropolitan police magistrate, sitting at Bow-street police-court.

An information was preferred by John Hawke, the appellant, against Donald Mackenzie, the respondent, under section 7 of the Betting Act, 1853, charging that the respondent, as occupier of a certain office or place situate at 23, Bedford-street, Strand, did, on the 12th of November, 1901, unlawfully cause a certain advertisement to be published whereby it appeared that the said office or place was opened,

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

kept, or used for the purpose of making bets or wagers.

At the hearing, when the learned magistrate dismissed the summons, the following facts were proved or admitted.

On the date specified the respondent was occupier of the office in Bedford-street and also the registered proprietor of a newspaper called *Football Chat and Athletic World*. The office was the principal one at which *Football Chat* was published and the business of that newspaper conducted.

A copy of *Football Chat*, dated the 12th of November, 1901, was put in evidence at the hearing, as was also one of its posters for the 12th of November, 1901. The copy contained an advertisement of a football coupon competition, and was procurable at the office by intending competitors. A copy of *Football Chat* for the 12th of November, 1901, was annexed to this case, as was also the poster given in evidence.

All the coupons filled up and dispatched by the competitors, together with the remittances accompanying, were, in accordance with the instructions in the advertisements, addressed to "*Football Chat*, Middelburg, Holland," and remittances were to be made payable to H. T. Terry.

The respondent stated in evidence that H. T. Terry was the sole promoter of the competitions, and that H. T. Terry received all the money sent by competitors in respect thereof, and all the profits derived from them belonged to H. T. Terry.

The respondent swore he had no interest in the competitions or the profits thereof except moneys received from advertising them in the newspaper, which moneys amounted to about £27 in each issue of *Football Chat*, and also the moneys arising from the periodical publication in *Football Chat* of the list of prize winners, the number of which varied from time to time, the insertion of such lists being paid for at the same rate as the advertisements. H. T. Terry made personal use of the office by occasionally calling there.

It was proved that the competitions for which the money was received were in respect of football matches, and that they were described in *Football Chat* as "*Football Chat* Football Skill Competitions," and that the address in Holland was given as "*Football Chat*, Middelburg, Holland."

Upon the above facts counsel for the appellant contended that the decision of the Divisional Court in the case of *Stoddart* v. *Argus Printing Co.*, 49 W. R. 666, [1901] 2 K. B. 470, was not fully argued as both parties had the same interest, and that it was inconsistent with the opinions expressed by several of the judges in the case of *Reg.* v. *Stoddart*, 49 W. R. 173, [1901] 1 K. B. 177, in the Court for Crown Cases Reserved, and that, as this latter court was the superior one, the magistrate would be bound by its decision rather than that of the Divisional Court.

Counsel for the respondent contended that the office was not opened, kept, or used for the purpose of H. T. Terry making bets or wagers in manner prohibited by the Act; that the respondent did not advertise the office as being so opened, kept, or used; and that the decision in *Stoddart* v. *Argus Printing Co.* would be binding on the magistrate as it was later in date to that in *Reg.* v. *Stoddart*.

The following cases were also referred to before the learned magistrate: *Cox* v. *Andrews*, 32 W. R. 289, 12 Q. B. D. 126, and *Reg.* v. *Brown*, 43 W. R. 222, [1895] 1 Q. B. 119.

The question for the opinion of the court was whether the magistrate came to a correct determination in point of law.

The Betting Act, 1853 (16 & 17 Vict. c. 119), provides as follows:

Section 7.—Any person exhibiting or publishing or causing to be exhibited or published any placard, handbill, card, writing, sign, or advertisement whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers in manner aforesaid or for the purpose of exhibiting lists for betting or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers in manner aforesaid; or any person who on behalf of the owner or occupier of such house, office, room, or place or person using the same shall invite other persons to resort thereto for the purpose of making bets or wagers in the manner aforesaid, shall upon summary conviction thereof before two justices of the peace forfeit and pay a sum not exceeding £30, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable, and on the non-payment of such penalty and costs or in the first instance if to such justices it shall seem fit may be committed to the common gaol or house of correction with or without hard labour for any term not exceeding two calendar months.

*Avory, K.C.* (*J. K. Mackay* with him), for the appellant.

*G. H. Stutfield*, for the respondent.

The following case, the facts and points of law being somewhat similar to those in the above case, was then proceeded with:

HAWKE v. MACKENZIE (No. 2).

This was also an appeal by way of case stated from the decision of R. H. B. Marsham, Esq., metropolitan police magistrate, sitting at Bow-street.

Two informations were preferred by John Hawke, the appellant, under 16 & 17 Vict. c. 119, and section 3 (1) of the Betting Act, 1874 (37 & 38 Vict. c. 15), against the respondent Mackenzie, for that he did on the 12th of November, 1901, unlawfully cause two certain advertisements to be published whereby it appeared that J. O'Reilly, of 55, Chatham-road, Rock Ferry, Cheshire, and J. Taylor, of 46A, Market-street, Manchester, respectively would on application give information for the purpose of or with respect to certain bets, wagers, events, or contingencies mentioned in the Betting Act, 1874.

At the respective hearings on the 5th and 7th of December, 1901, the summonses on the above informations were heard, and the following facts were proved or admitted:

On the date specified, the respondent was the occupier of an office, 23, Bedford-street, and also registered proprietor of a newspaper called *Football Chat and Athletic World*. The office was the principal one at which the newspaper was published and the business thereof conducted.

A copy of the newspaper, dated the 12th of November, 1901, was put in evidence at the hearing. The copy contained advertisements whereby it appeared that J. O'Reilly and J. Taylor respectively would on application give information with respect to certain bets, wagers, events, or contingencies with respect to the game of football. A copy of the newspaper for the 12th of November, 1901, was annexed to this case.

Upon the above facts, counsel for the appellant contended that the decision of the Divisional Court in the case of *Stoddart* v. *Argus Printing Co.* was not fully argued as both parties had the same interest, and that it was inconsistent with the opinions expressed by some of the judges in the case of *Reg.* v. *Stoddart*

in the Court for Crown Cases Reserved, and that, as this latter court was the superior one, the magistrate would be bound by its decision rather than that of the Divisional Court; and, further, that the decision in *Stoddart* v. *Argus Printing Co.* did not itself apply to advertisements such as those of O'Reilly and Taylor.

Counsel for the respondent contended: (1) That the advertisements did not relate to information to be given for the purpose of wagers to be made in any house or place prohibited by 16 & 17 Vict. c. 119. (2) That the decision in *Stoddart* v. *Argus Printing Co.* would be binding on the magistrate as it was later in time than that of *Reg.* v. *Stoddart.*

Upon the facts as proved and stated in the other special cases now being stated by the magistrate with reference to decisions given by himself at the same hearing on other informations, the magistrate held that the office, 23, Bedford-street, was used by H. T. Terry (a person referred to in the other special cases) for the purpose of money being received by him as the consideration for his promise to pay money on the events of football matches; and the magistrate further found that the respondent permitted the user by H. T. Terry, and that the respondent opened and kept the office for the purpose of such user by H. T. Terry; but the magistrate was of opinion that the case of *Stoddart* v. *Argus Printing Co.* did not apply to all the advertisements in question, and he dismissed the summonses.

The question for the opinion of the court was whether upon the above facts the magistrate came to a correct determination in point of law.

The Betting Act, 1874 (37 & 38 Vict. c. 15), provides as follows: "Section 3. Where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published (1) whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose or with respect to any such bet or wager or any such event or contingency as is mentioned in the principal Act (16 & 17 Vict. c. 119) or will make on behalf of any other person any such bet or wager as is mentioned in the principal Act . . . every person sending, exhibiting, or publishing or causing the same to be sent, exhibited, or published shall be subject to the penalties provided in the 7th section of the principal Act with respect to offences under that section."

Lord ALVERSTONE, L.C.J.—These two appeals involve the same point, although the summonses were under different sections. The first summons was a summons under the 7th section of the Act of 1853, that Mackenzie, being the occupier of a certain office, did unlawfully cause certain advertisements to be published whereby it appeared that the said office was kept and used for the purpose of making certain bets or wagers, against the form of the statute. The second case was framed on the 1st sub-section of the 3rd section of the amending Act of 1874, which provides that "where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published (1) whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any such bet or wager or any such event or contingency," and so on. The learned magistrate practically recapitulates, upon the summons for the issue of the advertisement and also in respect of the offence under the Act of 1874, what he has found with regard to the case we have just disposed of (*Mackenzie* v. *Hawke*). He repeats, in fact, that Terry was using this place for the purpose, and would have come to the conclusion that, so far as that ingredient of the case was concerned, there was sufficient evidence for him to act, but he considered that he was bound by the case of *Stoddart* v. *Argus Printing Co.* which was a judgment of Phillimore, and Gainsford Bruce, JJ. Before that case was argued, the matter was considered in the Court for Crown Cases Reserved in *Reg.* v. *Stoddart.* It is contended, and I think rightly contended, that the principle and ground of the decision of the case in the Court for Crown Cases Reserved is inconsistent with the view taken by Bruce and Phillimore, JJ. The question depends on the language of the Act of 1853. Section 7 provides: [His Lordship read the section.] Now, in *Stoddart* v. *Argus Printing Co.*, in connection with the printing of advertisements of this kind, it was contended before my brothers Bruce and Phillimore that the contract to print was not illegal, because section 7 only meant to refer to advertisements in respect of what has been called the first branch of section 1, and the court in that case so decided. But, looking to what was decided in the case of *Reg.* v. *Stoddart*, and to the ground of the judgment there given by my brother Wills, I certainly cannot think that section 7 is so confined. I think the language of section 7 is inconsistent with its being confined solely to the case of betting by persons who resort to the place, and I think that the attempt that was there made to confine the meaning of section 1 to the more narrow construction based on section 7 to a certain extent shows the inconsistency of the view that section 7 is to be confined to the first part of section 1. It seems to me that, having enumerated the main and principal offence in section 1, in dealing with the subordinate offence in section 7, the Legislature has said enough in section 7 to indicate that it is referring to the transaction referred to in section 1, and it would certainly serve no useful purpose to, nor ought we to adopt a mode of construction that would, cut down section 7 to the limited case referred to in the judgment in *Stoddart* v. *Argus Printing Co.*, the mischief of the evil aimed at by the statute being certainly as great in one case as in the other. I do not wish to say too much on the *Argus case* having been what is called a friendly case. It certainly does not seem to have been argued on the part of the defendants as strenuously as it might have been argued if the parties had been hostile, but I think in such a matter as this, if the two cases are inconsistent, as to a certain extent they are, we must in the present case follow the decision in the Court for Crown Cases Reserved, and treat that for the purposes of these proceedings as being the authority by which we are bound.

Now, the same point arises with regard to the second case—that is to say, the summons under section 3 of the Act of 1874 with a slight addition to which I must refer. There the learned magistrate, having again stated the facts in reference to Terry's user, considered he was bound by the decision in *Stoddart* v. *Argus Printing Co.*, and, in addition to that, relied on the case of *Cox* v. *Andrews*, which had held, and I think rightly held, that the Act of 1874 was an amendment with an extension of the Act of 1853, and that the two Acts were to be read together. If the limited construction were to be put on section 7, so that it was only to be confined to the first class of offences mentioned in the 1st section of the Act of 1853, the same argument might be applied with reason to section 3 of the Act of 1874, and it might then be successfully maintained that the Act of 1874, when it referred to any such bet or wager, or any such event or contingency as is mentioned, must of course be limited in the same way as section 7 was limited. I might say at once that I do not adopt the wide con-

tention of Mr. Avory that the words "any such event or contingency" were meant to widen the scope of the Act altogether by including information about bets, or information about contingencies. But while I think these words are very important to indicate that sub-section 1 of section 3 of the Act of 1874 includes all the 1st section of the Act of 1853, I still think there must be the element, which is essential in all these cases, of some place which is used as a part of the machinery whereby the unlawful transaction is carried out, though the money may not be actually received there. I think, therefore, that in adopting the view the learned magistrate did of section 7 of the Act of 1853, he was quite logical and consistent in applying the same view to section 3 of the Act of 1874. But, as I think he should have followed the decision of the Court for Crown Cases Reserved in *Reg.* v. *Stoddart*, his judgment in this respect must be reversed both as regards the information under section 7 of the Act of 1853, and also as regards the information under section 3 of the Act of 1874.

DARLING, J.—I am of the same opinion. I desire to say a word with regard to the first of these appeals. I quite agree that the case on which the learned magistrate felt bound to act—*Stoddart* v. *Argus Printing Co.*—is in conflict with the other case to which my lord has alluded, and which was decided by the full court, and I think that decision must prevail. But, apart from that, I should disagree with the case of *Stoddart* v. *Argus Printing Co.*, and with the judgment that was there given. Phillimore, J., there held that section 7, which created the punishment for the offence, was confined to the offences which are enumerated in the first part of section 1 of the Betting Act, 1853. He says: "And when one comes to examine that section carefully"—that is, section 7—"it seems clear that it is directed only against advertisements of houses kept for the purpose mentioned in the first part of section 1—that is to say, for the purpose of betting with persons physically resorting thereto—and is not directed against advertisements of houses kept for the purpose mentioned in the second part of section 1." I think, if you examine it carefully, you will see that section 7 is not exclusively confined to offences against the first half of section 1, because it says: "Any person exhibiting or publishing"—the things Phillimore, J., alluded to—"whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers in manner aforesaid"—that it is quite true, is all within the first part of section 1, but it goes on—"or for the purpose of exhibiting lists for betting"; now exhibiting lists for betting is not forbidden by section 1 at all, neither by the first nor the second part of it. Therefore section 7 deals with an offence for which one may be prosecuted, which is certainly not mentioned in the first part of section 1 of the Betting Act of 1853. Now, to hold that section 7 applies only to the first part of section 1, and to nothing more, is obviously to put a most technical and a most limited construction on this Act of Parliament. Why should one put it? It is not necessary to do so, as was shown by the case to which my lord has alluded. But on general grounds I can see no reason for holding that this section 7 was necessarily cut down to those offences in the first part of section 1, and left undealt with all the offences mentioned in the second part of section 1, and therefore reduced the second part of section 1 to a nullity. It seems to me that what one must do in these cases is to have some regard to what the Legislature was aiming at. The Legislature was not aiming merely at a person who goes to a house to bet, and bets with a person in a house, or bets with a person who comes into a house. It was really trying to put down what it considered was a public vice. This is shown by the fact that it did prohibit such things as the advertising, the publication, or the exhibition of lists for betting. You need not go into the house to look at the list. The Act does not say so, and therefore I cannot say that we ought, in construing such an Act as this, to assume that the Legislature meant to forbid things, and then to make it impossible that anybody should be prosecuted who did the thing which was forbidden. It seems to me that *Stoddart* v. *Argus Printing Co.* was wrongly decided. I do not wonder that it was decided as it was. It was brought before the court in a most unsatisfactory way. It was a mock battle altogether. The plaintiff and defendants engaged one another in order that no genuine person should sue either of them; they were both desirous of the same result being arrived at. That was the object of it. I feel bound to say that the argument in that case on behalf of the defendants, which did not prevail, was a very short and perfunctory one. It did not draw attention to the point to which I have drawn attention.

CHANNELL, J.—I agree. I only want to add that as to the expression "bets and wagers," in section 7, I think bets refer to the first part of the 1st section, and wagers to the second part of that section. Then, as an additional reason why we are not bound by the decision in *Stoddart* v. *Argus Printing Co.*, I may point out that there is no appeal from our present decision, it being in a criminal matter; and I understand where you have conflicting cases, in such a case as that the court is bound to form its own opinion.

*Appeals allowed.*

Solicitors for the appellant, *Mulkin & Co.*

Solicitor for the respondent, *E. M. Lazarus.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) April 24, 25, 1902.

HAWKE v. MACKENZIE (No. 3). (a.)

*Criminal law — Penalties — Informer — Discretion of magistrate to deprive informer of portion of penalty—Metropolitan Police Courts Act,* 1839 (2 & 3 *Vict. c.* 71), *s.* 34—*Betting Act,* 1853 (16 & 17 *Vict. c.* 119), *s.* 9.

*Notwithstanding section* 9 *of the Betting Act,* 1853, *which says that one-half of every pecuniary penalty which shall be adjudged to be paid under that Act shall be paid to the informer, a Metropolitan police magistrate has, under section* 34 *of the Metropolitan Police Courts Act,* 1839, *a discretion to deprive an informer in proceedings under the Betting Act,* 1853, *of any share in the penalty imposed under that Act, even though the informer has not been guilty of any corrupt practice.*

Case stated.

This was an appeal from the decision of R. H. B. Marsham, Esq., metropolitan police magistrate, sitting at Bow-street police-station.

An information was preferred by the appellant, John Hawke, against the respondent, Donald

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Mackenzie, under section 7 of the Betting Act, 1853 (16 & 17 Vict. c. 119), for that he being the occupier of a certain office or place—to wit, an office or place situate at 23, Bedford-street, Strand—did on the 12th of November, 1901, at 23, Bedford-street, Strand, knowingly and wilfully permit the office to be used by H. T. Terry, a person using the same for the purpose of money or valuable things being received by or on behalf of H. T. Terry as and for the consideration for an undertaking or promise to pay or give thereafter money on events or contingencies of or relating to the game of football, against the form of the statute in such case made and provided.

At the respective hearings on the 5th and 7th of December, 1901, the two summonses issued on the above informations were heard, and on the 11th of December the magistrate convicted Donald Mackenzie on these informations and fined him £100 on (1) and 1s. on (2) and ordered him to pay twenty guineas costs. The magistrate found also as a fact that the informer, the present appellant, was not guilty of corrupt practices, but he considered this to be immaterial (see 2 & 3 Vict. c. 71, s. 34), and he adjudged that the appellant should not receive any part of the penalties.

Upon the above facts counsel for the appellant contended: That under the above circumstances the informer was by virtue of section 9 of 16 & 17 Vict. c. 119 entitled to one half of the penalties, notwithstanding section 34 of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71).

The magistrate was of opinion that he had discretion to deprive the informer of the whole or any part of the moiety of the penalties although he did not think that the informer was guilty of corrupt practices.

The question on which the opinion of the court was desired was whether the magistrate upon the statement of facts came to a correct determination in point of law, and, if not, what should be done in the premises.

The Betting Act, 1853 (16 & 17 Vict. c. 119): Section 9 enacts: "One half of every pecuniary penalty which shall be adjudged to be paid under this Act shall be paid to the informer, and the remaining half shall be paid or applied in aid of the poor rate of the parish in which the offence shall have been committed."

The Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), section 34, provides: "And whereas by divers Acts the moiety or other fixed portion of the penalties to be thereby recovered is directed to be adjudged to the informer, and the same has been found to encourage corrupt practices of common informers; for prevention thereof be it enacted that where, by any Act now in force or hereafter to be passed, a moiety or other fixed portion of the penalty or penalties thereby imposed is or shall be directed to be paid to the informer, not being the party aggrieved, it shall be lawful for any one of the said magistrates before whom the conviction shall be had to adjudge that no part, or such part only of the penalties as he shall think fit, shall be paid to the informer."

By the Statute Law Revision Act (No. 2), 1890 (52 & 53 Vict. c. 51), Schedule, Part II., section 34 of the Act of 1839 is repealed from the beginning down to the words "enacted that."

*Avory, K.C.* (*J. M. Mackay* with him), for the appellant.

He cited *Reg.* v. *Titterton*, [1895] 2 Q. B. 61, 44 W. R. Dig. 7.

The respondent did not appear.

Lord ALVERSTONE, L.C.J.—This case raises an entirely different point. The magistrate has convicted Mr. Mackenzie and fined him £100, and ordered him to pay twenty guineas costs; and then he said: "I found also as a fact that the informer, the present appellant, was not guilty of corrupt practices; but I considered this to be immaterial" (referring to the Act of 1839), "and I adjudged that he"—that is to say, Mr. Hawke, the present appellant—"should not receive any part of the penalties." The question in this case arises under two sections. Under section 9 of the Act of 1853, "one half of every pecuniary penalty which shall be adjudged to be paid under this Act shall be paid to the informer, and the remaining half shall be applied in aid of the poor rate." If the matter had stood there, of course the appellant would have been entitled to succeed; but there was at the time the Metropolitan Police Courts Act, 1839, s. 34, of which enacts: "And whereas by divers Acts the moiety or other fixed portion of the penalties to be thereby recovered is directed to be adjudged to the informer, and the same has been found to encourage the corrupt practices of common informers; for prevention thereof be it enacted that where, by any Act now in force or hereafter to be passed, a moiety or other fixed portion of the penalty or penalties thereby imposed is or shall be directed to be paid to the informer, not being the party aggrieved, it shall be lawful for any one of the said magistrates before whom the conviction shall be had to adjudge that no part, or such part only of the penalty as he shall think fit, shall be paid to the informer." Now, the learned magistrate here has justly and rightly in the interests of the appellant negatived the existence of corrupt practices, and he has found that there were none, but he has exercised a discretion.

Mr. Avory makes two points. He first says that because the Act of 1853 was passed some fourteen years later than the Act of 1839, full effect must be given to the words "one half shall be paid to the informer," and that it is an enactment inconsistent with there being any discretion on the part of the learned magistrate. I think that goes too far. Section 34 of the Act of 1839 says in terms it is to apply to Acts hereafter to be passed; and it further says this, it is to apply in every case where a moiety is or shall be directed to be paid to the informer. The words are express. Therefore to the main argument of Mr. Avory I am not able to accede.

Then he said, but at least if there is a discretion, that discretion can only be exercised for good cause, and that good cause must be either something that amounts to corrupt practices, or some other good cause which the magistaate has in his mind, and which can be, so to speak, appreciated by us. Now, I think it is quite impossible to confine it to corrupt practices. I may say parenthetically that I attach no importance to the repeal of this preamble of the section by the Statute Law Revision Act. I am dealing with the Act as though it had not been repealed, but the motive of the section is one thing, the enactment is another. The motive is that it had been found to encourage corrupt practices, but, instead of limiting the enacting part to the case of corrupt practices, the Legislature says there shall be a discretion. Now, I wish to say that I do not want to lay down the rule that the magistrate has an arbitrary discretion which he can exercise without good reason. I think, if no corrupt practices are suggested or established, that under ordinary circumstances most certainly the magistrate ought to give the informer half the penalty; but it seems perfectly impossible to say that he has not got a discretion upon other grounds, and I can well imagine, not to repeat the cases that were put in argument, that either from the amount of the penalty in cases that

have been before him, or other considerations, he might be of opinion that the informer, who was appearing and performing a public duty, ought not to make a profit by receiving a part of the penalty. At any rate, I think it is impossible for us to say that the magistrate had no discretion, and I certainly think there is no ground for our interfering with his discretion. All I do say is this, that of course where there is no case of corrupt practices the magistrate must exercise a judicial discretion as to whether or not he will deprive the informer of his penalty. But I think we should be wrong if we were to overrule, or attempt to overrule, the discretion of the magistrate in this case, there being no ground for our so doing. Therefore I think that the appeal by Mr. Hawke must be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion.

*Appeal dismissed.*

Solicitors for the appellant, *Malkin & Co.*

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## Privy Council.

(*From the Supreme Court of New South Wales.*)

Dec. 13.

WISE *v.* PERPETUAL TRUSTEE CO. (LIMITED). (*a.*)

*Club—Trustee—Indemnity—Position of members of club.*

*It is an implied, but fundamental, condition in the constitution of every ordinary club that the members thereof incur, as such, no liability to pay anything beyond their subscriptions as members, either to the club funds or to anyone else.*

*Consequently, in the absence of any express provision to the contrary in the rules of the club, the members of an ordinary club are not personally liable as such, to indemnify the trustees of the club against liabilities incurred by the latter as such trustees.*

Hardoon *v.* Belilios, 49 *W. R.* 209, [1901] *A. C.* 118, *distinguished.*

This was an appeal from the Supreme Court of New South Wales.

The facts are set out at length in their lordships' judgment.

*Scott Fox, K.C.*, and *Shearman*, for appellants.

*Haldane, K.C.*, and *C. James*, for respondents.

The judgment of their lordships (Lords MACNAGHTEN and LINDLEY, Sir FORD NORTH, Sir ARTHUR WILSON, and Sir JOHN BONSER) was delivered by

Lord LINDLEY.—This appeal raises the extremely important question whether the members of an ordinary club are personally liable to indemnify the trustees of the club against liabilities incurred by them as such trustees, where there is no rule expressly imposing such liability upon the members.

The undisputed facts are shortly as follows:

In the year 1886 certain persons including a Mr. Paling, now deceased, formed a club in Sydney, New South Wales, which was known as the Cercle Français. The appellant became a member of the club in July, 1886, and remained a member of the club until its dissolution. In January, 1887, the club adopted certain rules, the 12th and 17th of which were as follows:

"12. The administration of the affairs of the club is entrusted to a committee elected at the first general meeting in each year. The duties of the members of the committee are purely honorary.

"17. The committee disposes of the funds of the society and has full power to take all measures for the internal management which it may deem necessary."

Between July and December, 1887, it was considered by some members of the club that the premises then occupied by the club at No. 50, Wynyard-square were too small and steps were taken to provide increased accommodation. A general meeting was called to consider the subject; and a meeting was held on the 9th of December, 1887. Too few members attended to bind the club; but the subject of obtaining a lease of new premises of the club was discussed and the members present resolved that the matter be left in the hands of M. Lachaume, the president of the club, to make the best arrangements in the interests of the club; and the said Lachaume and the said W. H. Paling and Messrs. Doublet and Van de Velde were appointed trustees of the club.

A general meeting of the club was held on the 13th day of January, 1888, at which the minutes of the meeting of the 9th day of December, 1887, were read and confirmed.

On the 12th day of July, 1888, the above-mentioned Messrs. Paling, Lachaume, Doublet, and Van de Valde became lessees of certain premises known as 50, Wynyard-square and 9, Wynyard-lane for a term of ten years from the 9th day of July, 1888, at a rental of £555 per annum and subject also to certain onerous covenants set out in the said lease. After the execution of this lease the above-mentioned premises were used for the purposes of the club and the club remained in possession thereof until it was dissolved. In July, 1888, after the execution of the lease the old rules of the club were repealed and new rules were adopted. The 3rd, 4th, 14th, and 15th were as follows:

"3. The property of the club, subject to the liabilities thereof, shall belong to the members for the time being.

"4. No member shall by reason of his membership have any transmissible or assignable interest, by operation of law or otherwise, in any of the property of the club. On any member ceasing by death, resignation, or otherwise to be such, all his interest shall survive, accrue, and belong to the other members for the time being.

"14. The affairs of the club shall be under the management of the following office bearers—viz.: a president, vice-president, four trustees, a committee, and a treasurer.

"15. All purchases, investments, leases, conveyances, securities, or contracts, by, to, or on behalf of the club, shall be made, taken, or entered into in the names of the trustees. All the real and personal property of the club shall be vested in, and shall be held by them upon trust for the members for the time being, and shall (except as to the real property) be subject to the disposition of the committee, whose order, certified in writing under the hand of the chairman of the day, and attested by the secretary, shall be obligatory upon and a justification to the trustees as to making, taking, or entering into any such purchase, investment, lease, conveyance, security, or contract, or any disposal of any personal property vested in them as such trustees. And the orders of the committee certified in like manner as to any purchases necessary for carrying

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

on the internal management of the club shall also be obligatory upon and a justification to the trustees for making the same. The real property of the club shall not be dealt with except by the resolution of a general or special general meeting of the members of the club."

The rules prescribed the entrance fees and subscriptions, but there was no rule imposing any liability on any of the members to pay more.

The club continued to exist until February, 1891, when it was dissolved. It had eighty members when the lease was obtained and ninety more joined afterwards.

In April, 1891, the above-mentioned lessees sublet the premises comprised in the lease of the 12th of July, 1888, to the Cosmopolitan Club Co. for the unexpired portion of the ten years' term less one day, the underlessees covenanting to pay the same rent and perform the lessees' covenants. The Cosmopolitan Club Co. remained in possession until January, 1894, and paid the rent up to that date, when they went into liquidation. The lessees then re-entered into possession of the premises and from time to time re-let them, giving the club the benefit of all rentals received. Finally all the trustees, except the said William Henry Paling, being unable to pay the rent, the said Paling in his lifetime, and his executors (the respondents to this appeal) after his death, paid under the lessees' covenants, various sums amounting in the aggregate to £2,350 or thereabouts in excess of moneys received by them by sub-letting the premises.

On the 22nd of April, 1897, the executors of the said William Henry Paling, deceased, filed a statement of claim in an action in the Supreme Court of New South Wales in equity against certain members of the club selected to represent them all, and the plaintiffs prayed as follows:

"(1) That it may be declared that all persons who were members of the said Cercle Français on the 12th of July, 1888, and all persons who became members of the same Cercle Français subsequent thereto, and the personal representatives of any such persons respectively who are now deceased became and are jointly and severally liable to contribute to and indemnify the plaintiffs and the estate of the said William Henry Paling against the rent paid and expenses incurred by the said William Henry Paling during his lifetime and by the plaintiffs since his death in respect of the said lease and the covenants thereof and the future rent and expenses to which the plaintiffs as executors of the said William Henry Paling are or may become liable under the said lease and the covenants thereof, and that the defendants and all such other persons and representatives as respectively aforesaid may be jointly and severally decreed to repay to the plaintiffs and indemnify them against such rent and expenses with interest on the same at such rate as this honourable court shall direct and also to pay the plaintiffs' cost of suit.

"(2) That an account be taken under the direction of this honourable court of the rent and expenses respectively aforesaid.

"(3) That an inquiry may be directed as to the persons constituting the said several classes of members and whether any and which of such persons are dead and if so who are their respective legal personal representatives."

The appellant was not a party to the said suit nor was he served with notice of the said statement of claim nor of the proceedings therein. In the statement of claim the plaintiffs set out the various classes of members which each defendant was to represent. They were as follows:

(i.) a'Beckett as representing members of the committee at the time of the making of the lease.

(ii.) Fesq as representing members of the club present at the general meeting of the 13th day of January, 1888.

(iii.) Burne as representing members at the time when the lease was made, but who were not present at the meeting of the 13th day of January, 1888.

(iv.) Woolcott-Waley as representing members of the committee at a date subsequent to the lease being made.

(v.) Henderson as representing the members of the club elected at a date subsequent to the date of the lease.

On the 25th day of May, 1897, Manning, Chief Judge in Equity, made an order authorising the above-mentioned defendants to defend the proceedings respectively on behalf of the above specified classes. The appellant was not served with and was no party to the said order.

On the 27th day of October, 1898, Simpson, Chief Judge in Equity, made a decree dismissing the suit against the defendants Woolcott-Waley and Henderson with costs, and declaring (*inter alia*) that the defendants a'Beckett, Fesq, and Burne and all other persons who were members on the 12th day of July, 1888, and who assented to or subsequently ratified the action of the trustees of the club in taking the lease of that date are and each of them is bound to indemnify the late William Henry Paling and his estate against the rent and other moneys paid by the said William Henry Paling or his executors under the said lease. By the said order it was further decided that the master in equity should inquire as to what persons were liable to contribute on the basis of the above decree.

On the 5th day of August, 1899, the defendants gave notice to the appellant that the master in equity was proceeding to settle the said list and that the appellant's name had been submitted to the master for inclusion therein.

On the 25th day of August, 1899, the appellant filed an affidavit objecting to his inclusion in the said list and on the 21st day of November, 1899, the appellant filed a notice of further objections.

In November, 1899, evidence was taken upon the said matter, and the master found that the appellant had assented to or ratified the action of the trustees in taking the lease and that he ought to indemnify the plaintiffs with costs to be taxed; and on the 15th day of December, 1899, the master made a separate certificate to that effect. On the 15th day of February, 1900, the appellant took out a summons to vary the master's certificate. The said summons was heard by the Chief Judge in Equity; and on the 5th day of March, 1900, the said summons was dismissed with costs.

On the 19th day of March, 1900, the appellant filed a notice of appeal against the said order to the full court; and on the 23rd day of July, 1900, the said appeal was dismissed with costs.

The present appeal is from these last orders. There is no appeal from the decree of the 27th of October, 1898. In the case lodged by the appellant he stated, and his counsel repeated before their lordships, that the appellant was always willing to share with all the other members of the club the liabilities under the said lease, but as the form of the suit and the declarations in the decree rendered only four or five persons liable to make good a sum which (by the addition of costs) amounted to over £5 000, he objected and objects to take upon himself an individual liability not shared by other members of the club.

The decree of the 27th of October, 1898 was not made upon the broad ground that the members of the club as *cestuis que trustent* were bound to

indemnify their trustees, it was made upon the theory that only those members of the club were liable to indemnify the plaintiffs who had assented to or ratified the taking of the lease; and the master's certificate found that the appellant had assented to and ratified it. The chief judge refused to vary the certificate, thinking it right. The full court on appeal affirmed the decision, but not unanimously nor on the same grounds. The Chief Justice considered it proved that the appellant had become one of the *cestuis que trustent* of the lease and was therefore liable to indemnify the plaintiffs. Cohen, J., considered that the appellant had assented to and ratified the taking of the lease, and had therefore become liable. Owen, J., differed. He thought the master's certificate wrong and that the appellant ought to succeed.

With respect to the appellant's assent or ratification to the taking of the lease much discussion took place as to what was meant in this case by ratification, and it was contended that no ratification as distinguished from approval could be established. It is not, however, necessary to do more than to say that it became plain to their lordships when the evidence had been examined that although there was ample evidence to prove that the appellant knew that a lease had been taken for the club and that the club had the use of the property and that the lease might become a burden to the club, yet that the appellant had done nothing whatever to incur any liability to indemnify the trustees, unless such liability attached to him as a member of the club and as one of the *cestuis que trustent* of the lessees. It further appeared to their lordships to be proved that notwithstanding the irregularities of the meeting of December, 1887, and the doubts thrown on the legal validity of its subsequent confirmation, yet that the members of the club generally and the appellant with the others, through the committee of management and otherwise, so far assented to what had been done as to have become *cestuis que trustent* of the lessees. Their lordships were satisfied that the relation of trustee and *cestui que trust* had been created. It follows from this that the lessees as trustees were entitled to be indemnified out of any property of the club to which their lien as trustees extended. But the evidence against the appellant did not prove anything more than the existence of the above relation; and their lordships intimated that in their opinion the real question for decision was whether the appellant was liable to indemnify the trustees under the circumstances thus proved. This view was ultimately accepted by counsel, and their lordships do not therefore think it necessary to allude further to the evidence on the present occasion.

In *Hardoon* v. *Belilios*, 49 W. R. 209, [1901] A. C. 118, this board had to consider the right of trustees to be indemnified by their *cestuis que trustent* against liabilities incurred by the trustees by holding trust property. The right of trustees to such indemnity was recognized as well established in the simple case of a trustee and an adult *cestui que trust*. But, as was then pointed out, this principle by no means applies to all trusts and it cannot be applied to cases in which the nature of the transaction excludes it.

Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club to be paid so long as as he remains a member. It is upon this fundamental condition, not usually expressed, but understood by everyone, that clubs are formed; and this distinguishing feature has been often judicially recognized. It has been so recognized in actions by creditors and in winding-up proceedings: see *Flemyng* v. *Hector*, 2 M. & W. 172; *In re St. James' Club*, 2 De G. M. & G. 383. Apart from an observation of Lord St. Leonards in the last case, and which observation is in favour of the appellant, the only reported case in which a court has had to consider the application to a club of this right to indemnity is *Minnitt* v. *Lord Talbot*, 7 L. R. Ir. 407. In that case some members of a club who had guaranteed the repayment of money borrowed for the club sought indemnity not only out of the property of the club but from the members personally. The court which had already given effect to their lien (see 1 L. R. Ir. 143) afterwards made an additional order and inquiry similar to those made in this case. The grounds upon which this addition to the original decree was made do not appear; nor does it appear what were the grounds on which any member was held to have incurred liability nor indeed whether any member had incurred such liability. This case does not therefore assist their lordships on the present occasion.

The question now to be decided may be regarded as not yet covered by authority; and a choice must be made between either ignoring the essential features of a club or holding that the general rule established in *Hardoon* v. *Belilios* is inapplicable to such a body of persons. Their lordships feel no difficulty in making this choice. The trustees of a club are the last persons to demand that the fundamental conditions on which their *cestuis que trustent* have become such, shall be completely ignored.

The appellant in this case is not in their lordships' opinion under any legal or equitable obligation to pay or contribute anything towards the indemnity of the plaintiffs; but he has offered to do so, and the plaintiffs are not satisfied with his offer. Their endeavour to obtain more is to be regretted and cannot succeed. This may seem hard on the trustees; but they have only themselves to blame for their own imprudence in not seeing to their own safety. A decision in their favour would not only be hard on the members of the club, but would be inconsistent with the terms on which they became members.

Their lordships will therefore humbly advise his Majesty to set aside the certificate of the master and to reverse the orders of the 5th of March, 1900, and the 23rd of July, 1900, with costs.

The respondents will pay the costs of the appeal.

Solicitors, *George Slade; Kimbers & Boatman.*

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## Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) — Dec. 12, 19.

LOSH v. RICHARD EVANS & CO. (LIMITED). (a.)

*Master and servant—Employers' liability—Accident—Compensation — Employment — Injuries received by applicant starting engine—No part of applicant's duty to start or stop engine—"Accident arising out of or in the course of" applicant's employment — Workmen's Compensation Act*, 1897, *s.* 1 (*i.*).

*The applicant was employed as a brow girl at the*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*respondents' colliery pit, and her work as such, was to pick out rubbish from the coal as it was slowly moved along on a belt to the wagons. It was found as a fact by the county court judge that it was no part of the duty of the girls who did this work to start or stop the engine which worked the band, and that the applicant on the occasion in question was told by the other girls not to touch the engine. The man whose duty it was to start the engine being at the moment absent, the applicant started the engine herself, and her dress catching in the wheel she was drawn in and seriously injured.*

*Held, by* COLLINS, M.R., *and* ROMER, L.J. (MATHEW, L.J., *dissenting*), *that as the county court judge had found as a fact that it was no part of the applicant's duty to stop or start the engine, and as there was evidence to justify such finding, the accident did not arise out of or in the course of her employment with the respondents.*

*Per* MATHEW, L.J., *that there was no evidence to support the finding that it was no part of the applicant's duty to touch the engine.*

Lowe *v.* Pearson, 47 *W. R.* 193, [1899] 1 *Q. B.* 261, *followed.*

This was an appeal from an award of his Honour Judge Shand at the St. Helens, Widnes, County Court, in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was a "brow" girl, and had been employed by the respondents at their Lee pit at Haydock for a fortnight, and her duty on the day of the accident was to pick out from the coal as it passed along on a "band" the slate and dirt before the coal was discharged into wagons.

During the day the band engine had to be stopped and started again several times. The applicant had herself stopped or started it about three times.

During the temporary absence of the man in charge of the engine—a man named Dixon—the applicant, hearing the signal to start the engine, started it again, and in doing so her dress was caught, and she sustained serious injuries.

The county court judge found that the accident did not arise out of or in the course of the applicant's employment, and he accordingly made his award in favour of the respondents.

The applicant appealed, and on the original hearing of the appeal the court directed that the case should go back to the county court judge in order that he might prepare a statement of the grounds of his decision.

The county court judge made the following report: "I found as facts that the applicant was on the day of the accident employed by the respondents at their Lee pit as a brow girl. As such, her duty was to pick out 'bass' from the 'slack,' while it passed over a band which discharged the slack into railway wagons. The band was worked by a steam engine which was stopped and started by turning a wheel. In starting the engine it was frequently necessary to go some distance into the machinery in order to pull the fly-wheel round. Thomas Dixon was the man in charge of the belt engine. It was no part of the duty of the applicant to touch or interfere with the belt engine. On the 8th of March, 1899, the pit had become blocked. Dixon, having stopped his engine, had gone to assist the shunt man in order to set the pit working again. While Thomas Dixon was away the applicant, clothed in a skirt, having heard a signal which referred to the engine, went to the belt engine. In pulling the large fly-wheel round to start the engine she became caught in the machinery and was injured. Several of the girls at work on the belt, seeing the applicant going to the engine, told her not to touch it. The applicant, who had been at the pit a fortnight, had not herself been warned by Dixon not to touch the engine, but the girls who told her not to do so had received express instructions to that effect. The operation of setting the engine in motion was a dangerous one and unfitted for a woman clothed in a skirt. At the date of my award, the 10th of January, 1899, the case of *Lowe* v. *Pearson*, 47 W. R. 193, [1899] 1 Q. B. 261, had just been decided. Acting upon that decision I was of opinion that the applicant's duty being to pick bass from the belt, and having been told not to touch the engine, the accident could not be held to have arisen out of, or in the course of, her employment."

The appeal was re-argued on the 12th of December, when judgment was reserved.

*F. H. Mellor*, for the applicant.

*Ruegg, K.C.*, and *S. H. Leonard*, for the respondent.

Dec. 19.—COLLINS, M.R.—In this case the county court judge has held that the applicant is not entitled to compensation, on the ground that the accident did not arise out of or in the course of her employment. The question we have to decide is whether, on the evidence as to the way in which the accident happened, the respondents are liable to pay her compensation, and that depended upon whether the accident arose out of and in the course of the applicant's employment with the respondents. It is, then, a question really purely of fact.

The principle in such cases which this court had laid down is that in every instance where the judge decided a matter of fact on evidence that was capable of supporting his finding, then, unless this involved a misdirection on a matter of law, his decision cannot be questioned by this court. Here the county court judge, on the invitation of this court, has given his reasons for his decision. It is clear that, as an employer is at liberty to define the sphere of duty of his workmen, and to divide the labour of his workmen into mere labour and skilled labour, if a workman in the former class, without experience, voluntarily undertook to do something in the latter class, and an accident happened, the workman was doing something which was not in the course of his employment. Here the applicant's own evidence did not furnish any suggestion that her sphere of duty extended beyond the simple work of picking "bass" out of the coal. The case of *Lowe* v. *Pearson* decides that a workman employed in one sphere of work cannot make his master liable for injuries accidentally received by him while acting in another sphere. The question of how far one sphere is marked off from another is a question of fact. Reading the report of the learned county court judge it is clear that he finds as a fact that it was no part of the applicant's duty to start the belt engine and that she was told not to touch it. In my opinion there is evidence justifying the county court judge in finding as he did, and we ought not to interfere with his decision.

ROMER, L.J.—I agree with the judgment delivered by the Master of the Rolls, and for the reasons he has stated I think this appeal fails.

MATHEW, L.J.—I regret that I cannot concur in the judgment of the other members of the court. The sole question here is whether on the evidence the accident is shown to be one that within the meaning of the section reasonably construed, was one that "arose out of and in the course of" the applicant's employment. Now that is an elastic phrase, and in my judgment covers the present case. For the masters it was said that it did not. Why? They said it was no part of the girl's duty to handle the engine. But there is nothing in the Act limiting

the liability of the masters to accidents that occur to workmen doing that only which it was their express duty to perform. The county court judge, in the reasons which he gave for his decision, said there was evidence that led him to hold that it was no part of the applicant's duty to touch or interfere with the engine. I have read all the evidence in the case, and I cannot see any evidence of the existence of any duty on the part of the applicant not to stop or start the engine. She was not told in express terms, at the time when she was engaged, that she was not to stop or start the engine. It was admitted, indeed, that she never received any precise directions on the matter. The respondents had means of knowing what ordinarily went on when the girls were at work, and the evidence showed that it was the usual practice, when the man Dixon was away, for the girls to obey the signals and stop or start the engine. For this reason I think the county court judge's finding is not supported by the evidence, and I therefore with regret take the unusual course of differing from my brethren on a question as to the effect of evidence, but although my decision does not alter the result of this appeal I feel bound nevertheless to express my opinion.

Solicitor for applicant, *Charles Russell & Co.*, for *Riley*, St. Helens.

Solicitor for respondents, *W. Norton Ellen*, for *Edwin Peace*, Liverpool.

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From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Dec. 18.

EASTON *v.* ISTED. (*a.*)

*Light—Ancient lights—Consent or agreement—Window—Skylight—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

*In* 1873 *the predecessor in title of the plaintiff erected a conservatory abutting on the defendant's property, and entered into an agreement with the defendant's predecessor in title whereby he agreed to pay one shilling a year to defendant's predecessor for allowing the window of his conservatory to overlook and open on to the defendant's property. The sloping top of the conservatory was of glazed glass, as also was the whole of the vertical side adjoining the defendant's property above a few feet from the ground. Portions of the glazed side of the conservatory were movable, so that when opened they overhung the defendant's property. The yearly rent was duly paid until* 1888, *when the conservatory was converted into a passage or corridor, the sloping top of the conservatory being retained and giving light to and forming the roof of the corridor. The defendant erected certain buildings which obstructed the access of light to the corridor through the glazed roof. The plaintiff brought an action for an injunction and damages.*

*Held, that the word "window" in the agreement referred to the sloping roof of the conservatory as well as the vertical side. Consequently the light was enjoyed only by virtue of the said agreement, which was a consent or agreement within the meaning of section* 3 *of the Prescription Act, and therefore the action failed.*

*Decision of* Joyce, J. (50 *W. R.* 472), *affirmed.*

This was an appeal from a decision of Joyce, J. (reported 50 W. R. 472), who had dismissed an action brought by the plaintiff, who was the owner and occupier of certain premises known as the Golden Fleece Hotel, Commercial-road, Portsmouth, against the defendant, who was the owner and occupier of adjacent premises in the same road, in respect of the obstruction by the defendant of the access of light over a yard at the back of his premises to a window or skylight over a passage or corridor on the north side of the plaintiff's hotel.

The plaintiff alleged in his statement of claim that the skylight was an ancient light, and that free and unobstructed access thereto of light had been enjoyed as of right for twenty years and upwards without interruption prior to the commencement of the action.

The defendant did not admit that the said skylight was an ancient light, or that free and unobstructed access thereto of light had been enjoyed as of right for twenty years without interruption before action brought; and he denied that the buildings recently erected by him (in respect of which the action was brought) seriously obstructed the access of light to the plaintiff's skylight.

The window or skylight in question was inclined at an angle of somewhat less than forty-five degrees to the plane of the horizon, and at somewhat more than forty-five degrees to the vertical plane, and its northern or lower side was practically on the boundary line between the plaintiff's and defendant's properties.

This window or skylight originally formed the sloping top of a conservatory erected by the plaintiff's predecessor in title in the year 1873 on the northern side of the hotel and abutting on the defendant's property. This top was entirely glazed, as was the vertical side of the conservatory adjoining the defendant's property to within a few feet of the ground. Portions of the glazed side of the conservatory, amounting to less than one half thereof, were movable, and opened out in such a way as to overhang the defendant's property. The rest of the side and the glazed top were immovable and could not be opened.

In the year 1873, at the time when the conservatory was built, an agreement in writing was entered into between the predecessors in title of the plaintiff and the defendant, but was only signed by the plaintiff's predecessor in title.

This agreement, which was dated the 13th of June, 1873, was as follows: "I hereby agree to pay Mr. Isted, of No. 43, Commercial-road, Landport, the sum of one shilling a year as an acknowledgment for allowing the window in my conservatory adjoining to open on to and overlook his property, and do also agree to close the same when required to do so." The yearly payments of one shilling were duly paid under this agreement until the year 1888, when the conservatory was pulled down, and the space converted into a passage or corridor in the hotel by building a brick wall where the glazed side of the conservatory formerly stood, to the height of the skylight, and retaining the skylight with its glazed glass in its original position.

The defendant had recently erected a wall along or close to the boundary line of the plaintiff's and defendant's properties. The plaintiff alleged that this wall was of such a height as to obstruct the access of light to the glazed roof of the passage or corridor in the hotel, and he brought the present action claiming an injunction or damages.

Joyce, J., held that the light was enjoyed by the plaintiff and his predecessor in title, only by virtue of the above agreement, which was a consent or agreement within the meaning of section 3 of the Prescription Act. He accordingly dismissed the action.

The plaintiff appealed.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*Hughes, K.C.*, and *Coldridge*, for the appellant, used arguments similar to those put forward in the court below.

*Kenyon Parker*, for the respondent, was not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I do not think we can differ from Joyce, J. I cannot doubt that this agreement was entered into with a view, among other things, of preventing the acquisition of a right of ancient light under the Prescription Act by the plaintiff's predecessor in title. That is clear to my mind from the use of the word "overlook" in the agreement. It was admitted that if once you arrive at the conclusion from the words of the agreement that this was the object of the agreement, the question cannot be debated. In these circumstances it is not necessary for me to say more than that I affirm the judgment and adopt the reasoning of Joyce, J.

STIRLING and COZENS-HARDY, L.JJ., concurred.

Solicitors, *James, Mellor, & Coleman*, for *Hobbs & Brutton*, Portsmouth; *A. W. Mills*, for *Cousins & Burbidge*, Portsmouth.

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From K. B. Div. (Collins, M.R., and Romer, L.J.) — Dec. 15.

*In re* BAKER, LEES, & CO. (*a.*)

*Solicitor—Costs—Taxation—Parliamentary agents—Bill of costs for work done by solicitor as parliamentary agent—Jurisdiction to tax—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

*A bill of costs of a parliamentary agent, who is also a solicitor, if it relates exclusively to work done by him as a parliamentary agent, cannot be taxed in the High Court under section* 37 *of the Solicitors Act*, 1843.

Appeal from an order of Ridley, J., for the taxation of certain costs.

In the Parliamentary session of 1902 a private Bill was introduced into Parliament and passed, which resulted in the Mexborough and Swinton Tramways Act, 1902. The promoters of the Bill were represented in the proceedings in Parliament by Charles E. Baker and Arthur J. Lees, who practised as parliamentary agents and also as solicitors under the firm name of Baker, Lees, & Co.

Baker, Lees, & Co. delivered their bill of costs, charges, and disbursements to the promoters and proceeded to take it in for taxation before the taxing officer of the House of Commons.

The promoters, being desirous to have the costs taxed under the Solicitors Act, 1843, in the High Court, took out a summons in the King's Bench Division for an order to that effect.

The master refused the application, but on appeal Ridley, J., made an order that the bill of costs should be taxed by one of the taxing-masters of the Supreme Court.

Baker, Lees, & Co. appealed.

The bill of costs related exclusively to the appellants' costs and charges in relation to the promotion of the said private Bill in Parliament, and the appellants' affidavit stated that the items therein contained related wholly to work done and expenses incurred by them as parliamentary agents properly taxable under the House of Commons Costs Taxation Act, 1847.

*Danckwerts, K.C.*, and *Vesey Knox*, for the appellants.—Ridley, J., was of opinion that, as no part of the business charged for in this bill was transacted in any court of law or equity, the costs were taxable in the High Court under section 37 of the Solicitors Act, 1843, as modified by section 16 of the Judicature Act, 1873, but that the taxation must take place in the Chancery Division: see *In re Pollard*, 36 W. R. 515, 20 Q. B. D. 656; and *In re Collyer-Bristow & Co.*, 50 W. R. 4, [1901] 2 K. B. 839. The Legislature, however, have enacted special provisions for the taxing of the costs of Bills in Parliament, to be found in 10 & 11 Vict. c. 69, and 12 & 13 Vict. c. 78, which have taken the place of the earlier Acts, 6 Geo. 4, c. 123, and 7 & 8 Geo. 4, c. 64. These provisions are inconsistent with the provisions of the Solicitors Act, and constitute an entirely separate jurisdiction. There is therefore no power to tax the costs of proceedings in Parliament in this court. The charges made by the appellants in this bill are made, and the expenses incurred by them for which they charge in this bill were incurred by them, not in their capacity as solicitors, but in their capacity as parliamentary agents. The fact that the appellants happen to be solicitors as well as parliamentary agents does not give jurisdiction to tax such a bill of costs as the present, in the High Court.

They referred to *Allen* v. *Aldridge*, 5 Beav. 401; *In re Strother*, 5 W. R. 797, 3 K. & J. 518; *In re Sudlow and Kingdom*, 11 Beav. 400; *In re Oliver*, 15 W. R. 331, 36 L. J. Ch. 261.

*Warrington, K.C.* (*Tudor Howell* with him), for the respondents.—The relationship of solicitor and client existed in this case, and the fact that the solicitors acted as parliamentary agents is not sufficient to oust the jurisdiction of the Solicitors Act.

COLLINS, M.R.—The question in this case is whether a bill of costs charged by a person who is a solicitor and also a parliamentary agent, if it embraces exclusively such charges as might be made by a parliamentary agent who was not also a solicitor, is subject to taxation in this court. The Legislature has provided machinery for dealing with the taxation of the costs of proceedings in Parliament in two statutes—viz., 10 & 11 Vict. c. 69, and 12 & 13 Vict. c. 78. It is clear that those statutes provide facilities for the taxation of the costs of the work with which they deal, which are different from the procedure laid down in the Solicitors Act; and it seems to be also clear that, where a person who does such work is not a solicitor, there are no other means of obtaining taxation except the facilities provided by those statutes. The question is how to deal with the case where the work is done by a person who is a solicitor. The appellants do not contend that a solicitor has immunity from taxation in this court where his bill is a mixed bill consisting partly of items such as only a solicitor could charge and partly of items for work such as any parliamentary agent might do. In such a case they do not dispute that there is jurisdiction to tax the bill in this court. But they contend that where the charges relate exclusively to work done by a solicitor merely in the capacity of a parliamentary agent and not in that of solicitor, the special jurisdiction provided by the above-mentioned statutes is incompatible with the jurisdiction under the Solicitors' Act relating to work done by solicitors, and that the bill is not referable for taxation as a solicitor's bill under section 37 of the Solicitors Act, 1843. We have had several cases cited to us, and I think that, when we come to criticize those cases, they are found to be capable of being reconciled by one principle—viz., that, in order that a bill may be taxable under the Solicitors Act, it must relate to business in which the solicitor was employed because he was a solicitor.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

And in my opinion, where we have to deal with work which could be performed either by a person who was a parliamentary agent alone or by a person who was a parliamentary agent and also a solicitor, we ought to look to see what was the real relation between the parties, and, if the person was employed because he was a parliamentary agent and not because he was a solicitor, that consideration ought to govern the case. On these grounds I agree with the order made by the master, and disagree with the order made by Ridley, J.

ROMER, L.J.—I am of the same opinion. The circumstances of this case do not raise any real difficulty. The appellants are parliamentary agents; they were not employed by the respondent except as parliamentary agents, and the charges made by them are such as may properly be made by parliamentary agents. There is nothing to show that they ever came into the position of solicitors to the respondent; on the contrary, they acted solely in their capacity as parliamentary agents. Then does it follow that because they happen also to be solicitors their bill of charges can be taxed in the Supreme Court? I think not. The method of taking costs of this kind is dealt with by the special Acts which have been referred to. The principle on which the court ought to act when a question of this sort arises was laid down by Lord Langdale in *Allen* v. *Aldridge*. After pointing out that a bill of costs might be taxed under the Solicitors Act, though no part of the business to which it related had been transacted in a court of law or equity, he proceeded to describe the business, the charges for which were taxable: "It must be business connected with the profession of an attorney or solicitor—business in which the attorney or solicitor was employed because he was an attorney or solicitor, or in which he would not have been employed if he had not been an attorney or solicitor, or if the relation of attorney or solicitor and client had not subsisted between him and his employer." It seems to me to be clear that the work charged for in this case does not come within that principle, and this court ought not to take on itself to tax charges made by the appellants in their capacity of parliamentary agents. I do not think there is any inconsistency between this principle and the decisions in the cases of *In re Strother* and *In re Sudlow and Kingdom*.

*Appeal allowed.*

Solicitors for the appellants, *Baker, Lees, & Co.*

Solicitors for the respondents, *Blair & W. B. Girling*.

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Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) Dec. 13.

REES v. PENRIKYBER NAVIGATION COLLIERY CO. (LIMITED). (a.)

*Master and servant—Employers' liability—Accident—Compensation—Dependant—Father of deceased in workhouse at time of death—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2, *Schedule I.*, (1) (a) (ii.).

*The father of a workman who was accidentally killed in the course of his employment was in the workhouse at the time of the death of the deceased. The deceased did not during the last six or seven months of his life contribute towards the maintenance of his father, though before that period he had so contributed. The father applied for compensation under the Workmen's Compensation Act*, 1897, *as being a dependant, in part dependent upon the earnings of the deceased.*

*Held, that the county court judge was justified in holding that the applicant was not a dependant.*

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from a decision of the judge of the Glamorganshire County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the father of a deceased workman, who had been in the employment of the respondents, and who met with an accident on the 6th of September, 1901, arising out of and in the course of his employment, and died in consequence thereof on the 15th of January, 1902.

The applicant claimed as having been a dependant in part dependent upon the deceased man's earnings at the time of his death.

The applicant had been blind for some years. In the course of the year 1897 he first went into the workhouse, and remained there until the end of the year. During this period the deceased man, under an order, contributed 1s. 6d. a week through the relieving officer towards his father's maintenance in the workhouse. In 1899 the father lived for about three months with a married daughter, and the deceased man paid her 8s. a week towards his maintenance. The deceased man also lived in the same house. From May, 1900, to May, 1901, the father lived with another married daughter, and the deceased man paid her from 7s. to 8s. a week towards his maintenance and paid for his clothes. In May, 1901, the father went to the workhouse, and remained there until the 16th of January, 1902, the day after the death of his son. During this period the deceased man did not contribute towards his father's maintenance, nor was any order made against him for that purpose. The deceased man at the time of his death was earning wages at the rate of 36s. a week, and was unmarried.

The county court judge made an award in favour of the respondents.

The applicant appealed.

*S. T. Evans, K.C.*, and *Sankey*, for the applicant.—The county court judge made a mistake in point of law. The applicant was a dependant in part dependent upon the earnings of the deceased man at the time of his death within the meaning of Schedule I., par. 1 (a) (ii.) of the Workmen's Compensation Act, 1897. The son was under a legal obligation to contribute towards his father's maintenance when his father became chargeable under the Poor Law Acts; and he was able so to contribute. That is sufficient to constitute dependency; it is not necessary that the son should have been actually contributing up to the time of his death.

They referred to *Main Colliery Co.* v. *Davies*, [1900] A. C. 358; 48 W. R. Dig. 113; and *Cunningham* v. *McGregor & Co.*, 3 Ct. Sess. Cas. 5th Ser., 775.

*Ruegg, K.C.*, and *A. Parsons*, for the respondents, were not called upon.

COLLINS, M.R.—This is an appeal by a person claiming to be a dependant of a deceased workman. The county court judge has found that he was not a dependant. Unless this finding involves a mistake in point of law we cannot interfere; we are bound by the decision of the county court judge on a question of fact, especially on a question of dependency, which we now have the authority of the House of Lords for saying is entirely a question of fact. The applicant, who was the father of the deceased man, was in the workhouse at the time of the death. That is the only ground set up to support the claim of the applicant.

The argument comes to this—that, where a person is in the workhouse, and there is a person outside the workhouse against whom the guardians could enforce the obligation of maintenance by exacting contributions, then the person in the workhouse must be a dependent on the other person. In my opinion that contention involves a straining of the language of the Act. By section 7, sub-section 2, "dependants" are defined to be "such persons of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death." And by Schedule I., par. 1 (*a*) (ii.), where the workman leaves dependants in part dependent upon his earnings, the amount of compensation is to be such sum as may be determined on arbitration to be reasonable and proportionate to the injury to the said dependants. The words of the Act contemplate an actual dependency of the claimant on the deceased workman, and no such dependency exists where the claimant is being maintained by the guardians in the workhouse. It is clearly a matter of indifference to the claimant whether the guardians are entitled to be reimbursed by anyone else. I am of opinion that it cannot be laid down as a matter of law that there must be dependency in such circumstances. It is sufficient to say that the question is one of fact, and is concluded by the finding of the county court judge.

ROMER and MATHEW, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the applicant, *Riddell & Co.*, for *Walter Mogan, Bruce, & Nicholas*, Pontypridd.

Solicitor for the respondents, *H. P. Becher*, for *Simons & Powell*, Pontypridd.

## High Court of Justice.

Chan. Div. Kekewich, J. — Jan. 13.

*In re* BARROW-IN-FURNESS CORPORATION AND RAWLINSON'S CONTRACT. (*a*)

*Vendor and purchaser—Executor—Charge of debts and legacies—Power of executor to sell land and to grant easements to provide for payment of debts and legacies—Law of Property Amendment Act*, 1859, *Lord St. Leonards' Act* (22 & 23 *Vict. c.* 35), *ss.* 14, 15, 16, 18—*Lands Clauses Act*, 1845 (8 *Vict. c.* 18), *s.* 7—*The Barrow-in-Furness Corporation Act*, 1901, *ss.* 22, 31, 32.

*A testator bequeathed his residuary personal estate to trustees (who were also appointed executors) upon trust for sale and conversion, and directed that if his residuary personal estate should be insufficient to provide for his funeral and testamentary expenses, debts and legacies, his residuary real estate should stand charged with payment of such deficiency, and authorized the trustees to raise such deficiency by mortgage of his residuary real estate; and the testator devised his residuary real estate in case (as happened) no son of his should have attained the age of twenty-five years during his lifetime, to the use of such son of his as after his death should first attain the age of twenty-five years in fee. The testator died in* 1875. *At his death part of his residuary real estate was incumbered and the legal estate was outstanding. The residuary personal estate proved insufficient to pay the legacies. The testator's eldest son attained twenty-five years in* 1888, *and subsequently settled the real estate, subject to prior incumbrances, and died in* 1897. *In* 1901 *the surviving executor and trustee of the testator's will contracted to sell part of the residuary real estate to the Barrow-in-Furness Corporation, and further to grant to them an easement over other parts of the residuary real estate.*

*Held, that the vendor, as executor, had power (apart from any common law right) to sell the land under section* 16 *of Lord St. Leonards' Act; and that section* 18 *of that Act did not apply, because at the date of the testator's death there was no devisee within the meaning of that section who could sell the land.*

*Held, also, that under the joint operation of section* 32 *of the Barrow-in-Furness Corporation Act*, 1901, *and section* 7 *of the Lands Clauses Act*, 1845, *the vendor was not competent to grant the easement.*

Summons.

At the time of his death, which occurred in the year 1875, William Sawrey Rawlinson was the owner of a certain estate known as the Duddon Hall estate in Cumberland and Lancaster, and lord of the manor of Dunnerdale with Seathwaite, in the county of Lancaster. The said estate, which consisted of lands of freehold and copyhold or customary freehold tenure respectively, included a small lake called Seathwaite Farn, which formed part of the manor. Part of the said estate was subject to a mortgage created by an indenture dated the 30th of December, 1865, and the legal estate in the freehold hereditaments comprised therein was at the time of William Sawrey Rawlinson's death outstanding in the mortgagees and has ever since remained outstanding. Other parts of the said estate were subject to a jointure deed dated the 25th of June, 1862, whereby a rent-charge of £800 a year was reserved in favour of Elizabeth Mary Rawlinson, the wife of William Sawrey Richardson.

By his will, which was dated the 17th of October, 1872, William Sawrey Rawlinson appointed his wife and Robert Rawlinson and Crayston Webster, therein referred to as his trustees, to be executrix and executors of his will, and after bequeathing certain legacies, the testator bequeathed all the residue of his personal estate to his trustees upon trust for sale and conversion and directed that if the moneys to arise from the conversion of his residuary personal estate should be insufficient to provide for the payment of his funeral and testamentary expenses and debts and legacies then, and in such case he thereby charged his residuary real estate thereinafter devised with the payment of such deficiency, and he authorized his trustees to raise such deficiency by mortgage of all or any part of his residuary real estate, and the testator devised all his manors and all the residue of his freehold estates subject and charged as thereinbefore mentioned to the use of his eldest or only son living at his death in case such son should have attained the age of twenty-five years in fee, but if there should be no son of his living at his death who should have attained the age of twenty-five years, then to the use of such son of his as after his decease should first attain the age of twenty-five years in fee, with remainder as therein mentioned. And the testator further devised his copyhold or customary estates to the said Robert Rawlinson upon trusts corresponding to the uses therein declared of and concerning his residuary freehold estates.

The testator died on the 29th day of June, 1875, and his will was duly proved on the 26th day of July, 1875. The testator's personal estate after payment of the testator's funeral and testamentary expenses and

(*a*.) Reported by C. B. CAMM, Esq., Barrister-at-Law.

debts proved insufficient for the payment of all the legacies bequeathed by the said will.

None of the children of the testator had attained the age of twenty-five years at the date of his death, but his eldest son, William Millers Rawlinson, attained that age on the 20th day of April, 1888.

By an indenture dated the 18th of June, 1889 (being a settlement made on his marriage with Rosella Ellen Rigge), William Millers Rawlinson conveyed the Duddon Hall estate to trustees subject to the said mortgage of the 30th of December, 1865, and to the said jointure rent-charge and to the unpaid legacies, upon the trusts therein mentioned. Subsequently to the said settlement, William Millers Rawlinson effected mortgages of the said hereditaments which as to certain of the mortgaged hereditaments affected the legal estate therein.

By his will, dated the 9th of March, 1897, William Millers Rawlinson, after appointing George Brooke Millers Rawlinson and Frederick Maurice Dickson to be trustees and executors thereof, devised to his trustees all his manors or lordships and all the real estates of which he had power to dispose by his said will upon certain trusts thereby declared, during the life or widowhood of his wife, with remainders over, and he directed that they should have a power of sale over the said hereditaments.

William Millers Rawlinson died on the 20th of March, 1897, and his will was proved on the 12th of June, 1897.

By an agreement dated the 3rd of June, 1901, and made between the Mayor, Aldermen, and Burgesses of the Borough of Barrow-in-Furness (hereinafter called the corporation) as purchasers, of the one part, and Elizabeth Mary Rawlinson (who was then the sole surviving trustee of the will of William Sawrey Rawlinson), the vendor, of the other part, after reciting that the corporation were promoting a Bill in Parliament to enable them to bring water from Seathwaite Farn by a line of pipes to the borough of Barrow-in-Furness, it was agreed that the said Elizabeth Mary Rawlinson should sell to the corporation for the sum of £15,000 (*a*) the fee simple of and in 93 acres of land in the said agreement mentioned, and (*b*) the right to lay down and maintain in perpetuity a line of pipes through the estates known as the Duddon Hall and Thwaite Flat estates. The 93 acres of land mentioned in the above agreement formed part of the waste lands of the Manor of Dunnerdale with Seathwaite, and the line of pipes was to traverse the lands included in the jointure deed of the 25th of June, 1862. The said agreement was confirmed by section 22 of the Barrow-in-Furness Corporation Act, 1901, which received the Royal Assent on the 9th of August, 1901.

In the requisitions on title the corporation objected that under the will of the testator W. S. Rawlinson the trustees took no estate in the residuary real estate, and that the will did not show any power of sale in the trustees; and, further, that the vendor was not authorized to grant easements by statute or otherwise, and they accordingly insisted that all persons having a legal interest in the property should concur in the conveyance and grant. The vendor, however, asserted that, as the personal estate of the testator was insufficient to pay the legacies, she, as sole surviving trustee, had an overriding power of sale over all charges created subsequently to the death of the testator, and she declined to procure the concurrence of such incumbrancers, but consented to obtain the concurrence of incumbrancers whose charges were in existence at the date of the testator's death.

The present summons was taken out by the corporation, asking for a declaration that the vendor was not competent to convey the land nor grant the easement comprised in the said agreement of the 3rd of June, 1901, without the concurrence of all persons having a legal title or legal remedy against the said land and the hereditaments over which the said rights were agreed to be granted.

The vendor relied on her common law right to sell as executrix under the general charge of debts given by the said will and also on the powers conferred on executors by sections 14 and 16 of 22 & 23 Vict. c. 35 (Lord St. Leonards Act), and further that she was empowered to grant the easement by virtue of the powers given her by section 32 of the Barrow-in-Furness Corporation Act, 1901, and the Land Clauses Acts incorporated therewith.

Section 22 of the Barrow-in-Furness Corporation Act, 1901, confirmed the agreement of the 3rd of June, 1901, and section 31 empowered the corporation to acquire easements. Section 32 provided as follows: "Persons empowered by the Lands Clauses Acts to sell and convey or release lands may if they think fit, subject to the provisions of those Acts and of this Act, grant to the corporation any easement, right, or privilege . . . required for the purposes of this Act in, over, or affecting any such lands, and the provisions of the said Acts with respect to lands and rent-charges so far as the same are applicable on this behalf shall extend and apply to such grants and to such easements, rights, and privileges as aforesaid respectively."

Section 7 of the Lands Clauses Act, 1845, enacts as follows: "It shall be lawful for all parties being seised, possessed of, or entitled to any such lands—(*i.e.*, lands authorized to be taken by the special Act)—or any estate or interest therein to sell and convey or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose; and particularly it shall be lawful for all or any of the following parties so seised, possessed, or entitled as aforesaid so to sell, convey, or release—that is to say, all corporations . . . trustees, or feoffees in trust for charitable or other purposes, executors and administrators and all parties for the time being entitled to the receipt of the rents and profits of any such land in possession . . . and the power so to sell, convey, or release as aforesaid may lawfully be exercised by all such parties . . . not only on behalf of themselves and their respective heirs, executors, administrators, and successors, but also for and on behalf of every person entitled in reversion, remainder, or expectancy after them or in defeasance of the estates of such parties . . . and as to such trustees, executors, and administrators on behalf of their *cestui que trusts* . . . and that to the same extent as such *cestui que trusts* respectively could have exercised the same powers under the authority of this and the special Act if they had respectively been under no disability."

*Warrington, K.C.*, and *Attwater*, for the purchasers.—Two questions arise—firstly, as to the vendor's power to sell the land; secondly, as to her power to grant an easement. With regard to the sale of land, the vendor has no power of sale under the statute. She could only sell under section 16 of Lord St. Leonards' Act, but that section is not applicable here, as the present case falls within the express exceptions mentioned in section 18, as William Millers Rawlinson was devisee in fee. But assuming William Millers Rawlinson was not devisee at the time of the testator's death, yet he clearly became so in 1888, when he attained twenty-five years of age, and from that date he could have sold as devisee under sections 15 and 18 of the Act. (They referred to *In re Wilson, Pennington* v. *Payne*, 34 W. R. 512, 54 L. T. Rep. 600;

*In re Rebbeck, Bennett* v. *Rebbeck*, 42 W. R. 478, 71 L. T. Rep. 74, and *Lippincott* v. *Smyth*, 8 W. R. 336, 29 L. J. Ch. 520). With regard to the grant of the easement, the vendor has no power to grant the easement. Sections 31 and 32 of the Barrow-in-Furness Corporation Act, 1901, only apply to persons empowered by the Lands Clauses Act to sell and convey or release lands, and section 7 of the Lands Clauses Act, 1845, only authorizes persons "seised, possessed, or entitled to lands to sell, convey, or release," and it has no application to an executor with a power of sale.

*P. O. Lawrence, K.C.*, and *Dickinson*, for the vendor.—Firstly, with regard to the sale. Apart from the statute the vendor has a power of sale as executrix under the ordinary or common law. But she has also a power under section 16 of Lord St. Leonards' Act. Section 18 does not apply in the present case. The son eventually entitled as devisee could not at the testator's death sell, and therefore the vendor as executrix had power to sell under section 16. *In re Wilson* is a somewhat similar case to the present, and is in our favour. Section 16 is not excluded by section 18 unless at date of the testator's death there is a devisee then actually in existence and ascertained. They also referred to *Wrigley* v. *Sykes*, 4 W. R. 228, 21 Beav. 337; *Sabin* v. *Heape*, 8 W. R. 120; 27 Beav. 553; and *In re Tanqueray-Willaume and Landau*, 30 W. R. 801, 20 Ch. D. 465). As regards the grant of the easement, the vendor is clearly entitled to grant the easement by virtue of sections 31 and 32 of the Barrow-in-Furness Corporation Act, 1901, and section 7 of the Lands Clauses Act, 1845. Section 7 of the Lands Clauses Act, 1845, expressly mentions executors.

*Warrington, K.C.*, replied.

KEKEWICH, J.—In this case there are two questions for decision, which it will be convenient to treat separately. The executrix of William Sawrey Rawlinson has contracted to sell land, and the first question is whether she has made a good title to the purchaser. [His lordship then read the material parts of the testator's will.] The question is, can the executrix sell the land which is charged with the debts and legacies. For some purposes it is immaterial whether the legacies are charged or not, but for the purposes of Lord St. Leonards' Act there must be a charge of debts or legacies. It has been argued that the executrix has a power of sale under the ordinary or common law quite independent of Lord St. Leonards' Act, and that really the two questions are the same, and that is, I think, correct. It is not competent for me to cast any doubt on the authorities which have decided that where there is a charge of debts an executor can sell, and it necessarily follows that an executor selling under such a charge can vest in the purchaser such estate as his testator had, whatever that may have been, so as to give the purchaser as good a title as the testator would have been competent to give.

It is not necessary for me to refer to the cases cited, but I will assume that independently of the statute there was a power of sale; but the main question is whether there is a power of sale under the statute. This is, I think, not only an open, but in its precise form an entirely new point. If the executrix here has a power of sale, it is under section 16 of the Act, which to some extent operates by reference to the preceding section 14. The 16th section takes the case of no devise of the land to other persons or to the executor himself as trustee. It is the case we have here, of an executrix selling and being entitled to sell by exercise simply of a power and not by virtue of any property whatever. The difficulty, however, arises under section 18, which places a limit on section 16. By section 18 the provisions of section 16, as also of sections 14 and 15, are not to extend to a devise to any person or persons in fee or in tail. It is said that as here there was a devise to the first son who should attain twenty-five in fee, there was no occasion or opportunity for the operation of section 16, which was excluded by the devise. The obvious purpose of the Act was to enable property which was charged with debts and legacies to be sold in any event, by the devisee if there was a devisee, by the executor if there was no devisee. Under which class does the present case fall? There is a devise here to a person in fee, but it is a devise by way of executory gift. It is a springing use. It is a devise to the first son who should attain twenty-five. In the present case the son attained twenty-five about thirteen years after the testator's death. What happened in the meantime. There being no provision in the will, the estate descended. It was vested in the heir. To that extent there was no devise. There was a devise eventually, but there was no devise then in operation. The result was that during those thirteen years there was no power in the devisee to sell, and it is said that there was no power in the executrix to sell. That, however, seems to me to contradict the purpose of the Act, it being inconsistent with the provisions of the Act. The precise case has never arisen, but a case somewhat similar arose in *In re Wilson*, before Kay, J. There there was a devise in fee, but in settlement—that is to say, it was a devise to a tenant for life, and then to other persons in remainder. They might or might not have between them disposed of the whole fee; it is immaterial to consider this, but the learned judge held that that was not a devise to any person or persons in fee or in tail. In other words, a devise to a person or persons or in tail does not mean a devise of a particular estate followed by a remainder, nor a number of particular estates followed by a remainder, nor does it mean anything else but one devise in fee or in tail to a single person or to a number of persons as tenants in common or joint tenants. The principle of the decision in *In re Wilson* seems to me to be entirely in accord with the vendor's argument. The decision proceeded on the construction of the Act, meaning, as I have said, that either the executor or the devisee is to have the power of sale, and if you have a settlement with any disposition of the fee which does not enable the devisee to sell—that is to say, does not necessarily vest the disposition, the conveyance, and the control of the whole legal fee in some person or persons competent to deal with it—then it seems to me the Act applies, and the exception in section 18 does not apply. But there was an argument on the concluding words of section 18, "nor shall they"—that is, the provisions of section 16 amongst others—"effect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do," and it was agreed that even if the son who ultimately took was not a devisee in fee immediately under the will, still he became a devisee in fee when he attained twenty-five, and from that time forward he must have been capable of selling, because the statute says that a devisee may sell, of and care is taken to provide that the powers such a devisee shall not be affected. To my thinking that is not the right interpretation. I think the section looks to the point of time when the will comes into operation. It is then, and not during the uncertain period (which may be any number of years during which it has to be ascertained whether there is a devisee or not), that the power is vested in the

executor for that time. It seems to me that, "any such devisee or devisees," in the concluding words of the section means a devisee of that character, devisees who take on the death of the testator, and by virtue of his will, the estate in fee or in tail thereby devised to them, and I see no reason for saying that if the executor once has the power it shall be taken away from him merely because it is ultimately found that the heir is displaced by the springing use, and that the son becomes entitled to the fee on attaining twenty-five. It is not necessary for me to say what his powers would be. That, I think, disposes of the first point, and I have intentionally disposed of it almost entirely under the statute because, as I have said, that was really the point for decision.

Now the other question is one of an entirely different character, and it has nothing whatsoever to do with the branch of law with which we have hitherto been dealing, though it is part of the law of real property. The executrix, besides contracting to sell the land, has contracted to sell an easement, the right to convey water over other land; and the question is whether she can do that. It is not suggested that there is any common law power, any power by virtue of charge of debts and legacies, or any power under Lord St. Leonards' Act to grant an easement. That is entirely beside the mark. What is said is that under the Lands Clauses Act, 1845, and the special Act of this corporation there is this power to grant an easement. Before the special Act was passed the parties entered into an agreement—the agreement which has given rise to this discussion — and by that agreement this executrix purports to sell and the corporation to buy this land and easement. The agreement is made binding on those parties by the 22nd section of the special Act, but it has not been argued that that statutory confirmation does anything more than make it a binding agreement—that is to say, neither, on the one hand, does it empower the corporation to buy anything which they could not properly buy; nor, on the other hand, does it empower the vendor to sell anything which she could not properly sell; still less does it enable her to convey any estate which is not vested in her. It merely makes it a binding agreement to be dealt with like any other binding agreement by an argument and decision in the courts. So we put that aside. Then the special Act incorporates the Land Clauses Act, and the special Act also says in section 32: "Persons empowered by the Lands Clauses Act to sell and convey or release lands may, if they think fit, subject to the provisions of those Acts and of this Act, grant to the corporation any easement." I need not read any further. It is said that under these sections this executrix can grant an easement to the corporation. It is quite clear that under the Land Clauses Act no railway company or other corporation simply having the powers of that Act could purchase an easement at all, and that no person, even an owner in fee, could grant them an easement so as to give them an indefeasible title to it. It cannot be suggested that the Lands Clauses Act gives the slightest power to any limited owner—that is to say, any owner who is not an owner in fee, to grant an easement, so that we approach this special Act and the Lands Clauses Act from that point of view.

I think we must deal with the two sections rather each by itself, the 32nd second of the special Act, and the 7th section of the general Act. The 32nd section of the special Act says: "Persons empowered by the Lands Clauses Acts to sell and convey or release lands." This lady is not empowered by the Lands Clauses Act to sell unless the construction which is contended for on the 7th section gives her that power. That I must turn to directly. She is not otherwise empowered by the Lands Clauses Act to sell, and if she is not empowered by the Lands Clauses Act to sell, then the 32nd section does not apply, and she is not one of the persons thereby authorized to grant to the corporation any easement. So now we must turn to the 7th section of the Lands Clauses Act. It is a long section, but it is not open to the objection which often applies to a lengthy section, because, though there are a great many words, they are (at least I have always found them to be) exceedingly well arranged, and they fall under different heads very easily. We have at the very beginning of the section a description of the persons to whom authority is given—namely, parties seised, possessed of, or entitled to any such land or any estate or interest therein. Well, they are to sell and convey and enter into all necessary agreements and then "particularly it shall be lawful for all or any of the parties so seised, possessed, or entitled as aforesaid. . . . Trustees or feoffees in trust for charitable or other purposes, executors or administrators, and all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession, or subject to any such estate in dower, or to any lease for life." Then the argument is: Executors and administrators are not entitled to land, and that shows that notwithstanding this strong language pointing in the other direction, the Legislature did contemplate a sale by persons who were not seised, possessed of, or entitled to the land. The answer is that land includes chattels real and also, of course, an estate *pur autre vie* which might be vested in the executor, and even an administrator might become so entitled as in the instance I suggested to Mr. Lawrance in the course of the argument as the legal personal representative of the sole or surviving executor of the original testator. So that we have a meaning which we can give those words without committing the extravagance of saying that they are not to be necessarily seised, possessed, or entitled. I pass on to the concluding words because I think they are important—"and as to such trustees, executors, and administrators on behalf of their *cestui que trusts*, whether infants, issue unborn, lunatics, femes covert, or other persons." Now creditors, legatees, and so forth might possibly be included under the "other persons," but I do not think that the language points in that direction. There is nothing to assist me in saying that by "other persons" is meant creditors, where there is a charge of debts, and legatees where there is a charge of legacies, and I think that such a construction is excluded by the following words: "and that to the same extent as such *cestui que trusts* respectively could have exercised the same powers under the authority of this and the special Act if they had respectively been under no disability." In order to apply that to such a case as we are dealing with you must conceive the legatee to be under disability, which there is no reason for supposing at all, and you must treat creditors as *cestui que trusts* and also as possibily under disability. I think it would be an extravagant construction of the Act to suppose that the Legislature ever meant this to apply to an executor or an administrator without any estate or interest in the land which he purported to sell and convey.

Therefore, that being so, this vendor is not a person empowered by the Lands Clauses Act to sell and convey. She can sell and convey—I have held that in her favour—not because she comes within the 7th section, but because she has power which is vested in her either at common law or under Lord St. Leonards' Act. But as she is not a person empowered by the Lands Clauses Act to sell and convey, she is not competent to grant an easement.

Having regard to the importance of both questions, the time which has been occupied by them and the result, I think the proper order as to costs will be that each party pay his own costs.

Solicitors, *Iliffe, Henley, & Sweet*, for *C. F. Preston*, Town Clerk of Barrow-in-Furness; *Tylee & Co.*

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Chan. Div.
Swinfen Eady, J. } Nov. 5.

*In re* STEEL.
WAPPETT *v.* ROBINSON. (*a.*)

*Will—Construction—Devise of "my freehold land and hereditaments"—Customary freeholds.*

*A testatrix devised "my freehold land and hereditaments at M" to A., and the residue of her real and personal estate to trustees. Testatrix was entitled at the date of her death to four closes of land at M, of which two were freeholds and two were customary freeholds. The four closes were in the occupation of A.*

*Held, that the words "my freehold land and hereditaments" included the customary freeholds.*

Originating summons.

By her will, dated the 22nd of September, 1899, Ann Steel, of the Town Head, Bolton, in the parish of Morland, in the county of Westmoreland, made the following devise:

"I give and devise my freehold land and hereditaments at Morland Field, in the said parish of Morland, unto and to the use of Mrs. Ann Robinson, of Morland . . . and her heirs, but if the said Ann Robinson shall die before me I give and devise the said land and hereditaments unto the person or persons, and if more than one in the proportions and for the estate or estates, and generally in the manner, to whom and in and for which, the same would have devolved if the said Ann Robinson had died immediately after me, and if her last will (if any) had first taken effect."

Testatrix then devised the residue of her real and personal estate to the plaintiffs as trustees upon trusts for sale, the proceeds to be divided between several beneficiaries.

The testatrix died on the 29th of January, 1902, and her will was proved on the 1st of March following.

The testatrix was at the date of her will, and thenceforth until her death, entitled to four pieces of land at Morland Field. Two of these pieces were of freehold tenure, and the other two were copyhold of the manor of Morland, of which the Dean and Chapter of Carlisle were the lords.

Testatrix had derived the lands as heiress-at-law of her brother William Steel, who died in 1886, seised in fee simple in possession of the freehold pieces of land and in customary fee simple of the copyhold pieces of land, of which he was tenant on the rolls of the said manor.

Testatrix had never been admitted tenant of the copyhold pieces of land on the roll of Morland Manor.

The four pieces of land were at the date of the will and for many years previously in the occupation of the defendant Mrs. Ann Robinson, the devisee in the will, and who then held and had for many years held the same as testatrix's tenant at a yearly rent of £12.

The said pieces of land all lie together in close proximity to another farm held by Ann Robinson.

The question to be decided by the court was whether the specific devise in the will to the defendant Ann Robinson of the testatrix's freehold land and hereditaments at Morland Field included the two copyhold fields held from the Dean and Chapter of Carlisle as Lords of the Manor of Morland, to which the testatrix was entitled as customary heiress of her late brother William Steel (deceased), the tenant then on the roll of the said manor, but to which she had never been admitted tenant; or whether such copyhold fields passed to the plaintiffs under the devise to them of the testatrix's residuary estate.

*A. Whitaker*, for the trustees, argued that the copyhold lands passed under the residuary devise: *Stone* v. *Greening*, 13 Sim. 390; *Arkell* v. *Fletcher*, 10 Sim. 299. *In re Bright-Smith, Bright-Smith* v. *Bright-Smith*, 34 W. R. 252, 31 Ch. D. 314, could be distinguished, as in that case there was no residuary devise.

*J. Gatey*, for the defendant, contended that the term "freehold land and hereditaments" included the customary freeholds.

SWINFEN EADY, J.—It appears that the testatrix derived these closes of land as heiress on the death of her brother. The fields have been let in one entirety to Mrs. Robinson. Part of the land was freehold and part was customary freehold of the manor of Morland belonging to the Dean and Chapter of Carlisle. Testatrix was never admitted as tenant and never paid the manorial rent of 1s. and 1s. 2d. per year payable in respect of these lands, and although she was not only heiress-at-law, but also customary heiress to her brother, she herself does not appear to have been aware of the distinction. These lands have been usually known as freeholds or customary freeholds in the locality. I am of opinion that the testatrix in the clause devising her "freehold lands and hereditaments" to the defendant, was not using the words in the strict technical sense of tenure, but intended in fact that these lands in their entirety should pass under the word freeholds. I therefore hold that both classes of fields, those properly called freehold, as well as those locally called freehold or customary freehold, pass to the devisee of her "freehold lands and hereditaments."

Solicitor for plaintiffs, *C. J. Brayshaw*, for *John Richardson*, Appleby.

Solicitors for defendants, *Harrison & Powell*, for *Bell & Moordaff*, Appleby.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) } Oct. 29.

SMITH (*Appellant*) *v.* MOODY (*Respondent*). (*a.*)

*Criminal law—Conviction—Conspiracy—Trades union—Intimidation—Conviction insufficiently describing offence—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 7—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 39, *sub-section* 1.

*Notwithstanding section* 39, *sub-section* 1, *of the Summary Jurisdiction Act*, 1879, *it is still obligatory to state on the face of a conviction the facts which are necessary ingredients of the offence.*

*By section* 7 *of the Conspiracy and Protection of Property Act*, 1875, *a person "who, with a view to compel any other person to abstain from doing . . . any act which such other person has a legal right to do . . . wrongfully and without legal authority . . . injures his property," commits an offence.*

*The appellant was convicted under this section, the*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*conviction stating that on the 4th of February, 1902, he, "with a view to compel" the respondent "to abstain from working for Messrs. John Bowes & Partners (Limited), at Felling Colliery, which he had a legal right to do, wrongfully and without legal authority did injure the property" of the respondent.*

*Held, that the conviction was not bad for not sufficiently stating the precise work which the respondent was compelled to abstain from doing; but that it was bad for not specifically stating what was the property injured.*

Reg. v. McKenzie, 41 *W. R.* 144, [1892] 2 *Q. B.* 519, *and* Ex parte Wilkins, 64 *L. J. M. C.* 221, 43 *W. R. Dig.* 57; *considered.*

Case stated by the court of general quarter sessions for the peace for the county of Durham.

At a court of summary jurisdiction in the county of Durham the appellant was convicted for an offence alleged to have been committed by him under section 7, sub-section 1, of the Conspiracy and Protection of Property Act, 1875, which enacts that "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority (i.) . . . injures his property . . . shall on conviction" be liable to pay a fine or imprisonment.

The conviction, so far as material, was in the following terms: "Cummings Smith, hereafter termed the defendant, is this day convicted for that he, on the 4th day of February, 1902, at the parish of Heworth, in the said county, with a view to compel Thomas William Moody to abstain from working for Messrs. John Bowes & Partners (Limited) at Felling Colliery, in the said county, which he had a legal right to do, unlawfully, wrongfully, and without legal authority did injure the property of the said Thomas William Moody, contrary to the statute in such case made and provided," &c.

The appellant appealed against this conviction to the quarter sessions, when the point was taken on his behalf that the form of the conviction was bad and ought to be quashed on two grounds: (1) That the conviction contained no sufficient definite specification of any act which the respondent had a legal right to do, or of any act which the appellant intended to compel the respondent to abstain from doing. (2) That the property of the respondent alleged to have been injured by the appellant ought to have been particularly specified in the conviction.

The quarter sessions, overruling both objections, affirmed the conviction.

The Summary Jurisdiction Act, 1879, s. 39, sub-section (1) provides that in proceedings before a court of summary jurisdiction "the description of any offence in the words of the Act . . . creating the offence, or in similar words, shall be sufficient in law."

*R. I. Simey*, for the appellant.—The conviction is bad because it is too vague. It should have stated the work which the respondent had been prevented doing by the alleged wrongful act of the appellant: *Reg.* v. *McKenzie*, 41 W. R. 144, [1892] 2 Q. B. 519. Moreover, the property which it is alleged that the appellant had injured is not stated. That such an indictment is bad has been held in a series of cases from the time when Holt, C.J., so ruled in *Rex.* v. *Chandler*, 1 Ld. Raym. 581. That inherent defect is not cured by section 39 (1) of the Summary Jurisdiction Act, 1879, which has not changed the law in this respect, for, while that section provides that "the description of any offence in the words of the Act creating the offence or in similar words shall be a sufficient description in law," it does not do away with the rule that in a conviction, as in an indictment, all the facts and circumstances constituting the offence must be specially set out.

*Shortt* (*Mitchell Innes* with him). for the respondent.—As to the first ground of objection, *Ex parte Wilkins*, 64 L. J. M. C. 221, 43 W. R. Dig. 57, is an authority for this court to hold that it is one without substance. The conviction states that the appellant was going to work for a particular specified person, and it was unnecessary to add a description of the work he was going to do and was prevented from doing for that particular person. The offence is the unlawful preventing another from working, and it is not necessary to set out the means by which the workman was prevented from doing that which he had a right to do, *Ex parte Perham*, 29 L. J. M. C. 33. As to the second ground of objection the conviction states that the property injured was that of Thomas Wm. Moody, and that is a sufficient description by virtue of s. 39 (1) of the Act of 1879, as it follows the words of the Act of 1875 creating the offence.

*Simey* replied.

Lord ALVERSTONE, L.C.J.—In this case two objections are taken to the form of the conviction. The first is that the conviction does not sufficiently state the act from the performance of which the respondent was induced to abstain. It is contended that the conviction should have stated the work which the respondent was going to do or the nature of the act which he was going to do, so to speak, in the furtherance of working for the firm named. I am of opinion that this objection fails. As regards this point no material fact has been omitted from the conviction and the offence is sufficiently stated. It is clear that the Act would apply to the case of a man who, not having in fact been employed by the employer named, is intending to try and obtain work from him at a particular place, and who therefore may not know the precise nature of the work which he will have to do; but it would be impossible in such a case to set out in the conviction the exact nature of the act which the workman was compelled to abstain from performing. It is said on behalf of the appellant that this view is contrary to that expressed by the present Master of the Rolls (then Collins, J.) in *Reg.* v. *McKenzie*, but I am of opinion that there is nothing in that decision contrary to the view which I am now expressing. The conviction there merely stated that, with a view to compel the informant from doing acts which he had a legal right to do, the defendant followed the informant in a disorderly manner. No information whatever was given; neither the name of the employer nor the place of employment was mentioned, and the conviction did not even allege that the man wanted to work at all. The court held that the conviction was bad because it ought to have set out some particular and definite act which the defendant had intended to compel the informant to abstain from doing, but there is nothing in the judgment to show that Collins and Bruce, JJ., thought that a statement that an endeavour had been made to compel a man from working for a particular employer at a specified place would have been insufficient. A similar question came before Cave and Lawrance, JJ., in *Ex parte Wilkins*, and the conviction in the present case is quite as specific for the purpose of stating the offence as it was in that case; and Cave, J., in referring to *Reg.* v. *McKenzie* made use of an observation, which showed that he, at any rate, declined to accept the broad principle which has been contended for in this case on behalf of the appellant. For these reasons I think that this objection fails.

The second objection to the conviction is that it

does not sufficiently specify the property of the respondent which the appellant is alleged to have injured, the only words used being "did injure the property of" the respondent. I have come to the conclusion that this objection is good and must prevail. I was at first inclined to think that the defect was cured by section 39 of the Summary Jurisdiction Act, 1879, which provides that "the description of any offence in the words of the Act . . . creating the offence or in similar words shall be sufficient in law"; but on further considering the question, which is undoubtedly one of importance, it seems to me that it could not have been intended by that section to do away with the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions. All that is meant by section 39 is that the offence itself need only be described in the words of the statute creating it. As was put forward in the argument for the appellant, it clearly would not be sufficient to say in a conviction for larceny "did steal the property of" the prosecutor without any further particulars; and in my opinion section 39 does not cure the omission from a conviction of such particularity in the description and details of the offence as has always been required. I therefore come to the conclusion on this point of the case, that the conviction insufficiently described the offence, and that it is no answer to the objection to say that in using the words "did injure the property of" the respondent, the language of section 7 of the Act of 1875 has been followed, and therefore that no further information is required. I have come to this conclusion with some reluctance because I have very little doubt that actual injury to the respondent's property was proved, but in giving our decision we have to consider how far it may have a bearing on other proceedings. The second objection is, in my opinion, fatal, and the conviction must therefore be quashed.

WILLS, J.—I agree. I think that section 39 of the Summary Jurisdiction Act, 1879, which provides that it is sufficient to describe the offence in the words of the statute creating the offence cannot be supposed to have been intended to break down the very important rule which has prevailed now for at least 200 years in the administration of justice with respect to the sufficiency of particulars in a conviction. I do not think for a moment that it was intended to relieve persons who had to draw convictions from inserting anything that was necessary as an ingredient of the offence of which the particular defendant had been found guilty. When one comes to the description of the offence itself, then it is quite sufficient if it is described in the terms of the statute, however general they may be. At the same time, the old rule must prevail that whatever is necessary to show that the person convicted has done something which brought him within the words of the statute must still be specified.

With regard to the first question I feel no difficulty, because that which the appellant intended to prevent the respondent from doing—namely, working for an employer—is necessarily of a somewhat vague character. It may be that the object of the appellant was to prevent the respondent from doing any work at all, and in such a case it would be impossible to state any specific act which the appellant sought to compel the respondent to abstain from doing. The act is described in the conviction as "working for Messrs. John Bowes & Partners (Limited), at Felling Colliery, in the said county," and I do not know how a more specific or appropriate description than that could be given. If it were necessary to choose between the two decisions *Ex parte Wilkin* and *Reg.* v. *McKenzie*, I should certainly be disposed to say that I agree with the former rather than with the latter. But for the reasons which my lord has given I do not think that there is any real inconsistency between the two decisions, though no doubt some of the observations of Collins, J., in *Reg.* v. *McKenzie*, when divorced from the particular circumstances to which they refer, do appear to go further than the case then before the learned judge required, and to apply to such a case as the present. Nor do I think that Cave, J., in *Ex parte Wilkin* meant to depart from a case which was binding on him.

But when we come to the second branch of this case it does appear to me that there is a very important question involved. I can well understand the reason of this necessity for holding magistrates and other tribunals to strictness in this matter of describing the elements in an offence, because if laxity is allowed in the statement of the offence in the summons or in the conviction, it is a great encouragement to those who have to deal with such matters to take refuge in generalities, and not to apply their minds to the specific question. Here the appellant has committed a specific offence, but it does seem to me that merely saying that he "wrongfully injured the property" of the respondent without anything further is not sufficient. It is not that there is any insufficiency in the description of the offence itself. The description of the offence follows the words of the statute, but there is insufficiency with respect to the ingredients of the offence which the appellant has committed, and for which he has been convicted. I think specific information as to the injury to property ought to have been given in the conviction.

CHANNELL, J.—I agree. I have a very clear opinion on the first point. In all probability the actual thing that was proved was that there was a desire to compel the respondent from doing any work of any kind whatever for the particular firm at the particular place, and if that was proved that is clearly an offence within the meaning of this statute, and it would be impossible to state it otherwise than in the way in which it is stated. I do not suppose that the intention was to prevent the respondent from working in one particular capacity and to allow him to work in another; at any rate, if that which I have suggested was proved the offence was committed, and the conviction, as stated, is not in any way defective. It is unnecessary to go through the cases in detail, but there is nothing in them which is contrary to the view I have expressed.

On the second point I have a good deal of doubt. I do not see the mischief that my brother Wills, J., seems to think there is with regard to the form of the conviction; because the form is necessarily drawn up after the conviction, and it does not seem to me that our holding that the conviction might be recorded in general terms would induce magistrates not to be particular as to what was proved. The principle, however, seems to be that, subject to statutory provisions making certain things unnecessary in certain cases, the conviction must be as precise as the summons, and if there were a charge against a man—either by an indictment or by summons made in the vague way in which this conviction is drawn up—a charge against a man of injuring the property of another without specifying what property or giving any further information, it does seem to me that that would be insufficient. Therefore, following the rule that the conviction must be as precise as an indictment,

I think that this conviction is wrong in form unless it is met by some statutory provision on the point. Section 39 of the Summary Jurisdiction Act, 1879, is the one relied on, but that seems to be a repetition of previous enactments, and although section 39 provides that it shall be sufficient so far as regards the description of the offence to follow the statute, I do not think the section in any way dispenses with the usual necessity for specifying time and place and matter in the way in which it has been hitherto specified. It could not possibly suffice in a case of larceny simply to specify the name of the person whose property was stolen. There must be facts relating to the particular matter, such as the time when and the manner in which the offence was committed, which would have to be inserted in the charge, and the omission of which cannot be cured by stating the offence in the words of the statute. No doubt the conviction might have been amended at quarter sessions, assuming, of course, that some specific property of the respondent was in fact proved to have been injured, and therefore I am rather reluctant to give effect to the objection, but we have no materials on which to make an amendment and there is therefore nothing for us to do but to quash the conviction.

*Appeal allowed; conviction quashed.*

Solicitors for the appellants, *Pyke & Parrott*, for *Joel & Parsons*, Newcastle-upon-Tyne.

Solicitors for the respondents, *Robinson & Bradley*, for *Edward Clark*, Newcastle-upon-Tyne.

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K. B. Div. (Wright, J.) June 11, 1902.

ISLINGTON CORPORATION *v.* LONDON SCHOOL BOARD. (*a.*)

*Local government—Lands taken compulsorily—Assessment for poor rate—Liability for deficiency in general rate—Lands Clauses Consolidation Act,* 1845 (8 & 9 *Vict.* c. 18), *s.* 133—*London Government Act,* 1899 (62 & 63 *Vict.* c. 14), *s.* 10, *sub-section* 2.

*By section* 133 *of the Lands Clauses Consolidation Act,* 1845, *promoters of undertakings are liable to make good the deficiency in the poor rate caused by their taking lands for the purposes of the undertaking, and by section* 10 *of the London Government Act,* 1899, *the general rate and the poor rate are to be made and levied as one rate as if it were a poor rate.*

*Held, that section* 10 *of the London Government Act,* 1899, *did not impose any fresh liability upon promoters of undertakings under the Lands Clauses Act,* 1845, *and that the defendants as promoters of an undertaking were only liable to make good the deficiency in that proportion of the general rate, which represented the poor rate.*

Case stated by consent under ord. 34, r. 1, in an action brought for (1) a declaration that under the Lands Clauses Consolidation Act, 1845, and the London Government Act, 1899, the defendants were liable to make good to the plaintiffs the deficiency in the assessment to the general rate as defined by the last-mentioned Act on a house and lands known as No. 7, Barnsbury-park, Islington, by reason of those premises having been taken and used for the purposes of the works of the defendants, until the works should be completed by the defendants and assessed to the general rate; (2) for payment of the sum of £5 7s. 7d., being the second instalment of a general rate made the 28th of September, 1901, for the period ending the 25th of March, 1902, and payable on the 1st of January, 1902.

By section 133 of the Lands Clauses Consolidation Act, 1845, "If the promoters of the undertaking become possessed by virtue of this or the special Act or any Act incorporated therewith, of any lands charged with the land tax or liable to be assessed to the poor rate, they shall, from time to time, until the works shall be completed and assessed to such land tax or poor rate, be liable to make good the deficiency in the several assessments for land tax and poor rate by reason of such lands having been taken or used for the purposes of the works.

By section 20 of the Elementary Education Act, 1870, as amended by section 15 of the Elementary Education Act, 1873, it is enacted that with respect to the purchase of the land by school boards for the purposes of the Elementary Education Act, 1870, the following provisions shall have effect—that is to say: (1) The Lands Clauses Consolidation Act, 1845, and the Acts amending the same, shall be incorporated with this Act except the provisions relating to access to the special Act; and in construing those Acts for the purposes of this section the special Act shall be construed to mean an Act confirming an order of the Education Department for the purchase of land, together with the Elementary Education Act, 1870, and the promoters of the undertaking shall be construed to mean the school board; and (2) the school board before putting into force any of the powers of the said Lands Clauses Consolidation Acts with respect to the purchase and taking of lands otherwise than by agreement are to give the notices prescribed by section 20 of the Elementary Education Act, 1870; and by the same section the Education Department may make an order authorizing the school board to put in force with reference to the land referred to in such order the powers of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same with respect to the purchase and taking of land otherwise than by agreement, but no such order is to be valid until it is confirmed by Parliament.

By a provisional order duly made and confirmed by the Education Department Provisional Order Confirmation (London) Act, 1898 (61 & 62 Vict. c. ccix.), after section 20 of the Elementary Education Act had been complied with, the Education Department ordered that the defendants be authorized to put in force the powers of the Lands Clauses Consolidation Act for the purchase and taking of lands otherwise than by agreement with reference to (*inter alia*) the premises known as No. 7, Barnsbury-park aforesaid.

On or about the 12th of December, 1900, the defendants, under the powers conferred by the order, became possessed of the said premises, which consisted of a private dwelling-house and garden, which were then liable to be assessed to the poor rate, and were not exempt from that or any rate, or liable to be assessed thereto at a less amount than other hereditaments, and in respect thereof the defendants became the promoters of an undertaking within the meaning of the said section 133; and the said Confirmation Act, together with the Elementary Education Act, 1870, became the special Act within the meaning thereof; and the works within such meaning in connection with the said premises have not been completed and assessed to such poor rate.

By virtue of the London Government Act, 1899, the plaintiffs became and are the borough council for the borough of Islington, and the collectors of the assessment for poor rate mentioned in section 133. By section 10, sub-section 1, of the London Government Act, 1899, it is enacted that a scheme under that Act (which was duly made and passed as regards

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

the borough of Islington) shall provide for all expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and a separate lighting rate, but shall make provisions for protecting the interests of owners and occupiers of any hereditaments which is exempt from any rate, or liable to be assessed thereto at a less amount than other hereditaments; and by sub-section 2 of the same section it is enacted that after the appointed day, which has long since passed, the general rate and the poor rate shall be assessed, made, and levied together by the borough council as one rate, which shall be termed the general rate, and shall be assessed, made, and collected and levied as if it were a poor rate, and all enactments applying or referring to the poor rate shall, subject to the provisions of this Act as to audit, be construed as applying or referring also to the general rate. A copy of the scheme was annexed to and formed part of the case.

By reason of the lands having been taken and used by the defendants for the purposes of their works, there was prior to the 28th of September, 1901, and still is, an entire deficiency in the assessment for the general rate in respect of the said lands, and the plaintiffs, as such collectors have demanded from the defendants £5 7s. 7d., the amount of such deficiency for the period ending the 25th of March, 1902, but the defendants have neglected to pay the same. The proportion of such £5 7s. 7d. representing that portion of the general rate which is applicable to the relief of the poor is £3 3s.

The deficiency has been computed according to the rental at which the lands with the buildings thereon were valued and rated at the time of the passing of the Confirmation Act, 1898.

The plaintiffs' claimed that the defendants were liable to make good to the plaintiffs the said deficiency in the general rate, but the defendants contended that they were not liable to make good any part of such deficiency, or at any rate that they were only liable to make good such part of such deficiency as arose with respect to that part of the general rate which represents the poor rate.

The questions for the opinion of the court were: (1) Whether under the provisions of the said Acts of Parliament the defendants are bound to make good to the plaintiffs the whole of the deficiency in the general rate. (2) If the last question is answered in the negative, whether the defendants are bound to make good to the plaintiffs the deficiency in the proportion of the general rate which represents the poor rate.

*Ryde* (*Danckwerts, K.C.*, with him), for the plaintiff.

*Avory, K.C.* (*Layman* with him), for the defendants.

The arguments sufficiently appear from the judgment.

WRIGHT, J.—Under section 133 of the Lands Clauses Consolidation Act, 1845, the promoters of undertakings to whom that Act applies are made liable, not to be rated to the poor rate, but to make good the deficiency in the poor rate caused by their taking under their statutory powers lands and buildings assessed to that rate; they are liable also to make good the deficiency in the land tax. The defendants have taken land under circumstances which render that section applicable, and the only question for my decision is what, in relation to the present case, is the meaning to be given to the expression "poor rate" in the section. The answer depends upon section 10 of the London Government Act, 1899. The Lands Clauses Act itself selected the poor rate as the rate the deficiency in which had to be made good; it left other rates, such as the county rate, the watching and lighting rate, &c., entirely outside its scope. I do not think that at that time the borough rate was payable out of the poor rate; certainly in some boroughs it was not so payable down to a very recent period. It is useless, however, to conjecture why the same principle was not applied to all rates; it may have been that the poor rate was a mere burden upon land, of which it was thought that everybody ought to pay his share, and that the rate ought to be paid even in a case like this where the land might be temporarily unprofitable, because then it would be a burden undertaken with a view to the future profitable user of the land. Again, it may have been thought that there should not be a similar liability in the case of charges which were not strictly a burden upon the land, but were rather charges in respect of the value of something provided by the local authority, such as sewerage, water, or lighting, &c., for in such a case the land might lie idle in the hands of the promoters of the undertaking, and they would receive no benefit from what was provided.

But the real question is what is the effect of section 10 of the Act of 1899; now, sub-section 2 of that section provides that the general rate and the poor rate are to be assessed, made, and levied "as one rate," which is to be called the general rate, and is to be assessed, made, collected, and levied as if it were the poor rate; it does not abolish either the general rate or the poor rate, but leaves them together side by side; it does not say that all these expenses are to be provided for by a levy which is to be part of the poor rate: it says "as if it were the poor rate," which is very different from saying that these expenses are to be treated as part of the outgoings of the poor rate. It is that difference of expression which prevents *Farmer* v. *London and North-Western Railway Co.*, 36 W. R. 590, 20 Q. B. D. 788, from being an authority in the present case. There it was decided, and properly decided, that everything which was chargeable on the poor rate was to be regarded as being within a provision of this kind.

Pausing at this point in the section, I do not think there is enough to establish the conclusion that all these purposes are to be treated as purposes of the poor rate. The section then provides that all enactments applying or referring to the poor rate are, subject to the provisions of the Act as to audit, to be construed as applying or referring, also to the general rate; I think that this carries the matter no further. The words in their natural sense mean that enactments relating to the machinery for assessment, for making, collecting, and levying the poor rate, and for appeals, are to apply in future to the general rate. The expression "all enactments applying to the poor rate" is, if taken literally, difficult of application; I do not think that the Lands Clauses Act, 1845, can be properly described as an enactment applying to the poor rate; it deals, not with the rate, but with the deficiency on the rate owing to the temporary non-rateability of certain premises. Then section 11, sub-section 3, of the Act of 1899 indicates that for some purposes the general rate and the poor rate are intended to be kept separate, for it provides for the separation in the demand note of the several purposes for which the rate is made, and for a statement of the approximate amount in the pound required for each purpose, including a proportionate amount of the costs of collection. In the scheme which has been made under this Act there is an express provision for the purpose of giving effect to exemptions. The borough council is to apportion the amount of the general rate

so as to show approximately the rate from time to time for any of the purposes or the number of purposes in respect of which there is such an exemption, and the rates in the pound so apportioned and entered are to be treated as levied for the purposes in respect of which these sums are given. I am not clear that that does not apply to this very case, although the word "exemption" is not appropriate for this purpose; but it may be that the word is there used in a general sense, and would cover a case like the present. Apart altogether, however, from the scheme, I think that the claim of the plaintiffs is not made out; the form of sections 10 and 11 would be a strange form to adopt if the intention were to impose a novel burden of this kind, especially when it is remembered that section 133 of the Act of 1845 is not concerned with rating at all; for while sections 10 and 11 of the Act of 1899, are entirely concerned with rating, section 133 of the Lands Clauses Act, 1845, is merely concerned with the making up of the deficiency in the rate. I think that the true meaning of the enactments when read together is that the school board must make up the deficiency of that part of the general rate which represents the poor rate, or represents anything chargeable on that rate. The first question must therefore be answered in the negative, the second in the affirmative.

*Judgment accordingly.*

Solicitor for the plaintiffs, *H. M. Bramall.*

Solicitor for the defendants, *C. F. Mortimer.*

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## Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Jan. 29.

*In re* AN ARBITRATION BETWEEN LORD MOSTYN AND FITZSIMMONS. (*a.*)

*Landlord and tenant—Renewal of lease—"At the costs of the lessee"—Costs of arbitration to assess fine payable on renewal.*

*A lease contained a covenant by the lessor that he would at any time during the term "upon the request and at the costs of the lessee," and on payment of a fine calculated upon the number of years of the term which had expired and the full improved annual value of the premises at the time of the renewal (such value to be determined by the lessor's surveyor or at the option of the lessee by the award of two referees or their umpire), renew the term. The lessee required the lessor to renew the term, and gave notice of his desire to have the full improved annual value of the premises determined by the award of two referees or their umpire.*

*Held, that the costs of the reference must be paid by the lessee.*

*Judgment of* Wright, J., ([1902] 1 *K. B.* 512, 50 W. R. Dig. 92, *reversed.*

Appeal by Lord Mostyn from the judgment of Wright, J., upon an award stated in the form of a special case (reported in [1902] 1 K. B. 512, 50 W. R. Dig. 92).

By two leases, dated respectively the 13th of October, 1860, and the 6th of January, 1863, two sets of premises at Llandudno were demised for terms of seventy-five years from the 25th of December, 1860, at the annual rent of 5s. reserved by each lease. Each lease contained the following covenant: "And also that the lessors, their heirs or assigns, will, at any time during the said term, upon the request and at the costs of the lessee, his executors and administrators or assigns, and on payment by him or them of a fine calculated according to the table hereunder written upon the number of years of the said term which have expired and the full improved annual value of the premises at the time of such renewal (such value to be determined by the said surveyor"—of the lessor—"or at the option of the lessee by the award of two referees or their umpire) renew or cause to be renewed the said term for a further term of seventy-five years from the date of such renewal at the like rent and subject to the like covenants and conditions as are herein reserved and contained, including this present covenant for renewal."

Fitzsimmons claimed to be entitled as lessee thereof to the premises comprised in the leases for the unexpired residue of the respective terms, and Lord Mostyn claimed to be entitled to the same hereditaments as the landlord thereof in reversion expectant on the determination of the respective terms and in the meantime subject to the leases. In 1900 Fitzsimmons (hereinafter called the lessee) applied to Lord Mostyn (hereinafter called the landlord) for a renewal of both the terms for further terms of seventy-five years from the 25th of December, 1900. Differences arose between the landlord and the lessee with reference to the assessment of the fines payable by the lessee to the landlord in respect of the renewal of the terms, and for the purpose of such assessment the lessee gave notice to the landlord of his desire that the full improved annual value of the demised premises should be determined by the award of two referees or their umpire as provided by the leases. The lessee and the landlord each appointed an arbitrator, and the arbitrators appointed an umpire. The arbitrators, having failed to agree, referred the matter to the umpire.

A question was raised before the umpire as to whether he had any power or discretion to deal with the costs of the reference and award, it being contended by the landlord that upon the true construction of the leases the lessee was only entitled to obtain a renewal of the terms at his own cost in all things, including the whole of the costs of both parties of and incidental to the reference and award, and that the costs of the reference and award had not been referred to the umpire to deal with. It was contended by the lessee that the reference, which was a costly and expensive one extending over three days, was not such a determination by the award of two referees or their umpire as was contemplated by the provisions of the leases; and, further, that, whatever construction was placed upon the leases in relation to the reference and award, the costs of the reference and award were in the discretion of the umpire, and that the umpire had power to deal with such costs under the provisions of the Arbitration Act, 1889.

The questions for the court were—(1) whether, upon the true construction of the leases, the costs of renewal to be paid by the lessee included the costs of the reference and award; and (2) whether (whatever construction was placed upon the leases in relation to the costs of the reference and award) the umpire had any power or discretion to deal with the costs.

Wright, J., held that the costs of the renewal which were to be paid by the lessee were the ordinary conveyancing costs only, and that they did not include the costs of the reference and award, which were in the discretion of the umpire.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-Law.

Lord Mostyn appealed.

*Montague Lush, K.C.*, and *J. C. W. Madden*, for Lord Mostyn, referred to *Wortham* v. *Lord Dacre*, 4 W. R 451, 2 K. & J. 437, and *In re Gray*, 49 W. R. 298, [1901] 1 Ch. 239.

*Marshall, K.C.*, and *E. P. Hewitt*, for Fitzsimmons.

VAUGHAN WILLIAMS, L.J.—I wish to begin my judgment by stating that no question is raised in this case as to the reasonableness of these costs in point of amount. I therefore assume that they are reasonable. The only question which we have to determine is as to the construction of the covenant for renewal in the leases. The question which we have to determine is whether the costs, which are specially dealt with in that covenant in the lease as having to be paid by the lessee, include the costs of the reference and award. In my judgment, having regard to the wording of the covenant, those costs are included in the covenant. I cannot see the application of the cases cited with reference to the payment of costs by lessees and others, where the payment is independent of any special agreement. In such cases the obligation to pay the costs is governed by the interests of the party for whose benefit the costs are incurred. Take, for instance, a lease and a counterpart. The costs of the lease and of the counterpart follow the respective interests of the lessor and lessee in those documents. We have only in the present case to construe this particular covenant. I do not think that Wright, J., would have arrived at the conclusion at which he arrived if he had merely considered whether the words of the covenant were wide enough to cover these costs. The learned judge thought that it would be unreasonable to place what I may call the natural construction upon the words, because to do so would give the landlord the power to force on the lessee unnecessary costs by claiming an extravagant sum as a fine. The truth of the matter is that the lease does not contemplate the landlord making any such claim at all or having an opportunity to make one. The lease contemplates the lessee exercising his option of calling for a renewal of the term and of having the amount of the fine assessed either by the landlord's surveyor or by arbitration, and of doing that without the landlord having the opportunity of making any claim at all. The costs of the reference and award are the costs necessarily incurred in the renewal of the terms having regard to the way in which the lessee has chosen to have the improved annual value of the premises determined, upon which the amount of the fines depends. The costs of renewal to be paid by the lessee, in my opinion, include the costs of the reference and award. The appeal must be allowed.

STIRLING, L.J., concurred. By the clause which we have to construe the renewal is to be at the costs of the lessee. The lessee elected to have the amount of the fine payable upon renewal ascertained by arbitration, and in my opinion any costs necessarily and properly incurred by the lessor in that arbitration are such costs as are referred to in the clause. A totally different question might have arisen if the lessor had misconducted himself in relation to the arbitration. No such question arises here.

MATHEW, L.J.—I am of the same opinion. We do not decide that in every possible case the costs of arbitration proceedings would be thrown upon the lessee. I am far from saying that, if the lessor behaved obstinately and unreasonably and compelled the lessee to go to arbitration, the lessor might not have to pay the costs.

*Appeal allowed.*

Solicitors for Lord Mostyn, *Hulberts, Hussey, & Metcalfe.*

Solicitors for Fitzsimmons, *Belfrage & Co*, for *Chamberlain & Johnson*, Llandudno.

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From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Jan. 23, 24, 26, 27.

BROOME *v.* SPEAK AND OTHERS. (*a.*)

*Company—Prospectus—Contract by company—Omission from prospectus—Rights to be "honourably met"—Cancelled contract—Materiality—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.

*A promoter in May*, 1898, *agreed to float a company for a sum of* £20,000. *Shortly after the company was incorporated it was resolved to purchase the business of another company as a going concern, and the buying company in September*, 1898, *entered into a contract with the promoter by which the promoter agreed to advance a sum of* £14,250 *by way of deposit on the purchase-money. The company, by a contract contained in a letter of the* 21*st of September*, 1898, *agreed to repay this deposit if the purchase went through, and further agreed to pay a bonus of* £7,500 *in consideration of the promoter's additional services. The agreement of purchase was signed on the* 26*th of September*, 1898. *The directors of the vendor company, some of whom were to join the board of the new company, objected to the payment of the* £7,500. *Consequently, on the* 10*th of October*, 1898, *an arrangement was come to whereby the contract of the* 21*st of September was cancelled, and the promoter was satisfied with an assurance that his right to receive proper remuneration for commission should be honourably met. A fortnight later the directors issued a prospectus, in which it was stated, on the advice of counsel, that the only contracts to which the company was a party were the promotion agreement of May and the purchase agreement of the* 26*th of September.*

*Held, that the contract of the* 21*st of September was not wholly cancelled by the arrangement of the* 10*th of October, and that, in any event, both contracts should have been disclosed in the prospectus under section* 38 *of the Companies Act*, 1867.

*Held, also, that the fact that the contracts were omitted from the prospectus on the advice of counsel was no defence.*

*Decision of* Buckley, J., 50 *W. R.* 614, *affirmed.*

This was an appeal from a decision of Buckley, J., dated the 30th of April, 1898, and reported in 50 W. R. 614.

The facts were as follows:

The London and Northern Bank (Limited) was incorporated on the 6th of April, 1898. Mr. Bowden was the promoter, and an agreement was made on the 9th of April, 1898, whereby he was to have a sum of £20,000, equal to one per cent. on the nominal capital, for promotion expenses. Subsequently it was resolved to purchase the business of the Leeds Joint Stock Bank. The Leeds directors, however, insisted on a deposit of £14,250, which was 10 per cent. on the purchase-money. Bowden agreed to find this deposit, and the London and Northern Bank in a letter of the 21st of September undertook to repay the amount of the deposit, together with a bonus of £7,500 for the loan. It was distinctly stated that Bowden alone

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

was to take the risk of forfeiture. The letter was written on behalf of the bank by one Haddock and addressed to a Mr. Craig, who was Bowden's nominee.

On the 26th of September the purchase agreement was signed and the sum of £14,250 deposited.

On the 27th of September the matter was considered by the directors and it was resolved that the agreement dated the 26th of September should be read and adopted and the company's seal affixed, it being understood that the bank underwent no liability as to the deposit.

On the 1st of October the matter came up again for consideration. The contract of the 21st of September was ratified and a letter to that effect was sent on behalf of the bank to Mr. Craig.

Arrangements were now made for the meeting of the directors of both banks, it having been agreed that one or two of the Leeds directors should become directors of the London and Northern Bank. This led to a meeting on the 10th of October.

Stong objection was taken by two the Leeds directors—Messrs. Bray and Gaunt—to the bonus of £7,500, and they refused to go on with the purchase unless it was abandoned.

When this was pointed out to Bowden, and also that if he persisted in his demand he stood to lose, not only the amount of the deposit, but also the money which he was to receive under the promotion agreement, he consented to the cancellation of the contract contained in the letter of the 21st of September.

At the same meeting a resolution was passed in the following terms: "That after full discussion and hearing the views of the directors of the Leeds Joint Stock Bank (Limited), and upon the chairman giving Mr. Bowden assurance that his right to receive proper remuneration for commission on introducing the business of the Leeds Joint Stock Bank (Limited), and raising the necessary deposit, shall be honourably met at a future meeting of the directors of the London and Northern Bank (Limited), it is resolved, with the assent of Mr. Craig, that the contract contained in the letter of the 21st of September, 1898, be cancelled, and that the subject be adjourned to a future meeting of the board.

On the 18th of October, Craig wrote to the trustee of the London and Northern Bank a letter as follows: "Referring to the letter which you wrote to me, dated the 21st of September, 1898, I understand that the directors of the London and Northern Bank have passed a resolution to the effect that the claim which I may have for commission on introducing the business of the Leeds Joint Stock Bank (Limited), or for raising the necessary deposit, shall be honourably and properly met. Having regard to that assurance, I am quite willing to agree to the terms of your letter to me being cancelled, and the arrangement there suggested as being considered at an end."

The contract of the 21st of September did appear in the prospectus originally proposed to be issued, but on the advice of counsel it was left out in the final prospectus. This was issued on the 24th of October. It stated that the only contracts to which the bank was a party were the promotion agreement of the 9th of May and the purchase agreement of the 26th of September.

On the faith of the prospectus the plaintiff applied for and was allotted shares in the bank. Subsequently the bank went into liquidation, and the plaintiff brought this action against the chairman, Mr. Paul Speak, and two of the directors, Messrs. Shepheard and Clayton, claiming a declaration that the prospectus must be deemed fraudulent on the part of the defendants, who knowingly issued it without specifying the names of the parties to, and the dates of, certain contracts, and asking for relief consequent on that declaration.

Buckley, J., found for the plaintiff, and the defendants appealed.

The appeals of the defendants Shepheard and Clayton were heard first.

*Haldane, K.C.*, and *Felix Cassel*, for the defendants Shepheard and Clayton.—The defendants honestly believed that after the 10th of the October there was no legal liability binding the company. The maxim *ignorantia juris neminem excusat*, where *jus* equals the general law, has no application when you are construing an agreement: *Cooper* v. *Phibbs*, 15 W. R. 1049, L. R. 2 H. L. 149, especially per Lord Westbury at p. 170; *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223, 21 W. R. Dig. 269. All that remained after the 10th of October was an honorary obligation, not a legal obligation: *Taylor* v. *Brewer*, 1 M. & Sel. 290; the dissenting judgment of Parke, B., in *Bryant* v. *Flight*, 5 M. & W. 114; *Roberts* v. *Smith*, 4 H. & N. 315, 7 W. R. C. L. Dig. 54; *Loftus* v. *Roberts*, 18 Times L. R. 532. This interpretation was also put upon the arrangement of the 10th of October by Craig, Bowden's nominee, in the letter of the 18th of October. Further, we say that the alleged omission is not material; that the plaintiff did not rely upon it; that the plaintiff has not suffered damage. The true test of materiality is whether an intending investor would have been deterred if that which was omitted was stated. What the prospectus should state is not ancient history, but the state of things at the time the prospectus is issued. The plaintiff in his evidence stated that he paid no particular attention to contracts. The judgment of Thesiger, L.J., in *Sullivan* v. *Mitcalfe*, 29 W. R. 181, 5 C. P. D. 455, at p. 460, shows what materiality is. Can a man knowingly issue a prospectus not specifying the date and parties to material contracts, when he does not believe in the existence of such contracts? Section 38 must be construed as referring to existing contracts.

*Astbury, K.C.*, and *J. Roskill*, for the plaintiff.—Even assuming the rescinding contract left merely an honourable obligation, yet it was a subsisting contract and should have been disclosed: *Bayley* v. *Homan*, 3 Bing. N. C. 915. But the rescinding contract did not entirely wipe out the previous contract. The result of the evidence is that the directors were simply substituting a more fit for a less fit sum. Bowden clearly thought that his right to £7,500 had not been put an end to. There is clear evidence of damage. The assets did not equal the payments in. In the phrase "knowingly issue," knowingly does not refer to the law: *Twycross* v. *Grant*, 25 W. R. 586, 2 C. P. D. 469. The defendants knew the facts; they took an opinion as to the law. They were bound to set out the facts.

*Haldane, K.C.*, in reply.—The defendants are not liable under the Directors' Liability Act, 1890. They were advised by counsel that no further contracts need be stated. If this not "reasonable ground," what is? The real case to meet is section 38 of the Companies Act, 1867. The words of Thesiger, L.J., in *Sullivan* v. *Mitcalfe*, 5 C. P. D., at p. 460, are important for the purpose of showing what is the kind of contract which comes under the section. The defendant is entitled to put a wrong construction on an obscure document, although he is not excused for ignorance of the general law. The defendants are entitled to show the state of their minds; they did not knowingly issue. In any event the evidence shows that the plaintiff did not trouble himself about the contract.

*Eldon Bankes, K.C.*, and *Leigh Clare*, for the defendant Speak.—After the 10th of October Bowden

would never have sued for the services he rendered; he had no legal right. Assuming the contracts had been set out they would never have operated to deter the plaintiff. The section must be confined to material contracts in the sense of contracts material to deter. It is impossible to say on the evidence that the plaintiff would have been deterred: *Sullivan* v. *Mitcalfe*. It is material to find whether the particular plaintiff was affected: *Baty* v. *Keswick*, 50 W. R. 15. The plaintiff must come into court with something more than a technical right.

*Astbury, K.C.*—The result of the resolution of the 10th of October was that something material did remain. It has never been anywhere suggested that material means anything except what a man might like to read and weigh before taking shares. The directors at the time of the cancellation recognized Bowden's services. They agreed that whatever he had earned he should be paid. The fact that a man was once a promoter does not prevent the company from subsequently entering into contracts with him. A contract between a promoter and an independent board of directors for remuneration of services performed at request is good unless those services are such as he is bound to perform *qua* promoter. After the 1st of October Bowden had a claim, not to a *quantum meruit*, but to a definite sum. On the 10th of October he was put in the same position which he would have had if the contract of the 21st of September had never been made. The resolution of the 10th of October amounted to a contract of cancellation and a contract of resuscitation of a common law right, and this affirmative part should have been put in the prospectus. It is never a protection for a man to say he does not know the law except in a matter of private right.

COLLINS, M.R.—The first important document for our purposes is the letter of the 28th of September, 1898, addressed by Haddock, who purported to be trustee for the London and Northern Bank, to Craig, who was Bowden's nominee, undertaking to repay the amount of the deposit together with a £7,500 bonus for the loan, "your taking the risk of forfeiture." This is a somewhat remarkable contract which might be significant in the attitude of the buying bank having to go to the promoter for the deposit. On the 1st of October the contract of the 21st of September was ratified. There was here a complete legal obligation binding on the directors. What was the effect of the resolution of the 10th of October? In my opinion it was not intended by the parties to and did not get rid of the obligation of the 21st of September, except with regard to the amount of the promoter's remuneration. It left the arrangement with regard to the deposit intact. It did, in my opinion, get rid of the obligation on the part of the directors to pay the fixed sum of £7,500, but it recognized a right on the part of the promoter to receive some sum by way of remuneration. It admitted an obligation and left the amount to be determined.

It is said on the defendants' part that they acted on the advice of counsel, and that they did not "knowingly issue" in the words of the section. This involves their not knowing of any contract. Were they conscious or not that the rescission itself involved a contract? Mr. Shepheard said he was aware of this. If he knew of the contract and yet relied on the advise of counsel, this is no excuse. But as a matter of fact counsel was consulted only as to whether the original contract need appear, and not as to this particular resolution of the 10th of October.

Again, it was argued that the plaintiff could not succeed unless he could show that he would have been deterred from buying his shares if he had known of the existence of the contract. This is putting the case higher than the authorities warrant. Does the section provide this? The standard is this: Did the defendants knowingly or intentionally issue the prospectus omitting a contract of which they were aware? The judgment of Baggallay, L.J., in *Sullivan* v. *Mitcalfe* gives the real meaning of materiality. Mr. Astbury has pointed out that you are demanding impossibilities of the court if you ask us to find whether a person would have been influenced by a contract which he had never seen. A person in considering whether he should take shares is entitled to have every material element clearly put before him, and the section deems it fraudulent if any material contract is not put before him. Coleridge, L.J., in *Twycross* v. *Grant*, 2 C. P. D., at p. 483, points out how important it is that an applicant for shares should know what sort of people are to have the control of his money. Buckley, J., has stated his view of the law in a manner which is absolutely sound. I cannot doubt but that this contract and its attendant circumstances would be material factors, and the learned judge who saw the witnesses was of the same opinion.

The last point urged by the defendants was that there are no damages. The fact that the company had gone into liquidation, in the words of the learned judge, does throw an after-light on the matter. Were the assets equivalent to the money paid at the time the money was paid? There was sufficient to satisfy the learned judge that substantial damage had been done. It is not necessary to consider the liability of the defendants under the Directors' Liability Act, 1890. The plaintiff's cause of action rests on section 38 of the Companies Act, 1867, and is fully established.

ROMER, L.J.—After what has been said by the Master of the Rolls I may be brief. I need only refer to the case of Shepheard, because if he cannot succeed the other defendants cannot. I reluctantly say the appeal must be dismissed. As I have frequently had occasion to say before, section 38 operates often very harshly, and I have been trying to find if there is any means by which Mr. Shepheard can escape. I am sorry to say that I have not succeeded. After the 1st of October, 1898, there was a contract binding Mr. Bowden and the company of a very material kind. Mr. Bowden had found the deposit, although he was not bound by any of his duties as promoter to find it; and the company had thrown upon Mr. Bowden the whole risk of forfeiting that deposit, although they were prepared to take the benefit. Not unnaturally there had to be some counter obligation. Mr. Bowden assented to the resolution of the 1st of October, and that resolution was subsequently confirmed by the company, although I do not know that it needed any confirmation. Then came the meeting of the 10th of October, the result of which is shown by the resolution entered on the minutes. I need not consider why the ambiguous letter of the 18th was drawn up. The resolution itself is sufficient, and it was subsequently confirmed on the 20th of October, when Shepheard and Bowden were present. I cannot myself have any doubt but that it constitutes a contract of a substantial material kind. It was a contract to rescind a previous contract in part. It left something still subsisting. It bound the company to carry out its assurance, and at the proper time to honourably meet the right of Mr. Bowden to be remunerated for introducing the Leeds Bank and running the risk of forfeiting the deposit. It is impossible to hold that the company were at liberty to

say that Bowden was to receive no remuneration whatever for the risk he ran. It was, to my mind, a distinct and important contract, and one which under section 38 ought to have been set forth. It was a contract which, if its terms had been described, might have influenced the plaintiff and induced him not to take shares. It was said by counsel that it would not affect any intending subscriber to know that valuable services were to be properly remunerated. But an intending subscriber might in my view most certainly object to the additional remuneration of a promoter who was already to get £20,000. The last question is whether Mr. Shepheard can excuse himself by referring to his good faith and a certain belief which he had. On consideration I do not think he can. I cannot think he is excused merely because he says he did not appreciate the legal effect of circumstances which he knew. Still less can he avail himself of the advice of counsel. The prospectus must for these reasons be treated as "fraudulent" within the section.

COZENS-HARDY, L.J.—I am of the same opinion. It is with reluctance that I am compelled to treat as fraudulent what is really not fraudulent, but section 38 of the Companies Act, 1867, is now repealed, and a case like this will probably not occur again. I think it is difficult to imagine that any contract between company and promoter can be otherwise than material, and a contract is material if it is of such a nature that a reasonable investor might require to consider it before deciding whether to take shares or not. As to the company's liability to pay a proper sum to Bowden, we know that as a matter of fact the latter did sue the company on the contract, and did obtain judgment for £1,500.

*Appeal dismissed.*

Solicitors, *Williamson, Hill, & Co.*, for *Storey, Willans & Storey*, Halifax; *Waterhouse & Co.; Parker, Garrett, Holman, & Howden; Rowcliffes, Rawle, & Co.*, for *Cooper & Sons*, Manchester.

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Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) Dec. 12.

SMITHERS *v.* WALLIS. (*a.*)

*Master and servant—Employer's liability—Accident—Compensation—Employment in agriculture—Partly or occasionally employed in other work—Liability of employer for accident which happened at a distance from his premises—Workmen's Compensation Acts,* 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *and* 1900 (63 *&* 64 *Vict. c.* 22), *ss.* 1 (i.) (3), 2.

*A workman employed in agriculture is not debarred from compensation under the Workmen's Compensation Act,* 1900, *because the accident did not happen "in, on, or about" his employer's premises, as those words of limitation in the Act of* 1897 *are not applicable to the Act of* 1900.

Appeal by the employer from an award in favour of the applicant made by the learned judge of the Aldershot County Court under the Workmen's Compensation Act, 1900.

The appellant, Mr. Wallis, lived at the "Cedars," Aldershot, and he had engaged Smithers, the husband of the applicant, as his handy man to look after his garden, which was about three quarters of an acre in extent, and to exercise and groom his horses.

On the 17th of February, 1902, Smithers was driving his master's horse in a trap to give it exercise when the trap collided with another vehicle and Smithers was thrown out and killed. The accident occurred about three and a-half miles from the "Cedars."

The widow claimed compensation, and the learned county court judge found as a fact that Smithers was employed "mainly in agricultural, but partly in other work" within the meaning of section 1 (3) of the Workmen's Compensation Act, 1900, and that the employer was liable, though the accident did not occur "on or in or about the premises." He accordingly made an award in favour of the applicant for £171 12s.

The employer appealed.

The following sections of the Act of 1900 are material: Section 1 (i.) enacts that "from and after the commencement of this Act the Workmen's Compensation Act, 1897, shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment." By sub-section 3, "where any workman is employed by the same employer mainly in agricultural, but partly or occasionally in other work, this Act shall apply also to the employment of workmen in such other work. The expression 'agriculture' includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables."

By section 2, "this Act . . . shall be read as one with the Workmen's Compensation Act, 1897."

*Ruegg, K.C.* (*G. T. Sills* and *H. P. St. Gerrans* with him), for the employer.—There is only one question of law raised by this appeal—namely, whether the Act applies if the accident does not occur on, in, or about the employer's premises. The appellant contends that as the accident happened some three and a-half miles away from the "Cedars," the master is not responsible. And for this reason. By section 2 of the Act of 1900, the provisions of the earlier Act of 1897 are to be read into it. Therefore the limitation in section 7 of the Act of 1897, that the accident must occur "on or in or about" the employer's premises, must be given effect to when construing the extending Act, in the same way as if the claim for compensation was being brought under the Act of 1897. The intention of the Legislature was to place workmen engaged in agriculture in the same position as, but in no better position than, men engaged in employments specified in section 7 of the earlier Act. The word "agriculture" is defined as including the use of land for certain purposes, and this localizes the employment in "agriculture" to employment in a certain locality—namely, "in or on or about" the land of the employer. No doubt the word "about" must have a reasonable meaning given to it, and its precise limits would vary in each case. But as the accident occurred in this instance between three and four miles away, to hold that it happened "about" the employer's premises would be to strike out this condition altogether, and would, in the case of a workman employed in agriculture, render the master liable for every accident to one of his employees so long as it happened to him while engaged in the master's business.

*Herbert Reed, K.C.*, and *D. Stephens*, for the widow, were not heard.

COLLINS, M.R.—In my opinion the contention of the appellant here, that as the workman was not at the time of the accident "on or in or about" the employer's premises, the employer was not liable under

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the Act, is untenable in face of the plain words of the Act of 1900. Section 1 of that Act makes applicable to the case of a man mainly employed in agriculture but partly or occasionally in other work the benefit of the earlier Act, and there are no words limiting the application of the Act to the employment in any particular located area. Having regard to the necessity in an agricultural employment of the workman being engaged elsewhere than on his employer's premises, as, for example, in driving cattle or taking produce to market, it would obviously defeat the object of the Act if we were to attempt to limit the language used and to exclude a workman employed in agriculture from the benefit of the Act if he met with an accident when away from his master's premises in the course of his employment. For these reasons I think the benefit of the Act of 1900 extends and is meant to extend to accidents to workmen employed in agriculture though the accident does not occur on or in or about his employer's premises, because it would be unreasonable to read the limitation in the Act of 1897 into the Act of 1900, for the reasons I have given.

ROMER, L.J.—I agree.

MATHEW, L.J. — I also think this appeal fails. The contention of the appellant amounts to a proposal that we should alter the language of section 1 (i.) of the Act of 1900 and read the sub-section thus: The Workmen's Compensation Act, 1897, shall apply to the employment "on or in or about the premises of the employer" of workmen in agriculture by any employer who habitually employs one or more workmen in such employment. Why should those words "on or in or about the premises of the employer" be introduced into the section? The Legislature did not think them necessary or they would have put them there. The object with which the Act of 1900 was passed is clear. It was passed for the purpose of protecting workmen employed in agricultural work in the ordinary course of their employment, and that kind of work included clearly employment often of necessity at a distance from their employer's premises.

*Appeal dismissed.*

Solicitors, *Cattarns & Co.; Blyth, Dutton, Hartley, & Blyth* for *Foster & Wells*, Aldershot.

## High Court of Justice.

Chan. Div. Kekewich, J. — Dec. 11.

HOW v. EARL WINTERTON. (a.)

*Trustee—Real estate—Accounts—Disallowance—Payment of voluntary school rate—"Fair and reasonable" payment.*

*A payment of a mere voluntary subscription by a trustee cannot be allowed in his account, but where such payment, although in one sense voluntary, is made reasonably and in the honest belief that it will benefit the estate, either as saving a future compulsory payment of larger amount or as being fairly and reasonably necessary under the circumstances of the estate, it may be allowed.*

Summons to vary certificate.

The plaintiff was an annuitant under the will of Mary Rabett (deceased), and the defendant was, as far as regarded the real estate of the testatrix, the sole surviving trustee of her will.

By an order made in the action on the 4th of March, 1896, an account was directed of (amongst other things) the rents and profits of the real estate of the testatrix received by the defendant during or in respect of a term of fourteen years created by the will, and which term had then expired. In an account lodged in chambers by the defendant in pursuance of the order, he included upon the disbursement side the following item—viz.: "Proportion of one year's school rate as above, due on the 1st of August, 1889, £1 5s."

This sum had been paid by the defendant in respect of the real estate of the testatrix as a voluntary school rate, and the master disallowed the payment.

A summons to vary the master's certificate, made under the said order, raised (amongst other questions) the propriety of the disallowance in question.

*Warrington, K.C.*, and *Richards*, for the summons, cited *In re Walker, Walker* v. *Duncombe*, 49 W. R. 394, [1901] 1 Ch. 879.

*M. Romer*, for the plaintiff.

KEKEWICH, J., stated the facts, and continued as follows: It is true that this payment was made to support a school not provided by the state, and so not supportable out of the rates. In one sense, therefore, the payment is a mere voluntary subscription. If it were that alone it could not be allowed to stand, but it is to be observed that it is a payment which, unlike other voluntary subscriptions, is not ascertained in amount by the generosity of the donor, but by an appeal to the rate books; moreover, there was this very strong argument to be met by the trustee—viz., that if he did not pay a small sum as a voluntary subscription there might be as a result partly of his omission a board school with both a higher and a compulsory subscription. The trustee may have come to the honest conclusion that if he did not pay this sum of £1 5s. he might subsequently be compelled to pay some larger sum, so that his payment of the smaller sum was in the nature of a compromise, and it is not suggested that the amount paid was in itself an unfair amount; the payment if made upon that footing seems to me to be justifiable. Again, I think the trustee might possibly have included it in his costs, charges, and expenses, if, having regard to the exigencies of the estate and the customs obtaining with respect to it, the payment was a reasonable and proper one. I prefer, however, to rest my judgment upon the former ground, and I order that the master's certificate be varied by allowing the payment.

Solicitors, *Crowders, Vizard, & Oldham; Bramall, White, & Roberts.*

Chan. Div. Byrne, J. — Oct. 28; Nov. 5, 6.

*In re* SPENSER'S SETTLED ESTATE. (a.)

*Settled land—Compound settlement—Appointment of trustees—Solicitor for tenant for life as trustee of settlement—Settled Land Act*, 1882, *s.* 2, *sub-sections* 1, 8; *s.* 38.

*The trustees of a compound settlement cannot be validly appointed, under section* 2 (8) *of the Settled Land Act*, 1882, *trustees, for the purposes of the Settled Land Acts, by a declaration to that effect contained in a document forming one of the documents composing the compound*

(a.) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

*settlement, to which document some of the beneficiaries interested under the settlement are not parties nor bound by its provisions; and consequently, notwithstanding such declaration, trustees for the purposes of the Settled Land Acts would have to be appointed by the court.*

*The general rule that the court will not appoint the solicitor of the tenant for life a trustee of the settlement will only be departed from when it can be shown that his appointment will be more beneficial than that of any other person.*

*The rule laid down in* In re Kemp's Settled Estates, 31 *W. R.* 930, 24 *Ch. D.* 485, *followed.*

Summons.

This was a summons under the Settled Land Acts, 1882-1890, raising the questions whether on a resettlement of estates trustees of the compound settlement should be appointed trustees for the purposes of the Settled Land Acts by the court or by the settlors, and whether the court would appoint the solicitor to the tenant for life as one of such trustees. The facts of the case were as follows:

By a settlement made the 23rd of December, 1863, on the marriage of Mr. H. H. Spenser and Miss Kelson, certain freehold estates were limited to the use of the said husband for life and to the use that Miss Kelson should receive £500 per annum by way of jointure as therein mentioned and subject thereto to the use of trustees on trust to raise £5,000 as portions for younger children, and subject thereto to the use of the first and other sons of H. H. Spenser in tail male with remainders over. In 1898 the estate tail was duly barred by the applicant, H. A. H. Spenser, the eldest son of the said marriage; and by an indenture dated the 19th of April, 1898, being a settlement made on the marriage of the applicant, to which the three persons who at that time were trustees of the settlement of 1863, and also H. H. Spenser, H. A. H. Spenser, and his intended wife, were parties, the estates were limited to the use of the said H. H. Spenser in restoration and by way of confirmation of his prior life estate, with remainder to H. A. H. Spenser for life, with remainder over. And it was thereby declared that the trustees of the settlement of 1863 should be the trustees under the settlement made by these presents, and also under the compound settlement, if such there be, made by the settlement of 1863, the disentailing deed, and by these presents, "for all the purposes of the Settled Land Act, 1882, and the Acts amending the same."

H. H. Spenser died in 1901, and the jointress was still alive.

The applicant, H. A. H. Spenser, was the tenant for life, and was desirous of selling portions of the estate, but doubts were raised as to whether the trustees of the compound settlement had been properly appointed trustees for the purposes of the Settled Land Acts. He accordingly asked that the existing trustees should be appointed trustees of the compound settlement if the court was of opinion that the existing trustees were not already trustees of such compound settlement for the purposes of the Settled Land Acts.

One of the trustees was the solicitor of the tenant for life.

*Potts*, for the applicant.—A settlor in such a deed of re-settlement has no power to appoint trustees of the compound settlement. They ought to be appointed by the court. It will be a great convenience for the applicant if the solicitor is appointed trustee. The special circumstances take the case out of the general rule.

*In re Mundy and Roper's Contract*, 47 W. R. 226, [1899] 1 Ch. 275; *In re The Earl of Stamford*, 44 W. R. 249, [1896] 1 Ch. 288; and Key and Elphinstone's Precedents (7th ed.), vol. 1, p. 653, were relied on.

*J. G. Wood*, for the trustees.—The trustees have been validly appointed under the Settled Land Act, s. 2, sub-section 8.

BYRNE, J.—In this case there is a settlement created by, and consisting of, three documents. The Settled Land Act, 1882, s. 2, sub-section 1, provides that "any instrument or number of instruments under or by virtue of which any land stands limited to or in trust for any persons by way of succession creates or is for the purpose of this Act a settlement." The use of the words "creates or is" rather, I think, points to the word "settlement" as including what is effected by the documents, but it also clearly means the documents making the settlement. In the events which have happened in this case there still remains the limitation of the jointure and a portions charge secured by a term of years. In the last of these deeds the parties to it have purported to appoint trustees for the purposes of the compound settlement, and the parties desire to know if these trustees have been validly appointed, because if they have been, the court has no jurisdiction to appoint new trustees. The Settled Land Act, 1882, s. 2, sub-section 8, in defining the trustees of the settlement, provides that "the persons, if any, for the time being who are by the settlement declared to be trustees thereof for the purposes of this Act are for the purposes of this Act trustees of the settlement." Section 38 provides for the appointment of trustees by the court if there are no trustees, or in any other case if it is expedient so to do.

It is argued that because the three deeds constitute one settlement the appointment is good. In this case I do not think that they are validly appointed. I want to guard myself by saying that I am dealing only with the facts of this case, and I am not attempting to lay down a general definition for all cases. I am not going to say that the appointment of trustees for the purpose of the compound settlement in one or perhaps two or three or four documents may not under some circumstances be an effectual appointment; but in the present case I have only an appointment contained in the last of the documents forming the settlement, to which document some of the beneficiaries interested under the settlement are not parties and are not bound by its provisions, and it appears to me under these circumstances I should be wrong in saying that the declaration contained in the re-settlement of 1898 amounts to a declaration by "the settlement" of the persons who are to be "trustees thereof for the purposes of this Act" within the meaning of section 2, sub-section 8. I express no opinion about the precedents referred to, as they do not appear to have been followed in the present case. I therefore have jurisdiction to make an appointment of trustees and am willing to do so.

The remaining question is whether it was proper to appoint as one of the trustees the solicitor for the tenant for life, and on that *In re The Earl of Stamford*, 56 L. T. Rep. 484, 35 W. R. Dig. 180, has been referred to, the result of which is that the court has undoubted jurisdiction, if it thinks, fit to appoint him; but it is not the course for the court to make such an appointment, although Stirling, J., did it in one case (*Marquis of Ailesbury* v. *Lord Iveagh*, [1893] 2 Ch. 345), and no doubt it would have been done again in other cases if strong reasons were shown that that would be more beneficial than another appointment. I have considered the question and I do not find sufficient advantages to be derived from the appointment in

this case to induce me to depart from the rule down by the Court of Appeal in *In re Kemp's Settled Estates*, 31 W. R. 930, 24 Ch. D. 485. I think I ought to follow that rule and must therefore decline to appoint the solicitor of the tenant for life as one of the trustees. I will appoint the other two gentlemen trustees of the compound settlement trustees upon production of affidavits of fitness in the usual way.

Solicitors, *Hepburn, Son, & Cutcliffe.*

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Chan. Div. } Joyce, J. } Nov. 11, 12.

MAPPIN BROTHERS *v.* LIBERTY & CO. (LIMITED). (*a.*)

*Highway—New street—Ownership of soil—Adjoining owner—Presumption of ownership* usque ad medium filum viæ—*Rebutting evidence.*

*The owners of land abutting on a road or street are only presumed to own the land* usque ad medium filum viæ *in the absence of facts to disprove such presumption.*

*Land was taken by commissioners under an Act of Parliament for the purpose of making a new street, and the Act gave the commissioners power to lease the premises abutting on the new street not wanted for the purposes of the Act, but it was doubtful whether this gave the commissioners power to lease the soil of the street. The commissioners leased one of the houses to the plaintiff's predecessor, and in the lease the property was described as abutting on the new street.*

*Held, that the presumption that the soil of the adjoining street* usque ad medium filum viæ *passed with such lease was rebutted by the circumstances of the case, regard being had to the provisions of the Act and the terms of the lease.*

The plaintiff, who traded under the name of Mappin Brothers, prayed for an injunction directing the defendant company to remove a tunnel which they had made in front of the plaintiff's house and to restore the ground to the state it was before the making of the tunnel. The plaintiff carried on business at 220, Regent-street, and the defendants carry on business at 218 and 222, Regent-street, on either side of the plaintiff's premises. These three houses are situated on the east side of Regent-street. By an Act of Parliament (53 Geo. 3, c. cxxi.), entitled "An Act for making a more convenient communication from Marylebone Park and the northern parts of the metropolis in the parish of St. Marylebone to Charing Cross within the liberty of Westminster, and for making a more convenient sewage for the same," the Commissioners for Woods and Forests were empowered to purchase certain lands described on a map deposited in the office of the commissioners, and they were authorized to make certain new streets, including Regent-street. In laying out any new street the commissioners had to provide the paving, lighting, and watching of it in the first instance, but the parish was to bear the future cost of doing these things. The commissioners were also among other things required to make a new sewer in Regent-street. The provisions as to paving, lighting, and watching the streets, were, however, repealed by an amending Act (56 Geo. 3, c. cxxviii.), which created a new body of paving commissioners who were authorized to pave and repair the streets referred to in the principal Act and in whom the property in the pavement rested. By section 34 the principal Act authorized the commissioners to sell and dispose of all or any part of the houses, buildings, lands, tenements, hereditaments of or belonging to his Majesty, his heirs and successors on the lines of the said streets and places respectively to be erected and built, altered, repaired or improved under or by virtue of this Act or which shall be so purchased or acquired as aforesaid and shall not be wanted for the purposes of this Act . . . and also to demise or lease, or previous to any demise or lease to enter into any contract or agreement for the demising or leasing, all or any part of the houses, buildings, lands, tenements, or hereditaments to be purchased, erected, built, altered, repaired, and improved under or by virtue of this Act." The section further provided that all conversions, exchanges, and leases made by the commissioners might be made according to the forms set forth in the schedule to the Act.

On the 11th of September, 1820, the commissioners entered into an agreement with one George Thompson to grant him a lease of 218 and 220, Regent-street—the new street not being then completed.

On the 7th of February, 1823, a lease of No. 220 was granted to nominees of Thompson for a term of ninety-nine years, the parcel being delineated in colour on a map drawn on the deed and described as "all that parcel of land situate . . . on the east side of a street now forming therein called or intended to be called Regent-street," and the lease also contained the following general words "and also all outhouses, buildings, yards, areas, vaults, cellars, sollars, ways, paths, passages, waters, watercourses, lights, easements, profits, privileges, advantages, emoluments, rights, numbers, and appurtenances whatsoever to the said piece or parcel of ground, messuage, or dwelling-house and premises hereby demised or every part thereof belonging or in any wise appertaining." The map or plan did not include any part of the soil of Regent-street, but as a matter of fact certain vaults underneath the street partly in front of 220 and partly in front of 222 were always held under this lease, though they were not referred to in the lease more specifically than in the general words.

The plaintiff now held this property under an underlease.

The leases of 218 and 222 were in similar form and were granted in 1822.

At the date of the agreement that part of Regent-street was not staked out but was completed before the lease of 220 was granted in 1823. The sewer was made before 1820.

The defendants denied that any part of the soil of Regent-street vested in the plaintiff, but alleged that it was in the Crown.

The Attorney-General was therefore added as defendant in order to determine this.

*Hughes, K.C.*, and *Dighton Pollock*, for the plaintiff.—When there are no facts rebutting, the presumption is that anyone in possession of a plot of land adjoining a highway is in possession *usque ad medium filum viæ* (*Doe* v. *Pearsey*, 7 B. & C. 304, when you know nothing of the facts possession raises the presumption. In *London and North-Western Railway* v. *Westminster Corporation*, 50 W. R. 268, [1902] 1 Ch. 279, the presumption was relied upon, and again in *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133, at p. 145, 35 W. R. Dig. 71, and in *Berridge* v. *Ward*, 10 C. B. N. S. 400, 9 W. R. C. L. Dig. 20; and in *Lord* v. *Commissioners of Sydney*, 7 W. R. 267, 12 Moo. P. C. 473. This last case shows that the presumption applies and must be followed in the case of a grant from the Crown as much as in any other case. The presumption applies in the case of a lease as

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

much as in conveyance in fee: *Haynes* v. *King*, 42 W. R. 56, [1893] 3 Ch. 439. The presumption applies to houses in a town: *In re White's Charities, Charity Commissioners* v. *Mayor, &c., of London*, 46 W. R. 479, [1898] 1 Ch. 659 at p. 663; *London and North-Western Railway* v. *Westminster Corporation. Leigh* v. *Jack*, 28 W. R. 452, 5 Ex. D. 264, which may be depended on as rebutting the presumption is directly contrary to *Micklethwait* v. *Newlay Bridge Co.* In *Marquis of Salisbury* v. *Great Northern Railway*, 7, W. R. 75, 5 C. B. N. S. 174, the land conveyed was described by plan, and the land and the roadway were separately numbered on the plan. We leave the other side to prove that the presumption does not apply or is rebutted by the deposited plan.

*Younger, K.C., G. Cave*, and *A. F. C. C. Luxmore*, for the defendants, Liberty & Co. (Limited).—We are here to make good paragraph 1 of the defence, that no part of the soil of Regent-street was included in the lease of 220, or was at the date of the lease vested in the lessor, or is otherwise vested in the plaintiff, as having regard to surrounding circumstances there was no demise of the soil: *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263 at p. 273, 36 W. R. Dig. 217. Assuming the soil vested in the Crown, both the terms of lease and the powers of the commissioners rebut the suggestion that any of the soil of Regent-street passed. The terms of the lease rebut the presumption as the parcels state that it is part of a larger piece of ground: Cotton, L.J.'s, judgment in *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. at p. 147, and Lopes, L.J., at p. 155. The present case is plainly within *Leigh* v. *Jack* and *Plumstead Board of Works* v. *British Land Co.*, 23 W. R. 634, L. R. 10 Q. B. 203. Except in the case of *Haynes* v. *King*, there is no decision to show that the presumption applies to leaseholds. In *Landrock* v. *Metropolitan Railway*, [1886] W. N. 195, it was held that a conveyance in which houses and a street were numbered separately on the plan rebutted the presumption. This case was not cited in *In re Whites' Charities*.

*Sir E. Carson, S.G.*, and *F. Vaughan Hawkins*, for the Crown.—It has never been decided that where land has been taken by the Crown for a public purpose with obligations to be performed that the presumption that the soil passed *ad medium filum viæ* could by the granting of leases be made applicable to the Crown. The origin of the presumption shows that there is no application to the Crown: *Doe* v. *Pearsey*; *Berridge* v. *Ward*. The presumption does not apply to the case of a street first laid out by a newly-created authority: *Rex* v. *Hatfield* (*Inhabitants*), 4 Ad. & E. 156. *Lord* v. *Commissioners of Sydney* was commented on in *Beckett* v. *Corporation of Leeds*, 20 W. R. 454, L. R. 7 Ch. App. 421. There is no reason why the presumption should be made applicable to the Crown.

*Hughes, K.C.*, in reply.—It is allowable to take into consideration circumstances known to both parties at the time of the conveyance. Here at the time of the conveyance of 220, Regent-street was made and named. *Leigh* v. *Jack* is really in my favour. We have been in occupation of the vaults in front of 220 for over eighty years; according to the defendant we have been trespassers.

JOYCE, J.—I suppose there is a presumption where persons own land by the side of a street that, in the absence of evidence or knowledge of what the real facts were, they must be taken to own the soil of the street *usque ad medium filum viæ*. But, of course, that presumption is displaced, or rather cannot be considered true, in a case where we have evidence and knowledge of all the facts as to the acquisition of the land. In the present case we have evidence, and we really know the history of what has taken place with reference to 220, Regent-street and the neighbourhood. The presumption which I have mentioned really has no application in the present case. Here we have the history, we have the Act of Parliament and the deposited plans, and we have the minutes of the commissioners. The plaintiff claims to be entitled to half the soil of Regent-street as it now stands under the lease of the 7th of February, 1823, of No. 220, Regent-street. That lease mentions Regent-street as a street then forming and called or intended to be called Regent-street. Now if any ordinary person —I mean a layman, not a lawyer—were to read through that lease from beginning to end I am sure it would never occur to him that that lease passed the ownership in any part of the soil of any part of Regent-street having regard to the way in which the parcels are described. The contention of the plaintiff can only be supported by recourse to another presumption of law which is thus stated in Elphinstone's Interpretation of Deeds, p. 179: "By the conveyance of land abutting on a highway . . . the *primâ facie* presumption of law, in the absence of evidence of ownership, is that . . . the soil of the road *usque ad medium filum* passes"; then *Beckett* v. *Leeds Corporation* is cited, and there are various illustrations of and exceptions to that rule mentioned in the following pages. In particular I observe that Blackburn, J., in his judgment in *Plumstead Board of Works* v. *British Land Co.* says that it has always been held enough to rebut the presumption where there was anything to show that it was not the intention to convey any part of the road.

The lease of the 7th of February, 1823, as I mentioned, speaks of Regent-street as "now forming"; but the contract for the lease was made some two years or so previously, and, as at present advised, I am of opinion that it is the date of the contract and not of the conveyance which must be referred to for the purpose of settling the rights of the parties with reference to this point; in support of which view I will refer to the analogous case before the Court of Appeal of *Broomfield* v. *Williams*, 45 W. R. 469, at p. 471, [1897] 1 Ch. 602, at p. 616, especially the judgment of Rigby, L.J. But one thing is clear, that this presumption may be rebutted by evidence of surrounding circumstances which lead to the inference that no part of the soil of the highway was intended to pass. As has been mentioned in the course of the argument, doubts have been expressed by various judges as to whether the presumption ever applies to houses in a town, and as to whether it applies to a building estate: as to that see Cotton, L.J.'s, judgment in *Leigh* v. *Jack*. The reason for the presumption is said to be founded on a supposition which is variously stated. In *Doe* v. *Pearsey*, Bayley, J., says: "The rule is founded on a supposition that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road." But none of the suppositions upon which the reason is founded is consistent with the facts of this case.

Upon perusal of the Act and of the map, I am of opinion that the site of the moiety of Regent-street next to No. 220 was land wanted for the purposes of the Act. If I am right in that, section 34 does not confer upon the commissioners any power to sell that particular land. Upon the construction of the section I very much doubt whether there was power to demise it. I agree there is a difficulty as to that; but looking at the terms of the section, and looking also at the language and at the object of the Act, I very much doubt whether the commissioners had power to demise anything that was wanted for the purposes

of the Act. But whether that be so or not, in my opinion there is not one single reason for their leasing the subsoil, particularly having regard to the provisions of the Act with reference to the roadway, and to the circumstances of the case, while on the other, to my mind, there are a thousand and one reasons against their doing anything of the kind. In my opinion the very least which could be said is that in the present case it would have been a very ill-advised thing to do, if indeed it would not have been most improper and possibly illegal, to demise the soil of the adjacent street.

In the view I take it is not necessary for me to decide whether a lease stands on the same footing as a grant, or whether a grant or lease from the Crown stands upon any other footing than a lease or grant by a private individual. I think that in the circumstances it is in the highest degree improbable that it should ever have been intended to demise or part with the site of the portion of the subsoil of Regent-street which the plaintiff claims. In short, if ever there was a case where it was to be inferred from the surrounding circumstances that it was not intended to pass the site of the moiety of the adjacent street, when the parcels in the demise are described as they are here by dimensions and by map, in my opinion this is the case.

The result is that, in my opinion, no part of the subsoil of what is now Regent-street was intended to be included or is comprised in the demise made by the lease of the 7th of February, 1823, and there must be a declaration to that effect.

Solicitors. *Lumley & Lumley; Rose-Innes, Son, & Crick; Solicitors to the Office of Woods and Forests.*

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Chan. Div.
Swinfen Eady, J. } Nov. 1.

*In re* JUMP.
GALLOWAY *v.* HOPE (*a.*)

*Power—Determination—Intention of donor that power should continue—Absolute vesting of estate—Incapacity of person entitled.*

*The question as to when a power of sale given to trustees becomes extinguished is a question of the intention of the donor of the power. Accordingly, where the beneficial interest in trust property has vested absolutely, but a conveyance of the property from the trustees has not been called for, the trustees' power of sale continues to exist in every case where this appears to have been the intention.*

*The reversion to property, held by trustees upon trusts for a lunatic for his life and with wide discretionary powers, became vested in the lunatic.*

*Held, that, nevertheless, the trustees were entitled to exercise their power of sale.*

This was a summons, taken out in the Liverpool District Registry, for the determination of the question to whom the proceeds of sale of certain real estate held by trustees belonged—*i.e.*, whether they devolved as personalty or as realty. The determination of this question depended upon whether at the time of sale a power of sale given to the trustees by the will of the testator in the action was still subsisting.

By his will the testator gave all his real and personal estate to his executors upon trust, after the death of his daughter, in their discretion and of their uncontrollable authority to manage and administer his said estate, and to pay, apply, and expend the same, or so much thereof as they should think expedient, to or for the clothing, board, lodging, maintenance, and support, or otherwise for the personal and peculiar benefit of his grandchildren (notwithstanding the competency of their parent), during their lives and the life of the survivor, whether infant or adult, and whether competent or incompetent to give an acquittance or discharge for the same, at such time or times, and in such proportions and manner in all respects as his said executors should think most conducive to their comfort and convenience; and on the decease of the survivor of his said grandchildren upon certain trusts for their issue which were held void for remoteness. And he empowered his trustees at any time after his decease, and when they in their own discretion should consider necessary, to sell and convert his estate and effects into money.

The testator died in 1842 and his daughter died in 1846.

There were only two grandchildren, Robert Eden and Jane Eden, who were the children of the daughter named in the will and who were both born in the testator's lifetime. Jane Eden died in 1882 without having been married. Robert Eden survived her and died in 1902 without having married and intestate.

The trustees sold a part of the real estate before the death of Jane Eden, and a further part after her death, but during the life of Robert Eden. The question in the summons related to the proceeds of sale of the latter part.

It was admitted that on the death of Jane Eden the reversion in the trust property vested absolutely in Robert Eden as the testator's heir-at-law, the ultimate trusts having failed for remoteness, and that he could if of sound mind have called upon the trustees to convey the property to him.

*H. Mather*, for the trustees.

*Micklem, K.C.*, and *Cann*, for the legal personal representative of Robert Eden.—The question whether the power of sale determined at the death of Jane Eden, though Robert Eden had not called and could not (being a lunatic) call for the conveyance of the estate to him, is a question of the intention of the testator: *Lantsbery* v. *Collier*, 4 W. R. 826, 2 K. & J. 709; *In re Cotton's Trustees and the School Board for London*, 30 W. R. 610, 19 Ch. D. 624; and *In re Lord Sudeley and Baines*, 42 W. R. 231, [1894] 1 Ch. 334.

*Eve, K.C.*, and *Methold*, for the heir-at-law.—The general rule is that a power is extinguished when the purposes for which it was created have ceased (Farwell on Powers (2nd ed.), p. 32, and *Wheate* v. *Hull*, 17 Ves. 80), and it must be taken to have ceased when a life estate coalesces with an absolute reversion in fee: *Wolley* v. *Jenkins*, 5 W. R. 281, 23 Beav. 53. There is only one exception—namely, that it may be exercised within a reasonable time when it is necessary to sell for purposes of division: *Peters* v. *Lewes and East Grinstead Railway Co.*, 29 W. R. 422, 18 Ch. D. 429. *Saunders* v. *Vautier*, Cr. & Ph. 240, shows that directions for maintenance and accumulation after twenty-one will not prevent an absolute vesting at that age.

SWINFEN EADY, J.—In my opinion the power of sale, given to the trustees by the testator's will, continued to exist after the death of Jane Eden. The cases of *In re Cotton's Trustees and the School Board for London*, 30 W. R. 610, 19 Ch. D. 624, and *In re Lord Sudeley and Baines & Co.*, 42 W. R. 231, [1894] 1 Ch. 334, show that where parties who have become absolutely entitled have not put an end to the power by calling upon the trustees to convey the trust property

(*a.*) Reported by G. R. BENSON, Esq., Barrister-at-Law.

to them it is a question of the testator's intention whether the power is to continue. In this case the testator plainly intended that the trust for the maintenance of Robert Eden should continue during his life, and that the power of sale should continue for the same time. The power was therefore well exercised, and the proceeds belong to the estate of Robert Eden as personal estate.

Solicitors for the trustees, *Collins, Robinson, & Driffield*, Liverpool.

Solicitor for the other parties, *Stanley Attenborough*.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) Jan. 12.

*In re* FRANCIS AND OTHERS. (a.)

*Copyright—Music—Sale of pirated music—Seizure—Order of magistrate for forfeiture—Necessity of summons before making order—Summary Jurisdiction Acts*, 1848 (11 & 12 *Vict. c.* 43), *s.* 1, *and* 1879 (42 & 43 *Vict. c.* 51). *ss.* 34 *and* 51 (3)—*Musical (Summary Proceedings) Copyright Act*, 1902 (2 *Ed.* 7, *c.* 15), *ss.* 1, 2.

*A court of summary jurisdiction has no power under section 2 of the Musical (Summary Proceedings) Copyright Act, 1902, to order the destruction of copies of pirated music seized by a constable when they were being offered for sale, unless the person from whom the copies have been seized has been served with a summons under the Summary Jurisdiction Acts.*

This was a case stated by Curtis Bennett, Esq., metropolitan magistrate, sitting at Marylebone police-court, raising the question whether under section 2 of the Musical (Summary Proceedings) Copyright Act, 1902, a magistrate could order the destruction of copies of pirated music on an *ex parte* application.

The case set out the following facts:

On the 3rd of October, 1902, an authorized agent of the appellants requested a constable in writing to seize the copies of music in question, they being then offered for sale in and along the Kentish Town-road by a person who gave his name and address. The constable thereupon seized the music, and informed the person from whom it was seized of the time when and place where further proceedings with reference to the seizure under the statute would be taken.

The music was produced in court on the following morning, and on behalf of the appellants the magistrate was asked, upon proof being tendered, that the copies in question were infringements of copyright, to proceed at once to make *ex parte* an order under section 2 of the Musical (Summary Proceedings) Copyright Act, 1902, that the copies should be forfeited or destroyed, or otherwise dealt with. The person from whom the copies had been seized, was not, nor was anyone on his behalf, present in court when the application was made.

The Summary Jurisdiction Act, 1879, s. 51, subsection 3, enacted that "where in any future Act any act or thing other than the payment of a sum of money is required or authorized by an order of a court of summary jurisdiction to be done the Summary Jurisdiction Acts shall apply accordingly."

By section 50 of the same Act the expression "Summary Jurisdiction Acts" includes the Summary Jurisdiction Act, 1848.

Section 34 of the same Act provided that "where a power is given by any future Act to a court of summary jurisdiction . . . of requiring any act or thing to be done . . . other than the payment of money, and no mode is prescribed of enforcing such requisition, the court may exercise such power by an order or orders."

The Summary Jurisdiction Act, 1848, s. 1, enacted that "in all cases where a complaint shall be made to any justice or justices of the peace upon which he or they shall have authority by law to make any order . . . it shall be lawful for such justice or justices to issue his or their summons directed to such person stating shortly the matter of such complaint and requiring him to appear at a certain time and place . . . to answer the said complaint, provided that nothing herein contained shall oblige any justice to issue any such summons in any case where the application for any order of the justices is by law to be made *ex parte*."

Section 33 of the same Act extended its operations to the Metropolitan police courts and magistrates.

The Musical (Summary Proceedings) Copyright Act, 1902, by s. 2 provides, that "if any person shall hawk . . . any pirated copy of any musical work, every such pirated copy may be seized by any constable, without warrant, on the request in writing of the apparent owner of the copyright, at the risk of such owner. On seizure of any such copies they shall be conveyed by such constable before a court of summary jurisdiction, and on proof that they are infringements of copyright shall be forfeited or destroyed or otherwise dealt with as the court may think fit."

The magistrate held that, there being no provision in the Musical (Summary Proceedings) Copyright Act, 1902, that applications for orders under it could be made *ex parte*, such applications could only be made in accordance with the Summary Jurisdiction Acts, and that the person whose property it was sought to confiscate should be duly summoned; and he accordingly declined to make any order.

The magistrate came to this conclusion on the grounds that the question to be decided under the statute was one which might prove to be a very difficult and debatable one—viz., whether or no the copies of the work so seized were in point of law and fact infringements of copyright or not, and that the person from whom they were seized should have an opportunity of negativing, if he were able, such infringement; and having regard to the cases of *Reg.* v. *Totnes Union*, 14 L. J. M. C. 148; *Gill* v. *Bright*, 20 W. R. 248, 41 L. J. M. C. 22; and *White* v. *Redfern*, 5 Q. B. D. 15, 49 L. J, M. C. 19 (decided before the Summary Jurisdiction Act, 1879), he considered that before he could make any order under section 2 of the Musical (Summary Proceedings) Copyright Act, 1902, it was necessary that a summons in accordance with the Summary Jurisdiction Acts should first have been legally served upon the person "hawking, carrying about, selling, or offering for sale" the alleged pirated music, calling upon him to show cause why such music should not be "forfeited or destroyed or otherwise dealt with." In the event of no order being made he would be entitled to have the music redelivered to him.

The question for the opinion of the court was whether the magistrate upon the above statement of facts came to a correct determination in point of law, and if not, what should be done in the premises.

*Scrutton, K.C.* (*Herman Cohen* with him), for the appellants.—We submit that the magistrate has power in a case like the present to make an order for the destruction of the music seized without the

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

complainant being required to take out a summons, where to the satisfaction of the magistrate the defendant has had notice either from him or from the police constable of when and where proceedings will be taken before the magistrate. If a summons must be served on the hawker the effect would be to render the Act practically nugatory. The difficulty is that there is no machinery under the Act under which if the names and addresses of the hawkers are refused or are wrongly given the hawkers can be detained. There is no machinery providing for the manner in which the seized copies are to be dealt with. In this case the hawker gave his correct name and address. The Commissioner of Police has intimated that he will not allow the police offices or courts to be made warehouses for copies seized for an indefinite time; but, if the magistrate's view is upheld, these copies cannot be dealt with promptly, in the case of a hawker giving a wrong address, because a summons could not be served. Where a magistrate's order is to be made against a thing, the procedure under the Summary Jurisdiction Acts does not apply, and oral notice to attend the hearing is sufficient notice to the defendant. That is clear from *White* v. *Redfern*, for there, as here, the object of the Act under which proceedings were taken would be defeated if the order for the confiscation of unsound meat in the one case and of pirated music in the other had to wait until the defendant had been served with a summons. The Act of 1848 could not refer to procedure against a thing, because no such procedure was then known. *Thomas* v. *Van Os*, [1900] 2 Q. B. 448, 48 W. R. Dig. 121, is also an authority for this proposition.

*H. Sutton* (*Robertson* with him) supported the magistrate's decision.—It has been laid down again and again that no order can be made *ex parte* that affects the property of a person unless he has had an opportunity of being present and stating why the order should not be made. That is recognized in *Gill* v. *Bright*, and *Reg.* v. *Davey*, [1899] 2 Q. B. 301, 47 W. R. Dig. 89. The only exceptions to that rule arise under statutes where express power is given to the magistrate to act on an *ex parte* application, and are limited to cases where in the general interest of the public, the order must be made without delay. That is not the case here and the statute neither gives the magistrate such power by express words, nor is it to be assumed from the character of the offence that the Legislature intended a magistrate to have that power by implication. The magistrate, moreover, could not order the copies to be destroyed without proof that they were infringements, and no court could be satisfied with regard to any particular fact affecting the property any more than the liberty of a person, unless the court had given that person an opportunity of opposing the order. Even if the names and addresses of the hawkers were not known, there is no hardship on the owner of the copyright, because the magistrate would not allow the hawker to regain possession of the songs without coming before him; and, therefore, it is only reasonable that a summons should be taken out if the complainant desires the copies destroyed.

*Scrutton* replied.

Lord ALVERSTONE, L.C.J.—This case raises a very important point, and it has been strenuously urged that this court ought to depart from a well-known principle of law, because, if we do not do so here, the object of the Act would be defeated. I hope that it will be quite clear from what I am about to say that I do not at all dissent from the view that if it were a necessary implication from an Act without any express words to that effect that any well-known principle should be departed from, we must act upon that necessary implication in the same way as the court would feel it their duty to act upon express words in the statute they were construing. It is also true that there are cases in which it has been recognized that *ex parte* proceedings might be taken, and *ex parte* orders made, although it is a principle that has been recognized for many years that the rights of persons in property are not to be affected by legal process without notice of those proceedings being given them. Numerous cases might be cited in support of this proposition, but perhaps *Gill* v. *Bright*, which was referred to during the argument, is as good an example as any. In that case liquors were kept for unlawful sale, and there was no reference to special procedure, but Lush, J., said, "It is quite clear that before the property of the appellant was forfeited the justices should have given him an opportunity of being heard; common sense and justice require that this should be so." As I before said, of course there are cases in which it has been held that by necessary implication *ex parte* proceedings might be taken and *ex parte* orders made. An instance of that is to be found in *White* v. *Redfern*, where a summons was not held necessary before an order could be made for the destruction of meat not fit for human consumption, and it is clear when that case is read that the decision was right in recognition of the principle of the necessity for the immediate destruction of unwholesome food exposed for sale. But, speaking generally, the authorities show that *ex parte* proceedings affecting rights in property are not to be allowed in the absence of express directions or necessary implication. The question here is, does this Act imply that the magistrate may make an order for the destruction of the music exposed for sale without summoning the person before him. In the view I take of the section it is no part of the implication of the section that the magistrate has power to act *ex parte*. The Act undoubtedly goes a very long way in the direction of interfering with the rights of property, because by section 2 it permits a constable to seize this property without a warrant, not under an order of a stipendary magistrate or a court, but at the request in writing of the apparent owner of the copyright or of his agent thereunto authorized in writing. Although the Act does go very far, the court nevertheless must not put a strained construction on the perfectly clear words of a section, when the doing so would cause the departure from a well-known principle of law. One great object of the Act was to get these pirated musical works taken off the streets at the request of the owner of the copyright. This privilege placed him in a better position than many other people whose rights are being infringed. I think it is material to notice that the second part of section 2 is substantially the same as the concluding words at the end of section 1. Then the question arises, is it a necessary implication from that clause that the magistrate may act *ex parte* and deprive the hawker of his property, the issue being one that might involve very nice questions as to whether there was an infringement of the copyright or not. Section 2 provides that if any person shall hawk or sell or offer for sale pirate music, it may be seized, and on proof that the copies seized are infringements they shall be forfeited, destroyed, or otherwise dealt with. In my opinion we cannot take the view that the words of the section give the magistrates power to act *ex parte* and make an order for the destruction of the music. The Act went further than mere hawking, for it deals with selling and offering for sale. It was

argued that unless this strained construction was put on the section, and unless we saw fit to depart from the rule that an *ex parte* order affecting the rights of a person not before the court in respect of his property ought not to be made, the Act must become one of no practical value, because in many cases persons would not give their names and addresses, or even if they did, in many instances there might be a difficulty in serving them with a summons where these were given. I think this case is directly met by section 51 of the Summary Jurisdiction Act of 1879, and I do not think it is necessary for me to make special reference to the other Summary Jurisdiction Acts. In my opinion, the word "person" in section 1 of the Act of 1848 must have a wider meaning than "a person who was to be ordered to do something," but, as I before said, I do not think it necessary to consider that further. On the other hand, section 51 (3) of the Act of 1879 enacts that where in any future Act any act or thing other than the payment of a sum of money is required or authorized by an order of a court of summary jurisdiction to be done, the Summary Jurisdiction Acts shall apply accordingly. So again section 34 of the Act of 1879 provides that "where a power is given by any future Act to a court of summary jurisdiction of requiring any act or thing to be done other than the payment of money, and no mode is prescribed of enforcing such requisition, the court may exercise such power by an order." Reading those sections, how can we hold that by implication a summons is not necessary in the case before us. It seems to me we ought to apply the principle of law laid down by Lush, J., in *Gill* v. *Bright*. Mr. Scrutton saw the difficulty, and he did not contend that the magistrate could directly act *ex parte*. He attempted to get over the difficulty by saying that because the constable had told the person whose songs were taken of the time and place at which the matter would be dealt with that that was sufficient, although, as was the case, that person decided not to be present when the case was called on. In one sense no doubt that was giving up the contention that the court by implication could make an order *ex parte*. It seems to me that it would be most dangerous if we were to hold in this case that the defendant must be satisfied with such a notice as the constable chose to give, and on receiving that notice must be treated as if he had been served with a summons to appear before the magistrate. In that case he might appear and contest the statement of the constable and take the point that a notice of the proceedings before the magistrate had not properly been given him. For this reason I cannot bring myself to hold that a notice by the constable can be sufficient. The conclusion I have come to is that in this case the magistrate came to a right decision, and that while that part of the Act which protects the copyright owner by having the goods taken off the streets without the necessity and delay of first applying for a summons is applicable, the other part of the Act, providing for the destruction of the pirated music after it has been seized, gives the magistrate power only to make the necessary order for its destruction after a summons has been duly served.

WILLS and CHANNELL, JJ., concurred.

Solicitor for the appellants, *Philip J. Rutland.*

Solicitor for the respondent, *The Treasury Solicitor.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — Oct. 28.

ELLIOTT AND ANOTHER (*Appellants*) *v.* RUSSELL (*Respondent*). (*a.*)

*Local government—Water—Supply by urban authority—Recovery of water rate—Demand—Summary procedure—Limitation of time—Summary Jurisdiction Act,* 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 56, 57, *and* 256.

*A person who has entered into an agreement with a local authority for the supply of water to him under section* 56 *of the Public Health Act,* 1875, *and who fails to pay within fourteen days after demand in writing by the authority a sum of money due to them as a charge for water supplied by them to him in pursuance of such agreement, is a person assessed to a "rate made under this Act," within the meaning of section* 256 *of the above Act, and may be summoned under such section before a court of summary jurisdiction.*

*For the purpose of applying section* 11 *of Jervis's Act* (*Summary Jurisdiction Act,* 1848) *to the aforesaid circumstances, the matter of the complaint or information arises at the date of the demand of the sum due, and therefore the summons under section* 256 *of the Public Health Act,* 1875, *may be taken out within six months from that date.*

East London Waterworks *v.* Charles, 42 *W. R.* 702, [1894] 2 *Q. B.* 730, *explained.*

Case stated.

At a petty sessions held at the Guildhall, in the borough and county of Southampton, on the 13th of February, 1902, there was heard and determined before four of the justices of peace in and for the said borough and county, an information and complaint preferred on the 31st January, 1902, by John Arthur Russell, the respondent, against Frank Henty Elliot and Walter Pearson Elliot, the appellants, charging the appellants that they had wilfully not paid and refused to pay the sum of £3 3s. 9d., being charges for water supplied by meter for the quarter ending the 5th of June, 1901, by the urban sanitary authority of the said borough and county under the Public Health Act, 1875, although the same had been duly demanded in writing more than fourteen days before the date when the said information and complaint was laid.

At the hearing it was proved that the respondent was one of the collectors of the mayor, aldermen, and burgesses of the county borough of Southampton, acting by the council as the urban sanitary authority; and that from the 2nd of April, 1896, water had been supplied to the appellants for trade purposes under a form dated the 2nd of April, 1896, at the price of 8d. per 1,000 gallons, with a provision for a minimum charge of 5s. per quarter.

On the 16th of March, 1901, the town clerk of Southampton sent to the appellants the following letter:

"I beg to inform you that my council have adopted new terms and conditions for the supply of water by meter for trade, manufacturing, and other than domestic purposes (copy whereof I send to you herewith) which will come into force on the 1st proximo. Should you on and after that date require a supply of water for any of the above-mentioned purposes, it will be necessary for you to fill in and sign the application form annexed to the copy terms and conditions, and return same forthwith to the Waterworks Engineer, 18, French-street, otherwise it will be

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

assumed that you no longer require such supply after the 13th instant."

On the 21st of March, 1901, the appellant signed and returned to the waterworks engineer applications requesting a supply of water by meter, according to the aforesaid terms and conditions. These applications were agreed to by the authority.

By clause 15 of the agreement it was provided that the minimum charge for a supply of water by meter to the appellants' premises should be the amount which would be levied upon such premises if the same were supplied only for domestic purposes.

By clause 7 all charges for water were to be paid quarterly.

By clause 21 the corporation, in case of non-compliance with the terms of the agreement, were empowered to cut off the supply without notice and without prejudice to their right to recover any penalties which they were legally entitled to recover.

On the 18th of August, 1901, a demand in writing was made by the borough council upon the appellants for the water supplied during the quarter ending the 5th of June, 1901.

The appellants neglected to comply with the demand; and the present information was laid on the 31st of January, 1902.

The amount claimed by the respondent on behalf of the corporation was £3 3s. 9d., and was in respect of water supplied to the appellants for trade purposes from the 21st of March to the 5th of June, 1901, and was calculated at the minimum charge specified in clause 15 of the agreement, and was greater than would have been payable had the same been calculated under the form dated the 2nd of April, 1896.

At the hearing of the summons it was contended on behalf of the appellants that the aforesaid signed forms did not under the circumstances amount to an agreement by the appellants to pay any minimum charge differing from that provided for by the form of the 2nd of April, 1896; and that the time when the subject-matter of the information and complaint arose was some day in June, 1901, and that such information and complaint having only been preferred on the 31st of January, 1902, had not been laid within six calendar months from the date on which the subject-matter of the said information and complaint arose, and that the justices therefore had no jurisdiction to hear the same.

It was contended on behalf of the respondent that the town clerk's letter and the said signed forms amounted to a new agreement, and that the matter of the information and complaint arose on the 18th of August, 1901, and that the justices had jurisdiction.

The justices determined both contentions in favour of the respondent, and ordered that the appellants should pay the said sum of £3 3s. 9d. and 6s. costs.

The question for the opinion of the court was whether the justices, upon the above statement of facts, came to a right decision in point of law.

*S. H. Emanuel*, for the appellants.—The sum claimed is not a "rate made under this Act" within the meaning of section 256 of the Public Health Act, 1875. Further, that section does not apply to the recovery of water rates; their recovery is specially provided for by sections 56 and 57. Section 256 applies to general district rates. The sum claimed is a water rent payable under the agreement entered into between the parties, and by virtue of section 56 the urban authority have the same power for recovering such rent as they have for recovering a water rate, but that does not make it a water rate. The authority can enforce this water rent by stopping the supply if the terms of the agreement are not observed, and in addition to this remedy they have the powers conferred by the Waterworks Clauses Acts, and a demand is not necessary to recover water rates under those Acts: *East London Waterworks* v. *Kyffin*, [1895] 1 Q. B. 55, 43 W. R. Dig. 190. Moreover, the justices had no jurisdiction to entertain the complaint because a claim by a water company being a complaint within section 11 of the Summary Jurisdiction Act, 1848, the summons must be taken out within six months from the time when the matter of complaint arose: *East London Waterworks* v. *Charles*, 42 W. R. 702, [1894] 2 Q. B. 730. That was not done here. In the present case the matter of complaint arose when the sum claimed became due, which is when the water was supplied, which at the latest was in June, 1901. The summons is therefore out of time. *East London Waterworks* v. *Kyffin* is to be distinguished from this case.

*Llewellyn Williams* (*Temple Cooke* with him), for the respondent.—The decision of the justices was right. The matter of complaint arose when the appellants failed to pay the rate demanded under section 256; the six months therefore begins to run from that time. A demand and a refusal are necessary before the matter of complaint can arise: *Labalmondiere* v. *Addison*, 1 Ell. & Ell. 41, 7 W. R. C. L. Dig. 55. Sections 56, 57, and 256 of the Public Health Act, 1875, must be read together. The local authority were entitled to take proceedings under section 256, as that section applies to the recovery of water rates or charges as well as to the recovery of other rates.

*S. H. Emanuel*, in reply, referred to *Hornsey Local Board* v. *Monarch Investment Building Society*, 38 W. R. 85, 24 Q. B. D. 1.

Lord ALVERSTONE, L.C.J.—The sole point we have to consider in this case is, whether or not the summons was taken out too late, so that the proceedings could not be entertained, having regard to the six months' limitation of section 11 of 11 & 12 Vict. c. 43 (Jervis's Act). The material dates are these. There was an agreement between the appellants and the corporation signed in March, 1901, which provided for the payment of all water charges quarterly, and gave the corporation the alternative of either charging according to the number of gallons supplied to the appellants, or of charging on a minimum of the annual value of the premises instead, if the charge for the number of gallons supplied did not exceed that minimum.

In this case the corporation demanded £3 3s. 9d. for water supplied during the quarter ending the 5th of June, 1901, which charge was the minimum, and was based upon the annual value. I do not wish to decide this case upon what I may call general principles by considering the question whether or not the actual amount due or claimed was known to the appellant. I have great doubt upon that point because the facts are not sufficiently stated. If the matter came to be investigated I think in all probability it would turn out to be similar to those cases which were referred to by Charles, J., in *East London Waterworks* v. *Kyffin*, where it was uncertain whether the person charged knew the actual amount he was going to be sued for. I think it is by no means clear it would not turn out to be one of those cases, so that the doctrine of *Labalmondiere* v. *Addison* would apply. I do not decide it upon that ground, because I have not the facts before me, and I must not be taken as expressing any opinion upon that question, which can be raised when the facts are properly stated.

In this case there is one plain ground upon which we ought to decide against the appellants.

There was a demand made upon the 18th of August, 1901, and there was an information laid on the 31st of January, 1902, clearly treating the matter as being a claim for money due and claimed under the authority of the Public Health Act, 1875.

The summons taken out which referred to the information that had been laid, was a summons for default of payment during fourteen days after demand. The question is whether that was a proceeding which could be taken. If it was, then the proceeding before the magistrates was a proceeding under section 256 of the Public Health Act, 1875, for non-payment within fourteen days after demand. It was contended for the appellants that that cannot be relied upon by the respondent because the provisions of sections 56 and 57 preclude section 256 from applying. Section 56 provides that "where a local authority supply water to any premises they may charge in respect of such supply a water rate to be assessed on the net annual value of the premises ascertained in the manner by this Act prescribed with respect to general district rates; moreover, they may enter into agreements for supplying water on such terms as may be agreed on between them and the persons receiving the supply, and shall have the same powers for recovering water rents or other payments accruing under such agreements as they have for recovering water rates." Section 57 incorporates a number of provisions of the Waterworks Clauses Act, and amongst them provisions "with respect to the payment and recovery of water rates"; and the result of the incorporation of those provisions seems to me to be that the water rate charged by the local authority does become a rate made under the Act of 1875. It is perfectly true that there are the special remedies of cutting off the water, certain rights of charging, and certain rights of inspection, breaking up the roads, and other things which are also adapted to this Act by virtue of the incorporation of the provisions of the Waterworks Clauses Act; but the rate does still seem to me to come within the words "a rate made under this Act," within the meaning of section 256. It is not the less a rate made under this Act because it is enforceable by virtue of certain provisions of the Waterworks Clauses Act which are incorporated. If that be so, I do not see why section 256 of the Act does not apply. It provides that, "if any person assessed to any rate made under this Act by any urban authority fails to pay the sum when due and for the space of fourteen days after the same has been lawfully demanded in writing," then the magistrates may summon the defaulter to appear before a court of summary jurisdiction. It is to that state of things we have to apply section 11 of Jervis's Act, which enacts that "in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

Upon the face of this proceeding here, it was a proceeding in respect of the appellants' failure to pay within fourteen days after demand. That seems to me to have been the matter of the complaint which arose. If that be so, the matter of complaint did not arise until the 18th of August, 1901, and these proceedings were in time.

I only desire to say I do not consider that the case of *East London Waterworks* v. *Kyffin* in any way conflicts with this, nor do I think that the court in that case intended to lay down any such general principle as that contended for on behalf of the appellants—namely, that no demand under any circumstances is necessary. If the language of my brother Mathew is looked at, it will be seen that he points out in that case that the dispute between the parties had been known some time, and the whole point was whether there was a necessity for a formal notice before the man could be summoned before the magistrate; but I do not understand him as laying down the proposition that, under no circumstances is any demand necessary before the time begins to run. I only say that, because in the argument before us that case was used by counsel for supporting a proposition larger than I think the decision was intended to apply to. For these reasons I think the magistrates were quite right in saying that these proceedings were taken in time.

WILLS, J.—I am of the same opinion. I only wish to add one word, and that is that the head-note in the report of *East London Waterworks* v. *Charles* is erroneous and incomplete, because it makes it appear that the decision was that the six months' limitation must be from the time of the debt becoming due. There is nothing of the kind in the judgment to that effect. The facts were that the six months had elapsed since the demand was made, and if the head-note had been complete Mr. Emanuel would have known it had no application whatever to this case.

CHANNELL, J.—I am of the same opinion.

*Appeal dismissed.*

Solicitors for appellants, *Speechley, Mumford, & Co.*, for *Lamport & Bassett*, Southampton.

Solicitors for respondent, *Church, Adams, & Prior*, for *R. R. Linthorne*, Town Clerk, Southampton.

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Prob. Div. & Adm. Div. Admiralty. } Nov. 10.

"THE DUC D'AUMALE." (*a.*)

*Practice — Ship — Collision — Action* in personam— *Service of writ out of jurisdiction — Foreign co-defendants—R. S. C.*, 1883, *ord.* 11, *r.* 1.

*Where a collision occurred outside British territorial waters between a British steamship and a French sailing sloop, which was in tow of a British tug, and the owners of the British steamship commenced proceedings* in personam *in England against the owners of the French vessel and the owners of the tug, the vessel having been taken to a French port,*

*Held that, under ord.* 11, *r.* 1 (*g*), *of the Rules of the Supreme Court*, 1883, *after due service of the writ upon the owners of the tug, leave could be given to issue a concurrent writ and serve notice thereof out of the jurisdiction upon the owners of the French vessel, they being proper parties "to an action properly brought against some other person duly served within the jurisdiction" within the meaning of the rule.*

Motion.

This was an application to set aside an order giving leave to issue and serve notice of a writ under the following circumstances.

The plaintiffs were the Marychurch Steamship Co. (Limited), the owners of the British steamship *Camrose*. The defendants were La Compagnie Maritime Française, the owners of the French barque *Duc d'Aumale*. These were defendants under protest and the other defendants were the Elliot Steam Tug Co. (Limited), the owners of the British steam tug *Challenge*.

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(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

The facts were as follows: On the 22nd of June, 1902, the steamship *Camrose* collided with the *Duc d'Aumale*, which was at the time in tow of the British tug *Challenge*. The collision occurred in the English Channel, but outside British territorial waters. *The Duc d'Aumale* was taken to Dunkirk for repairs, and *The Camrose* proceeded to Antwerp.

On the 2nd of July the owners of *The Duc d'Aumale* instituted proceedings in the Tribunal de Commerce at Nantes against the owners of *The Camrose*.

On the 11th of July the owners of *The Camrose* issued a writ *in personam* against the owners of *The Duc d'Aumale* and the owners of the tug *Challenge*, claiming compensation against the defendants "as owners respectively of the steam tug *Challenge* and the barque or vessel *Duc d'Aumale* for damage occasioned by a collision which took place in the month of June, 1902, between the plaintiffs' steamship *Camrose* and the barque *Duc d'Aumale* whilst in tow, or having been in tow of the tug *Challenge*."

The writ was duly served on the owners of *The Challenge*, and on the 8th of August the plaintiffs obtained leave, *ex parte*, to issue a concurrent writ and serve notice of it at Nantes on the owners of *The Duc d'Aumale* under ord. 11, r. 1, of the Rules of the Supreme Court, 1883, which is as follows: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or judge whenever (*g*) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

The plaintiffs made an affidavit that the owners of the French vessel were necessary and proper parties to the action brought against them and the owners of the British tug, inasmuch as the plaintiffs alleged that the collision was caused or contributed to by neglect or default in the navigation of *The Duc d'Aumale* and *The Challenge*.

The notice of the writ was served on the owners of *The Duc d'Aumale* in France within the twelve days' limit of time for appearance after service.

On the 20th of August judgment was given by the Nantes tribunal by default, holding the owners of *The Camrose* responsible for the damage occasioned by the collision, and *The Camrose* would have been arrested at Antwerp had not her owners given security, in the nature of bail without prejudice for 250,000 francs, and after ninety days it was alleged the proceedings in France by default would become final. On the 25th of August the owners of *The Duc d'Aumale* entered a conditional appearance, under protest, to the English writ, and on the 23rd of October applied in chambers (which application was adjourned into court and came on by way of motion) to set aside the order giving leave to issue the writ and serve notice of it.

*Scrutton, K.C.*, for the defendants, contended that the action was not within the meaning of the rule "properly brought" against the owners of *The Challenge* as she herself had not been in collision, and that the purpose of commencing the action against her owners was to bring in the owners of *The Duc d'Aumale*, who were out of the jurisdiction, and who were sued in respect of a cause of action which arose out of the jurisdiction.

They cited *Flower* v. *Rose*, 7 Times L. R. 280; *Witted* v. *Galbraith*, 41 W. R. 395, [1893] 1 Q. B. 431, 577; and *Williams* v. *Cartwright*, 43 W. R. 145 [1895] 1 Q. B. 142.

*Pickford, K.C.*, and *Balloch*, for the plaintiffs.—There is an actual *bonâ fide* cause of action alleged against the owners of *The Challenge* as well as against the owners of *The Duc d'Aumale*. If the owners of the tug and her tow had been within the jurisdiction they would both have been proper parties in a suit to recover for damage done to the plaintiffs' ship. *The Elton*, 39 W. R. 703, [1891] P. 265; *The Englishman and The Australia*, [1894] P. 239; *The Avon and The Thomas Jolliffe*, 39 W. R. 176, [1891] P. 7.

GORELL BARNES, J.—I am of opinion that the plaintiffs are right in their contention. I think the action is properly founded against both defendants if there is a *bonâ fide* charge of negligence against both sets of defendants, which is the case presented on the part of the plaintiffs, and therefore I do not think that it can be said that the other defendants, viz., the French owners, are either improper or unreasonable or unnecessary parties. Of course they are not strictly necessary parties, the words in the rule being "necessary or proper," but they are proper parties to the suit brought in this court against both, and I think, after listening to the cases cited by counsel for the owners of the French ship, that the reasoning of those cases is that the attempt was there made to bring into play the sub-section of the rule when there was no real cause of action against the persons who were within the jurisdiction, and it was sought to bring the rule into operation, if it could by possibility be done, in order to enforce a remedy against the persons who were not within the jurisdiction. In *Massey* v. *Heynes*, 36 W. R. 834, 21 Q. B. D. 330, at p. 338, Lord Esher says: "The question whether a person out of the jurisdiction is a proper party to an action against a person who has been served within the jurisdiction must depend on this—supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in the country, then the rule says that the other may be served just as if he had been within the jurisdiction. This is the legislation on the subject, and we are bound by it." Now there is one other consideration, apart from what may happen in the future if the plaintiffs succeed against the French shipowners in enforcing their rights. There can be no doubt that if this is a *bonâ fide* allegation of negligence against both sets of defendants it is quite the proper and right thing that the whole matter should be fought out once for all with everybody present who was concerned with the accident. Therefore, unless this is a mere attempt to bring in the outside person not subject to the jurisdiction without a shadow of right against the person who is within the jurisdiction, I think that it is quite a proper case for the process to be allowed to go against both. There may be the ultimate difficulty in enforcing the judgment if recovered, and at the present moment there is the difficulty on the part of the present appellants in setting aside this writ and enforcing what I understand is a judgment recovered by them in default of appearance in France against the present plaintiffs. It appears from the affidavits that some proceedings in France were instituted by the French company against the present plaintiffs, and an attempt is now being made to enforce that judgment in Belgium. I have not thought it necessary to adjourn this case in order to inquire what the rights of the parties are in Belgium, or to see what would be the result of the French suit; but it is a strong thing to say that the rights of the parties are to be precluded by default proceedings, and my decision, in the exercise of the discretion vested in me, is that the application on the part of the defendants, the French company, must be refused. The costs will be costs in the cause.

Solicitors for the defendants, *W. A. Crump & Son.*

Solicitors for the plaintiffs, *Thomas Cooper & Co.*

## House of Lords.

From C. A. (England). Nov. 13.

NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY *v.* THURSTON. (*a.*)

*Infant—Building society—Infant member—Advances—Mortgage—Infants' Relief Act,* 1874 (37 & 38 *Vict. c.* 62), *s.* 1—*Building Societies Act,* 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 38.

*The Building Societies Act,* 1874, *enables an infant to become a member of a building society, where the rules do not prohibit it, but it does not authorize him to borrow money by means of advances on mortgage of his property, for it is not a necessary part of a member's position to do so.*

*An infant member of a building society purchased a piece of land by means of a loan from the society, paid to the vendor, and gave the society a mortgage to secure the loan and further advances, which were expended in building operations on the land.*

*Held, that the mortgage was void under the Infants' Relief Act,* 1874, *but that the society were entitled to a charge on the land for the purchase-money paid to the vendor, together with interest at* 4 *per cent. on that amount.*

*Decision of the* Court of Appeal, 50 *W. R.* 179, [1902] 1 *Ch.* 1, *affirmed.*

Appeal from an order of Court of Appeal, 50 W. R. 179, [1902] 1 Ch. 1.

The respondent, Mrs. Thurston, who attained twenty-one years only in March, 1900, was in June, 1898, admitted a member of the appellant society, which did not exclude minors.

Being desirous of purchasing certain land and erecting houses thereon, she applied for an advance of £1,200 on the security of the land. The advance was made to her, the land paid for and conveyed to her, and by mortgage the respondent conveyed to the society in fee the land and houses erected, or in course of erection, subject to a proviso of redemption.

The £1,200 was to be repaid by monthly subscriptions of £10 4s.

In October, 1898, the society discovered that Mrs. Thurston was still under age, and entered into possession of the property.

The respondent had performed her obligations under the rules or the mortgage.

The respondent brought an action and claimed that the mortgage was void and not binding upon her, and that she was entitled to have it delivered to her and cancelled.

She did not dispute the claim of the appellants that they were entitled to a lien for the purchase-money and expenses.

Joyce, J., was of opinion that the conveyances and mortgage were one transaction, and dismissed the action.

The Court of Appeal held the mortgage void and directed the appellants to deliver it up to the respondent to be cancelled.

By the Building Societies Act, 1874 (37 & 38 Vict. c. 42), power is given under section 13 for persons to establish a society under the Act, whether terminating or permanent, for the purpose of raising by the subscriptions of its members a fund out of which loans should be made to members upon mortgage securities. Section 38 enacts: "Any person under the age of twenty-one years may be admitted as a member of any society under this Act, the rules of which do not prohibit such admission, and may give all necessary acquittances, but during his non-age he shall not be competent to vote or hold any office in the society."

The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), enacts that, from the date of its passing contracts entered into by infants, except for necessaries, are to be void, and that no action is to be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy.

*Hughes, K.C.,* and *G. Broke Freeman,* for the appellants.

*Badcock, K.C.,* and *E. Ford,* for the respondent, were not called upon.

Earl of HALSBURY, L.C.—I cannot doubt that the judgment of the Court of Appeal was right, and I move your lordships that the appeal be dismissed with costs. I really do not know that I can add anything to what the learned judges in the Court of Appeal have said. The real question seems to me to turn entirely upon the Act of 1874. That Act has, in terms, made the instrument which is put forward by the society as their security, and the foundation of their claim, absolutely void. The result is that there is no such obligation as has been insisted on at the bar against the respondent. I notice that Joyce, J., apparently, would not have disagreed with that proposition, but he gets out of the application of it by using a phrase which, to my mind, covers up the weakness of the argument. He says that what the court below, and your lordships here, are disposed to affirm, the right of the society to stand in the shoes of the vendor because they, as agents for the lady, paid the purchase-money, is a transaction which is not set aside and rendered void by the Act of 1874, and that is true. But then, in order to justify the judgment which he gave entirely against the respondent, he says: "But it is all one transaction, and this" (what I have now been describing) "being perfectly valid notwithstanding the Act, the whole claim must be rejected." That seems to me to be covering up in language things which are in their nature distinct. It is not true to say that it is one transaction. If it were meant that all the parties contemplated the things that were afterwards done, it is perfectly possible that it may be true, although I do not think that there is much evidence of it; but I will assume that it was so. What then? In order to make it one transaction so as to avoid the vice of infringing the Act of 1874, the transaction you are dealing with must be one which avoids that vice. Now, the transaction is a totally different transaction, according to the history of the matters as they occurred. There is one transaction in which, on behalf of the respondent, the building society buys from a stranger—I mean a stranger in the legal sense—land which belonged to that stranger. That stranger, at the instance of the society, conveys to this lady that land. Putting your finger upon that part of the transaction, what is there done is an absolutely separate transaction. The parties to it are different, and the nature of the transaction is different. It is a purchase of land. Then, in order to build upon that land, in order to make it available for the purpose for which the respondent desired it, money is borrowed from the society, and that money is secured by a mortgage on that which, by the transaction which I have just described, has become the property of the respondent. You cannot help analyzing the transaction for this purpose, and, so far as this part of the money now claimed is concerned, the only thing that one can say is that it is money borrowed. I agree that it is money borrowed for a particular purpose, but it is

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

money borrowed, and the claim, in substance as well as in form, is that that money should be repaid. Therefore it is money borrowed by a minor; whether it is secured by a mortgage deed, or whether it is by mere parol, it is money lent by one of the parties to the other, a minor, and now reclaimed from the minor. That is within the express language of the Infants' Relief Act, and how it can be suggested that it is the same transaction as that which I have previously described, so as to cure the illegality of that part of it, I confess that I am not able to follow. Then if we come to that which is the substance of the matter, what can be clearer than this, that if the original thing without the mortgage is in itself void, you can neither make it better nor worse by the fact of there being a mortgage? Nor can you dismiss the mortgage, which is the only security that this society possessed, and say that simply as a member of the society the lady is liable to pay. The answer to that, I think, is in a word—there is no necessity for a member of the society to borrow at all. It is not a necessary part of a member's function as a member of the society to borrow, and therefore the two Acts of Parliament, the Act which legalizes a minor becoming a member, and the Act which renders the transaction of a minor borrowing money and having to repay it absolutely void, are quite reconcilable. The minor might be a member without having any necessity to borrow. Under those circumstances it seems to me that there is no answer to the judgment of the Court of Appeal, which affirms the subrogated right of the society to be repaid the money which they, standing in the shoes of the vendor, would have a right to claim as a lien upon the property conveyed. On the other hand, it is absolutely hopeless, as it appears to me, to attempt to get rid of the express language of the statute, which renders the loan, and the mortgage which was the security for the loan, absolutely and entirely void. For these reasons I think that the appeal must be dismissed, and the judgment appealed from affirmed.

Lord SHAND.—I am of the same opinion. I think I am scarcely justified in interposing to add anything to what has been already said; but in a single word I should like to say that I think that in the vendor's lien to which this society succeeded, and had a right to succeed, in respect of the payment which they originally made, there was good ground of judgment so far as regards the sum paid for the purchase of the property, and that the judgment in the appellants' favour is right, so far as that goes. But I agree with your lordships that, while the society will take the benefit of that payment in succeeding to the vendor's lien, they cannot succeed on any other part of this case. I agree with the unanimous view of the Court of Appeal, that the money which was got and used for the purpose of making improvements on the property, or rather of adding buildings on the *solum* of the property, was really an advance to this lady during her minority, and consequently that she was not liable for the repayment of it, and, further, that the mortgage which she granted was a bad mortgage, and not in any sense a good security for the repayment of that money. These advances are expressly struck at by the provision in the Infants' Relief Act, which was passed a few days after the Building Societies Act. That being so, I see no answer, as Romer, L.J., has said, to the Infants' Relief Act. The language of that Act is too strong for the suggestion that the building society is to take the benefit of these advances. I do not see any possible answer to that Act. Therefore I agree with your lordships; and, for the reasons clearly stated by the judges in the court below, I am of opinion that this judgment ought to be affirmed.

Lord DAVEY.—The judgments which have just been delivered by your lordships who have preceded me, and the judgments delivered in the Court of Appeal, appear to me to have entirely exhausted the subject, and I will only add this, that I think that Joyce, J., if he had not been misled by the impression that the transactions in question in this litigation could all be treated as parts of one transaction, would have been of the same opinion also. The learned judge thought that the transactions of purchase and of mortgage were all parts of one transaction, and that the lady, the minor, could not repudiate the mortgage transaction without repudiating *in toto*. It has already been pointed out, and it is only necessary to say, that the transaction between the vendor and the purchaser is one thing, and the transaction between the purchaser who acquires the property and the mortgagees is another thing. The transaction appears to me to simply mean this: a person without any means of her own contracts to buy a property; before the purchase is completed she is called upon to pay the purchase-money, and she goes to a moneylender, or, as in the present instance, to a building society, persons willing to advance the money on some terms, and she obtains a sufficient advance to enable her to complete the purchase. That seems to be a very simple transaction. Then the loan is so framed as to include a further sum of money to enable the purchaser to commence building operations on the land also. The transaction with the vendor was complete when the purchase-money was paid to him, and the transaction between the purchaser and the mortgagee was one with which the vendor had no concern whatever. The only question of general importance in the case is the question how far the permission which section 38 of the Building Societies Act, 1874, gives for an infant to be a member of a building society, authorizes the infant to do in relation to his or her membership everything which an adult could do. It is argued that the Act having enabled an infant to become a member has, by implication, enabled and empowered an infant to contract to pay his or her fines, and to enjoy all the privileges of membership, including that of obtaining an advance; and it is said, on the principle, I suppose, that *generalia specialibus non derogant*, that this so, notwithstanding the absolute and positive declaration in the Infants' Relief Act of the same year that contracts by an infant for the repayment of money borrowed are void. I am not of that opinion. It is not necessary, as has been pointed out in the judgments in the court below, that a member of a building society should obtain an advance. He may be a member without obtaining an advance; it is entirely in his own option whether he will obtain an advance or not, and that option, as has been pointed out by Romer, L.J., can only be exercised on the condition that he is able to comply with the requirements or conditions on which alone an advance is given, one of which is that he shall be able to make an effectual mortgage to the society. He may possibly obtain an advance by getting a mortgage made by some friend or relation, but if he cannot do that—it may be his misfortune, or it may be his good fortune—inasmuch as the law prevents an infant from entering into a contract for the repayment of money borrowed, he cannot exercise that particular privilege of obtaining an advance until he becomes of age, simply because he is unable by law to comply with the conditions upon which alone that advance can be made. I ought to mention only one more point which was made. It is said that the mortgage is not for the repayment of money borrowed, but for the repayment of instalments in respect of the shares. No doubt in form it is so, but when the value of the share, as it is called, has been advanced, those payments

on the share assume and bear the character of repayment of money borrowed, and it would be trifling with the plain words of the Infants' Relief Act, 1874, if we said that an infant might contract for the repayment of a loan in that form by calling it payments on the share. On the whole, I agree so entirely with the judgments which have been delivered, and I am so well satisfied with the reasoning of Romer, L.J., in his judgment, with every word of which I agree, that I do not think that I ought to trouble your lordships at any greater length.

Lord ROBERTSON.—I entirely agree.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Peacock & Goddard*, for *Rothera & Sons*, Nottingham.

Solicitors for the respondent, *Beyfus & Beyfus*.

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## Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 7.

SURTEES *v.* WOODHOUSE. (*a.*)

*Landlord and tenant—Covenant by lessee to pay present and future outgoings charged on the premises—Expenses of private street works—Works completed before commencement of term—Final apportionment made afterwards—Private Street Works Act,* 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 12, 13, 14.

*A lease of certain premises contained a covenant by the lessee to "pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the said premises or the owner or occupier in respect thereof." Before the commencement of the term certain private street works, executed under the Private Street Works Act,* 1892, *had been completed, and the expenses thereof became, from the date of completion, a charge upon the premises, though the final apportionment of the expenses was not made until after the commencement of the term. The lessor, having paid the amount of the expenses apportioned in respect of the premises, sued the lessee to recover the sum so paid as being an outgoing which the lessee was liable to pay under his covenant.*

*Held, that the covenant did not apply to an outgoing which was charged upon the premises before the commencement of the term, though not payable until afterwards.*

Appeal by the defendant from the judgment of Walton, J., at the trial of the action without a jury.

The action was brought by the plaintiff, Mrs. Surtees, against the defendant, who was the occupier of a house at Maidenhead under a sub-demise from the plaintiff, to recover £60, being the cost apportioned to the premises in respect of certain private street improvement works carried out by the corporation of Maidenhead.

The facts, so far as material, were as follows: By an indenture dated the 16th of May, 1891, one Ward demised to the plaintiff the premises in question for the term of seven years from the 25th of March, 1891. By the terms of the indenture the plaintiff covenanted during the term to "pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the said premises or the owner or occupier in respect thereof." By a supplemental lease dated the 9th of September, 1892, the term was extended to twenty-one years, the plaintiff covenanting to perform all the covenants in the original lease. By an indenture dated the 30th of November, 1899, the plaintiff sub-demised the premises to the defendant for the remainder of the term less one day from the 30th of November, 1899, and the defendant covenanted that he would pay the rent "and will at all times during the said term hereby granted observe and perform all the covenants and conditions contained in the said recited indentures of lease on the lessee's part to be observed and performed (except the covenant for the payment of the rent thereby reserved), and will keep indemnified the lessor from and against the said covenants and conditions and all claims and demands in respect thereof." In September, 1899, the corporation of Maidenhead executed, under the Private Street Works Act, 1892, certain private street improvement works in the neighbourhood of this house. The works were completed on the 7th of October. The final apportionment of the expenses thereof was made on the 11th of December, 1899, after the date of the sub-demise, and the amount payable in respect of this house was £60. The plaintiff paid to the successor in title of Ward, her lessor, this £60, as being an "outgoing" which she was liable to pay under the terms of the covenant in the original lease of May, 1891, and she sought in this action to recover this sum from the defendant under the terms of the indenture of sub-demise of November, 1899.

Walton, J., held that, though the effect of the Private Street Works Act, 1892, as interpreted by the case of *Stock* v. *Meakin*, 48 W. R. 420, [1900] 1 Ch. 683, was to make the amount of the apportioned expenses a charge on the premises as from the date of the completion of the works, still the amount was not payable until the final apportionment, and these expenses, therefore, became due and payable after the 30th of November, 1899; and in his opinion, upon the true construction of the covenant, the defendant covenanted to pay all liabilities which accrued due after the commencement of the term, even though such outgoings arose in respect of an obligation created before the term. He accordingly held that the defendant was liable on his covenant, and he gave judgment for the plaintiff.

The defendant appealed.

*Danckwerts, K.C.*, and *Scarlett*, for the defendant.—In *Stock* v. *Meakin*, this court held that the expenses of private street works executed under the Private Street Works Act, 1892, become a charge upon the premises from the date of the completion of the works, and not from the date of the final apportionment. The expenses here were outgoings charged upon the demised premises before the 30th of November, 1899, the date of the sub-demise to the defendant. The covenant by the defendant during the term to observe and perform the covenants in the leases of 1891 and 1892, and to keep indemnified the plaintiff therefrom, applies, so far as material to the present case, to the covenant by the plaintiff in the lease of 1891 to pay and bear all present and future outgoings charged upon the premises. Those words mean charged upon the premises during the term. They do not cover an outgoing charged upon the premises before the commencement of the term, and becoming due and payable afterwards. The words are outgoings "charged" upon the premises, not outgoings "payable." Those words mean charged during the term. The words "present and future" do not operate so as to include

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

an outgoing already charged on the premises at the commencement of the term, but refer to outgoings of a kind that are then in existence or may come into existence in the future: *Brewster* v. *Kitchin*, 1 Ld. Raym. 317; *Mile End Vestry* v. *Whitby*, 78 L. T. Rep. 80. The learned judge was wrong in holding that an outgoing becoming due and payable after the commencement of the term, though charged on the premises before, comes within the covenant.

They also referred to *Hornsey Local Board* v. *Monarch Building Society*, 38 W. R. 85, 24 Q. B. D. 1.

*J. E. Bankes, K.C.*, and *E. Morten*, for the plaintiff.—The defendant is liable to pay this outgoing upon any one of four grounds. First, he undertook on the 30th of November, 1899, to pay all present and future outgoings charged upon the premises. The word "present" means existing, and this charge was existing on the 30th of November. Secondly, the covenant is that he will "pay" all outgoings charged upon the premises. These expenses became payable on the 11th of December, when the final apportionment was made. The meaning of the covenant is that he will, as between himself and the plaintiff, pay any outgoing which is charged upon the premises and which becomes payable in respect thereof after the 30th of November, 1899. Thirdly, the word "charged" means imposed as an obligation upon the owner or occupier, and that cannot be until the outgoing becomes payable. Until that time the local authority cannot claim it from the owner or occupier. Fourthly, under the plaintiff's covenant in the lease of 1891 she was liable to her lessor to pay these expenses. The defendant by his covenant in the sub-lease of 1899 has covenanted to indemnify the plaintiff against the covenants in her lease. Under section 14 of the Private Street Works Act, 1892, the local authority can recover the amount of the apportioned expenses from the "owner" of the premises, who is defined by section 4 of the Public Health Act, 1875, as the person in receipt of the rack-rent of the premises. The plaintiff being therefore liable to pay this sum to her lessor, the defendant must indemnify her.

*Danckwerts, K.C.*, replied.

*Cur. adv. vult.*

Feb. 7.—VAUGHAN WILLIAMS, L.J.—The question which we have to decide is as to the liability of the defendant to indemnify the plaintiff against the payment of certain moneys which had become payable under the Private Street Works Act, 1892, and which the plaintiff had to pay to her superior landlord, who was the successor in title of the person who granted her the lease in 1891. The defendant is sought to be made liable on a covenant in a lease of the 30th of November, 1899, by which he covenanted to observe and perform all the covenants and conditions contained in the said recited indentures of lease and on the lessees' part to be observed and performed, and to keep indemnified the lessor from and against the said covenants and conditions and all claims and demands in respect thereof. The two recited indentures of lease are those of 1891 and 1892, under which the plaintiff became the lessee. It is not, in my opinion, material to consider how far the words of the covenant in the lease of 1899 ought to be treated as merely repeating the covenants contained in the deeds of 1891 and 1892, because in my judgment the defendant is entitled to succeed upon another ground, whatever may be the true construction of the covenant of indemnity in the lease of 1899. I agree with Walton, J., that we must go back to the original deeds of 1891 and 1892 and see what would have been the position of the lessee under those deeds in respect of private street improvement expenses of this kind. The real question we have to decide is whether the covenant by the lessee in the deed of 1891 covers a charge in respect of private street works completed before the commencement of the tenancy but not payable until afterwards. If it does, then the defendant is liable in this action; if it does not, then he is not liable. I treat, for this purpose, the covenant in the lease of 1891 as being written in, in terms in the sub-lease of 1899. The words of the covenant are: "During the said term pay the said rent in manner aforesaid, and also will pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the said premises or the owner or occupier in respect thereof." In my judgment those words do not cover a rate or charge which has become effective before the commencement of the term by reason of the completion of the works. This court decided in *Stock* v. *Meakin*, which was a case between vendor and purchaser, that the implied indemnity which a vendor gives to a purchaser would cover a sum chargeable in respect of private street works which were completed before the date of the sale, though the final apportionment of the expenses was not made until after that date. That case does not necessarily govern the present case, because this is not a case of vendor and purchaser, but turns entirely upon the construction of the particular words of the covenant in the lease. It was suggested that the words "all present and future rates, &c., charged upon the premises or the owner or occupier in respect thereof," were inserted for the purpose of covering a rate or charge of this kind which became chargeable on the premises on the completion of the works under the Private Street Works Act, 1892, but which had not become payable at the commencement of the term because the final apportionment of the expenses had not then been made. I cannot agree with that contention. The words "present and future rates" were put in for the purpose of covering the case of rates, taxes, &c., of a kind not existing at the date of the lease, and I do not regard those words as referring in any way to charges on property before the commencement of the term, though not payable until after. It seems to me that, when the books containing the precedents of leases are looked at, they provide in plain and simple language for a case where a tenant is intended to bear charges to which the property has become liable but which had not at the time become payable. I do not think that the words in the present covenant have any reference to such a case. If one construes the covenant apart from the words "present and future" the covenant seems to me to be perfectly plain, and does not impose upon the tenant the obligation to pay charges to which the property has been assessed for private street works before the commencement of the term, though they do not become payable until after. For these reasons I think that the judgment of Walton J., must be reversed.

STIRLING, L.J., read the following judgment: I agree. I think that the case of the plaintiff cannot be placed higher than if the defendant had by the lease of the 30th of November, 1999, entered into a covenant with the plaintiff in the same terms as the covenant on the part of the lessees contained in the lease of the 16th of May, 1891—namely, a covenant on the part of the lessees during the term granted by the lease of the 30th of November, 1899, to "pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the said premises or the owner or occupier in respect thereof." The plaintiff contends that the sum sought to be recovered is an "outgoing charged upon the premises or the

owner in respect thereof." It is not disputed that that sum is an outgoing within the meaning of the covenant. The nature of the outgoing in question was considered by the Court of Appeal in the case of *Stock* v. *Meakin*, and it was held that the amount of the expenses incurred under the Private Street Works Act, 1892, becomes a charge on the premises on which they are apportioned as from the date of the completion of the works, and not from the date of the final apportionment. It was not expressly decided in that case whether or not the amount is "charged on the owner in respect of the premises" as from the same date. By section 12 of the Private Street Works Act, 1892, it is provided that "the sums apportioned . . . shall be recoverable in manner provided by this Act, or in the same manner as private improvement expenses are recoverable under the Public Health Act, 1875." Section 14 of the same Act provides that the local authority may from time to time recover "from the owner for the time being of any premises in respect of which any sum is due for expenses of private street works the whole or any portion of such sum," together with interest from the date of the final apportionment till payment. The Public Health Act, 1875, s. 257, provides that private improvement expenses may be recovered, together with interest from the date of service of a demand for the same, "from any person who is owner of such premises when the works are completed for which such expenses have been incurred." It appears to me that, by the combined effect of this last section and section 12 of the Private Street Works Act, 1892, the apportioned amount became charged on the owner at the time of completion of the works as from that date; and this view is supported by the reasoning of Vaughan Williams, L.J., who delivered the judgment of the Court of Appeal in *Stock* v. *Meakin*. There is nothing in the Private Street Works Act, 1892, to charge the expenses on the occupier. It was not disputed that at the date of the completion of the works the plaintiff was the "owner" within the meaning of the Private Street Works Act, 1892, of the premises in respect of which the sum sought to be recovered was apportioned; and it follows that the plaintiff had before the commencement of the term granted by the lease become charged with that sum in respect of the premises comprised in the lease. It is said that, although both the premises and the plaintiff as the owner thereof had become charged with the sum sought to be recovered before the date of the lease to the defendant, yet the sum was not payable until after the date of it. But the covenant is during the term to pay and bear, not "outgoings payable," but "outgoings charged"; and this particular outgoing, which is not of a recurring nature, became charged both on the premises demised and on the owner thereof before the commencement of the term. It is true that the charge could not be enforced against either the premises or the owner until the final apportionment was made, but still it does not seem to me that it is one which the defendant as lessee took upon himself. The learned judge attached great weight to the word "present" which occurs in the covenant contained in the lease of the 16th of May, 1891. If full effect were given to this word the lessee would be liable for arrears of rates and taxes due and payable at the date of the lease, a conclusion from which the learned judge himself shrank, and which was admitted in argument to be inadmissible. The main object of the introduction of the words "present and future" in covenants such as these is to impose on the lessee the liability to pay, not only taxes, rates, &c., existing at the date of the lease, but also all taxes, rates, &c., subsequently imposed, whether or not of the same nature or for the same purposes as those in existence at the granting of the lease (see Davidson's Precedents in Conveyancing (3rd ed.), vol. 5, Part I., p. 22, note *c.*); and, without saying that the effect of those words is in all cases necessarily so limited, I think that this affords a sufficient explanation of them in the present case.

MATHEW, L.J.—I am of the same opinion. The question turns upon the construction of the covenant in the lease of 1891 which has been imported into the sub-demise of 1899 as a covenant to be performed by the defendant during the term comprised in the sub-demise. Before the commencement of that term the private street works were completed, and according to the case of *Stock* v. *Meakin* the expenses thereof had then become a charge upon the premises, though the final apportionment was not made until after the commencement of the term. It must be taken that the defendant entered into a covenant in terms similar to that entered into by the plaintiff in the lease of 1891—namely, during the term comprised in the sub-lease to pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the premises or the owner or occupier in respect thereof. In my opinion that covenant does not impose upon the tenant the obligation to pay and bear a charge upon the premises existing at the commencement of his term, but only refers to future charges. The sub-lease all through is limited to what happens during the term. The plaintiff therefore fails in the action.

*Appeal allowed.*

Solicitors for the plaintiff, *Lowe & Co.*

Solicitors for the defendant, *Willis & Willis*, for *A. Fossick*, Maidenhead.

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From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Dec. 2.

REX v. ARCHBISHOP OF CANTERBURY. (*a.*)

*Solicitor—Treasury solicitor—Acting for individual—Costs—Duly qualified solicitor—Revenue Solicitors Act*, 1828 (9 *Geo.* 4, *c.* 25), *s.* 1—*Solicitors Acts*, 1843 (6 *&* 7 *Vict. c.* 73), *ss.* 2, 47, *and* 1874 (37 *&* 38 *Vict. c.* 68), *s.* 12—*Treasury Solicitor Act*, 1876 (39 *&* 40 *Vict. c.* 18)—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 43, *sub-section* 3.

*Where the Solicitor to the Treasury acts, under the directions of the Crown, for a private individual, he is to be deemed to be a duly qualified solicitor for all purposes, though he is not on the roll of solicitors and has not taken out a certificate authorizing him to practise as such.*

Appeal from an order of Lord Alverstone, L.C.J., at chambers, refusing to review the taxation of costs.

Upon the confirmation of the election of the bishop-elect of Worcester, Alexander William Cobham and Edward Henry Garbett appeared before the Vicar-General of the Province of Canterbury for the purpose of raising certain objections, relating to doctrine, to the confirmation. The vicar-general refused to entertain the objections. Two rules *nisi* were accordingly obtained on behalf of the objectors, directed to the Archbishop of Canterbury and the vicar-general, to show cause why a writ of *mandamus* should not issue commanding them to hear and determine the objections proposed to be made to the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

confirmation. Cause was shown against the rules by the law officers appearing on behalf of the Crown, and cause was also shown on behalf of the archbishop by separate counsel instructed by the Solicitor to the Treasury, the Crown having thought it desirable in the public interest that it should take up the case of the archbishop so as to ensure its being fully and properly placed before the court. The bishop-elect was also represented by counsel. The rules were discharged with costs to the archbishop, but the court held that the Crown was not entitled to costs, there being no jurisdiction to give costs either to or against the Crown. The case is reported in 50 W. R. 348, 476, [1902] 2 K. B. 503.

Upon the taxation of the bill of costs of the archbishop, the master taxed the costs as if they had been incurred by an ordinary solicitor. Cobham thereupon carried in the following objections to the taxation: (1) Because the Treasury solicitor, who purported to act as solicitor for the archbishop, was not qualified to act as such solicitor. The Treasury solicitor was unable to recover costs from the archbishop, and neither the Treasury solicitor nor the archbishop through the Treasury solicitor was entitled to recover costs from Alexander William Cobham. (2) Because the whole of the costs in the bill were in fact incurred by the Crown and not by the archbishop. An affidavit was made by a clerk of Cobham's solicitors to the effect that he attended at the office of Messrs. Lee, Bolton, & Lee, the solicitors to the archbishop, for the purpose of serving them with a copy of the rule *nisi*, and saw Mr. Harry Wilmot Lee, who, after having accepted service, informed him that he (Mr. Lee) had seen the Treasury solicitor that day and was handing over the matter to him, as he (Mr. Lee) did not see why the archbishop should have to pay costs and be charged with the same when all the archbishop had to do in the matter was to carry out a mandate from the Crown.

The taxing-master overruled the objections, stating as his grounds that the rules were directed to the archbishop, and that the archbishop was separately represented upon the argument of the rules, and though it was at first contemplated that the archbishop's solicitors—Messrs. Lee, Bolton, & Lee—would act for the archbishop, almost immediately after the rules had been obtained the Treasury solicitor took charge of the archbishop's case as well as that for the Crown; that he did not think that Messrs. Lee, Bolton, & Lee ever really acted for the archbishop in the case; that there were a few items in the bill of costs of the archbishop which were common to the cases for the archbishop and the Crown, and these he (the taxing-master) had, in accordance with the practice, apportioned in moieties; that in all other respects the costs he had taxed were distinct from the costs of the Crown, and were in fact incurred on behalf of the archbishop; and that with regard to the objection that the Treasury solicitor was not qualified to act as solicitor for the archbishop, he could find no authority for it, it being a very usual thing for the Treasury solicitor to act for magistrates and others in similar positions, and having regard to the King's position as head of the Church and the close connection between the interests of the Crown and the archbishop in the litigation, it seemed to him that the Treasury solicitor was acting within the ambit of his duties in representing the archbishop and instructing counsel on his behalf.

Upon appeal Lord Alverstone, L.C.J., affirmed the decision of the master.

Cobham appealed.

*Danckwerts, K.C.*, and *Morton Smith*, for the appellant.—First, the costs were incurred by the Crown on its own behalf and in its own interest, and were not incurred on behalf of the archbishop: *Dixon* v. *Farrer*, 35 W. R. 95, 18 Q. B. D. 43; *Paddock* v. *Forrester*, 1 Man. & G. 583, 8 Dowl. 834. Secondly, it is unlawful for the Treasury solicitor, who does not hold a certificate authorizing him to practise as a solicitor, to act for a private individual as his personal solicitor, and therefore the costs so incurred cannot be recovered. The Act of 1729, 2 Geo. 2, c. 23, which regulated the admission of attorneys, contained a provision (section 28) that the requirements of the Act were not to extend to the examination, swearing, admission, or enrolment of persons to be solicitors of the Treasury, Customs, Excise, Post Office, &c. That Act has been repealed by the Solicitors Act, 1843, but by section 47 the same exemption is continued. The Revenue Solicitors Act, 1828 (9 Geo. 4, c. 25), and the Treasury solicitor Act, 1876 (39 & 40 Vict. c. 18), deal with the appointment and status of the Treasury solicitor, making him a statutory person with powers limited by statute. The earlier of the two statutes, by section 1, authorizes a person appointed to be solicitor on behalf of his Majesty, under the orders and directions of the Commissioners of the Treasury, to act and practise as such solicitor under such orders and directions in any court; and the later statute, by section 1, incorporated the Treasury solicitor, making him a corporation sole. Under those statutes the Treasury solicitor can act for those persons or departments of state for whom he is authorized to act by a Treasury minute: see Pulling on Solicitors (3rd ed.), pp. 27, 28. It is no part of his statutory duty to act for the Archbishop of Canterbury. He therefore comes within the provisions of the Solicitors Act, 1843, section 2 of which makes it a misdemeanour for an unqualified person to act as a solicitor (*Reg.* v. *Buchanan*, 8 Q. B. 883); and sections 35 and 36 make it a contempt of court for him so to act, and render him incapable of recovering his fees. By section 12 of the Solicitors Act, 1874, no costs on account of any act done by an unqualified person shall be recoverable by any person whomsoever. The Treasury solicitor, in order to recover his costs, must be acting as solicitor for his Majesty's affairs within his statutory authority, otherwise he is not a duly qualified solicitor. The order appealed from was therefore wrong.

They also referred to *Galloway* v. *Mayor, &c., of London*, 15 W. R. 1032, L. R. 4 Eq. 90, at p. 95; *Fowler* v. *Monmouthshire Canal Co.*, 27 W. R. 659, 4 Q. B. D. 334; and *Irvin* v. *Sanger*, 58 L. J. Q. B. 64, 37 W. R. Dig. 60.

*Sir Edward Carson, S.G.*, and *H. Sutton*, for the archbishop.—The Crown thought it right to have the archbishop's case placed fully before the court, and therefore the Treasury solicitor was instructed to act for him. At the same time it was felt that there might perhaps be some conflict between the rights of the Crown and the duties of the archbishop, and therefore it was thought proper that the archbishop should be separately represented by counsel. The Treasury solicitor is to be treated as a duly qualified solicitor for all purposes so long as he acts under the directions of the Crown. This is clear from section 1 of the Revenue Solicitors Act, 1828, section 47 of the Solicitors Act, 1843, section 12 of the Solicitors Act, 1874, and section 43, sub-section 3, of the Stamp Act, 1891. Those statutes qualify the Treasury solicitor to act as a solicitor in all courts without taking out a certificate or being enrolled as a solicitor under the Solicitors Acts.

*Danckwerts, K.C.*, replied.

COLLINS, M.R.—This is an appeal from the decision of the Lord Chief Justice in chambers overruling

certain objections taken to the taxation of costs. The question arose in this way. Captain Cobham obtained a rule for a *mandamus* against the Archbishop of Canterbury, and the Crown being interested, and having been served with notice of the same, appeared to show cause against it on its own behalf. The Crown being also interested in the case to be set up by the archbishop, in the exercise of its undoubted right where someone in his public capacity is the object of the proceedings, took up the case for the archbishop in order that his case might be fully placed before the court. In the result the rule was discharged with costs to the archbishop, but it was held that, as the Crown could neither pay nor receive costs, apart from any statute expressly authorizing it, the Crown was not entitled to costs. Upon the taxation of costs the master allowed to the archbishop such costs as were properly payable to him in the same way as if he were represented by an ordinary solicitor.

Objection was taken that the costs could not be recovered on the ground that the archbishop had appeared by a person who was in law debarred from acting for him—namely, the Solicitor to the Treasury. It is contended in support of that objection that, inasmuch as the Crown appointed the Solicitor to the Treasury to represent the archbishop, and as that solicitor was debarred by law from acting as solicitor for the archbishop, the latter must be deemed not to have been represented by a solicitor at all, and is not entitled to recover any costs. The question therefore comes to this: Was it competent for the Solicitor to the Treasury to appear as solicitor for the archbishop, because if it was, the archbishop was entitled to his costs as against the other side?

It is contended on behalf of the appellant that, as section 2 of the Solicitors Act, 1843, debars any person from acting as a solicitor for another unless he is duly qualified, and as it is a necessary qualification that the person so acting should be enrolled as a solicitor and should hold a certificate, the Solicitor to the Treasury, who is not enrolled as a solicitor and does not hold a certificate, cannot act as a solicitor for the archbishop. It seems to me that, if it were made out that the Solicitor to the Treasury was not a "duly qualified" person, the appellant would be entitled to succeed. However, in the Solicitors Act, 1874, there is a section which appears to me to be practically conclusive of the case. Section 12 enacts that any person who wilfully and falsely pretends to be or takes or uses any name, title, addition, or description implying that he is duly qualified to act as a solicitor, shall be guilty of an offence under the Act, and no costs on account of any act or proceeding done or taken by any person who acts as a solicitor without being duly qualified so to act shall be recoverable by any person whomsoever. Now comes the most material clause: "For the purposes of this section a person shall be deemed to be duly qualified to act as a solicitor if he shall have in force at the time at which he acts as solicitor a duly stamped certificate authorizing him so to do, pursuant to the provisions of the stamp laws and the laws for the time being relating to solicitors." That is one qualification. Now comes another, which is an equally good qualification, "or shall have been appointed to be Solicitor of the Treasury, Customs, Inland Revenue, Post Office, or any other branch of her Majesty's Revenue, or of any other public department, including the department of the Ecclesiastical Commissioners, and of the Governors of Queen Anne's Bounty, or if he be a clerk or officer appointed to act for the solicitor for any public department as hereinbefore described." Therefore there are two qualifications, each equally good, one the general qualification dealt with in the first part of the section, and the other the special qualification by reason of holding the appointment of Solicitor to the Treasury or other public office. Therefore the archbishop was represented by a duly qualified solicitor, and unless there is some other ground of objection, the objection must fail. Now what other ground is there? The Solicitor to the Treasury was appointed originally under 9 Geo. 4, c. 25. Section 1 of that Act says that "whereas it has been found greatly conducive to the public interest that persons specially appointed by the Commissioners to the Treasury, or by the several commissioners to his Majesty's Revenue, to be solicitors or attorneys on behalf of his Majesty, should act and practise as such solicitors or attorneys without being admitted and enrolled as solicitors or attorneys, and without being subject, by reason of such acting or practising, to any of the regulations in force in any part of the United Kingdom relating to solicitors or attorneys: Be it therefore enacted . . . that whenever any person has been or is or shall be appointed to be solicitor or attorney on behalf of his Majesty, under the orders and directions of the Commissioners of the Treasury . . . it is and shall and may be lawful for such person to act and practise as such solicitor or attorney under such orders and directions in all and every court and courts, jurisdiction and jurisdictions, place and places, in any and every part of the United Kingdom, anything in any Act of Parliament, or in any order or rule of any court of justice, or any law, usage, or custom in force in any part of the United Kingdom relating to solicitors or attorneys, or to the admission or practice of such solicitors or attorneys, to the contrary in anywise notwithstanding." Therefore that section authorizes the appointment of a person who would otherwise not be a solicitor at all to be solicitor for his Majesty, and this gives him the rights of a solicitor in all courts. It is contended that the Solicitor to the Treasury was not acting in the present case on behalf of his Majesty, but on behalf of the archbishop. In my opinion it is on behalf of his Majesty, because the Crown thinks it is to the advantage of the public, which is only another name for the Crown, that the archbishop's case should be fully and properly heard. That is the reason why the Crown has intervened, and it intervenes by appointing the Solicitor to the Treasury solicitor for the archbishop. No wrong is done by that because the Solicitor to the Treasury is on the same footing as a duly qualified solicitor. Under the statute he is qualified to act and practise as such solicitor under the orders and directions of the Crown, and when the Crown thinks it expedient in the public interest to appoint him to act in a given case, he has to appear in the only way in which he can appear in the particular case, namely, by becoming solicitor on the record for the particular person in whose case the Crown is interested.

That really disposes of the case. The Solicitor to the Treasury is none the less a duly qualified solicitor because he has not got a certificate. He is none the less appearing at the instance of the Crown because he has been put on the record as the solicitor for the party. The only possible ground of objection would be the law of maintenance, but that law has no application to cases where the Crown appoints the solicitor. The objections therefore fail. It is clear that the Crown can intervene in the public interest where some public functionary is made defendant to an action. It can intervene in his behalf. The method by which it intervenes may be by appointing its own solicitor to act for the party. It seems to me, therefore, that all the conditions are fulfilled which entitle the archbishop to his costs. The appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. Putting aside for a moment the question of the personal capacity of the Solicitor to the Treasury, we find this: The archbishop is being proceeded against under circumstances which might make him personally liable for costs, and which, if he succeeded, would entitle him to receive costs, if so decreed by the tribunal which heard the case, from the persons who were proceeding against him. In these circumstances the Crown, for what appears to me to be good and sufficient reasons, came to the conclusion that it was to its interest that it should, at its own expense, defend on behalf of the archbishop. Now I want to point out that, in my opinion, when the Crown made the offer to the archbishop to conduct at its own expense the defence of the archbishop, the latter was not bound to have accepted that offer. If he chose he could have defended at his own expense and declined the assistance of the Crown. He did not do so; he accepted the Crown's offer, and he left it to the Crown to act for him. The result was that the Crown acted by its usual and proper solicitor, but still in this matter, and so far as I am considering the case, on behalf of the archbishop. I should point out that so long as the Crown was acting in that proceeding on behalf of the archbishop, it would have been bound to have regarded the archbishops' interests, even if it turned out that they were not absolutely identical with or were even in some respects opposed to the interests of the Crown. If the Crown found that the interests were so conflicting that it would not be proper to continue to act for the archbishop, it might have receded from that position; but so long as Crown was acting by its solicitor for the archbishop, it was bound to regard the archbishop's interests. The archbishop remained a party after the Crown had taken up his defence, liable to pay costs if he failed and entitled to receive costs if he succeeded, his solicitor being the Solicitor to the Treasury, acting by the authority of the Treasury. In those circumstances, which made the Treasury really liable for the expenses of the defence, the solicitor would naturally look, not to the archbishop personally for costs if he failed, but would look to the Treasury. So it appears to me that if the archbishop succeeded, they would, as his solicitors, be, in the ordinary course, entitled to receive the costs payable by the other side, if those costs were awarded, and would then have to come down on the Treasury under the indemnity only for the difference between the costs they received from the other side and the costs incurred on behalf of the archbishop.

The case cannot, to my mind, be substantially differentiated from that of a person in the position of a master against whom proceedings have been taken by a servant, where the master is insured against liability. There the insurance company defends on behalf of the master, and it generally employs its own solicitor, but although the insurance company in such a case employs its own solicitor, and that solicitor would primarily not look to the defendant personally for costs, yet when the solicitor acts for the defendant, so far as the plaintiff in that action is concerned, that solicitor is, for all purposes, as between the plaintiff and the defendant, the ordinary and proper solicitor for the defendant. In such a case, if the defendant is awarded costs, those costs would be recoverable by him, and in estimating what the amount of those costs are, he would naturally and properly include the costs of the solicitor who acted for him in that case, although, as between him and the insurance company, the solicitor was the solicitor for the insurance company, and the insurance company had to see that the costs were provided for by them if the defendant did not succeed.

It follows that in this case the appellants must fail unless they can establish that the Solicitor to the Treasury has a personal incapacity for appearing for the archbishop under such circumstances as those I have indicated. Was he under such incapacity? In my opinion, he was not. It appears to me that where the Crown for good and sufficient reasons thinks it is for the interests of the Crown that the defence of an individual in an action or proceeding against that individual should be undertaken, and the Treasury solicitor is delegated by the Treasury authorities to act as solicitor for that individual, that is within the rights of the Crown, and is within the purview of the ordinary duties of the Treasury solicitor. So that, when the Treasury solicitor, in such a case as that, acting on the directions of the Treasury, appears and takes up the defence of an individual, it is part of his duty to act for that individual, and he is none the less acting for the individual as between the individual and the person who is proceeding against him because the solicitor is the Treasury solicitor acting in the interests of the Crown by the directions of the Treasury. Nor, on the other hand, is the solicitor the less acting as Treasury solicitor on behalf of the Crown and by the directions of the Treasury authorities because he acts for a private individual under the circumstances which I have indicated. In my opinion the statute of 9 Geo. 4, c. 25, has no such limited application, when properly regarded, as that contended for by the appellant. It seems to me clear here that the Treasury solicitor, as part of his duty, was entitled to act as solicitor for the archbishop in the circumstances indicated, and in so doing he incurred no liability because he had not taken out a certificate and was not duly qualified as an ordinary solicitor.

I agree, therefore, that the appeal should be dismissed.

MATHEW, L.J.—I am of the same opinion. In this case the appellant seeks to get rid of the costs which were properly incurred in repelling the attack that has been made in the court below. It could not be disputed that the archbishop was attacked. The archbishop remained, as it were, the defendant on the record, and if the appellant had been successful the costs must have been paid by the archbishop. Now it was said that in the course of the proceedings it was ascertained that the Crown had intervened through the Solicitor to the Treasury. In what capacity? It was urged as representing the Crown. On the other hand, it is clear to my mind that the Solicitor for the Treasury intervened as solicitor for the archbishop, bound to protect the archbishop in the course of the proceedings, and that being the state of things, if there were no further technical difficulties in the way it would appear to be the proper course, according to the established practice of the courts, to direct the costs to be taxed as the master has taxed them. But it is said that it cannot be done because the solicitor that appeared for the archbishop was not a duly qualified solicitor—he was only the Solicitor to the Treasury. When that matter comes to be investigated it appears that, as Solicitor to the Treasury, he received instructions from the Crown to conduct the defence of the archbishop in the proceedings. On reference to section 12 of the Solicitors Act, 1874, it is perfectly clear that he occupied the position of a solicitor of the court, although he did not possess the qualification ordinarily necessary for that position. Parliament makes him a solicitor for the purposes necessary for the discharge of his duties as Solicitor to the Treasury, and here under his

instructions from the Crown he appeared as solicitor for the archbishop. In my opinion the taxation was right, and this appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the appellant, *Wainwright & Co.*

Solicitor for the respondent, *Solicitor to the Treasury.*

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From K. B. Div. (Collins, M.R., and Mathew, L.J.) Dec. 1.

HARRISON *v.* ALLIANCE ASSURANCE CO. (LIMITED). (*a.*)

*Insurance — Life — Payment into court — Opinion of directors—Reasonable ground for opinion—Costs—Life Assurance Companies (Payment into Court) Act,* 1896 (59 & 60 *Vict.* c. 8), *s.* 3—*Ord.* 54c, *rr.* 3, 5, 7.

*A life assurance company, against whom an action has been brought on a policy, are entitled to an order under Ord.* 54c, *r.* 3, *giving them leave to pay the insurance money into court, under section* 3 *of the Life Assurance Companies (Payment into Court) Act,* 1896, *if it is shown that in the opinion of the board of directors no sufficient discharge can otherwise be obtained. It is not necessary to show that the directors have reasonable grounds for being of that opinion.*

*Any prejudice to the claimant by reason of the directors having acted unreasonably in the matter may be remedied by an order as to costs on the subsequent application for taking the money out of court.*

Appeal from an order made by Darling, J., under ord. 54c., r. 3, in an action on a policy of life insurance.

In 1875 a policy of insurance on the life of one Paynter was granted by the defendant company to one Prince.

Prince died shortly afterwards, and in the administration of his estate the policy was assigned to trustees subject to the trusts of a family settlement.

The trustees paid the premiums on the policy regularly to the defendant company, and continued to do so during the life of Paynter, but about twenty years before the death of Paynter the policy was lost, and notice of the loss was duly given by the trustees to the defendant company.

On the death of Paynter, which happened in September, 1901, the plaintiff, who was the sole surviving trustee, made a claim under the policy and brought this action.

The defendant company, being desirous of availing themselves of the benefit of the Life Assurance Companies (Payment in Court) Act, 1896, took out a summons in the action under ord. 54c, r. 3, asking for leave to pay the moneys payable by them under the policy into the High Court.

Section 3 of the Life Assurance Companies (Payment in Court) Act, 1896, is as follows: "Subject to rules of court any life assurance company may pay into the High Court, or where the head office of the company is situated within the jurisdiction of the Chancery Court of the County Palatine of Lancaster either into that court or into the High Court, any moneys payable by them under a life policy in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained."

Order 54c of the Rules of the Supreme Court is headed "Life Assurance Companies (Payment into Court) Act, 1896," and rule 3 is as follows: "No payment shall be made into court under the Act where any action to which the company is a party is pending in relation to the policy or the moneys thereby assured except by leave of the judge to be obtained by summons in the action."

An affidavit used in support of the summons stated that, in the opinion of the board of directors of the company, no sufficient discharge could be obtained otherwise than by payment into court under the Act.

Darling, J., made an order giving the defendant company leave to pay the insurance money into court, and reserving all costs.

The plaintiff appealed.

*Disturnal*, for the plaintiff.—This is not a case in which payment into court under the Life Assurance Companies (Payment into Court) Act, 1896, ought to be allowed. The directors are acting unreasonably and attempting to avail themselves of the Act in a case to which it can never have been intended to apply. The company had notice of the loss of the policy twenty years ago, and since that time the premiums have been regularly paid by the trustees of the settlement, and latterly by the plaintiff himself as the last surviving trustee. It is admitted that the company have no record of having ever received any notice of any other claim under the policy, and the mere suggestion which appears to be now made that they may have received some such notice and forgotten it ought not to be attended to. Under the circumstances there is no reason why the company should not at once pay the insurance money to the plaintiff. Before the directors of an insurance company can avail themselves of the Act of 1896, they ought to show that they have some reasonable ground for believing that they cannot obtain a proper discharge for the insurance money otherwise than through the instrumentality of the court. In the present case there is no reasonable ground whatever for supposing that the directors are in any risk of not being able to get a good discharge from the plaintiff without the protection of the court. Further, the company are fully protected by section 3 of the Policies of Assurance Act, 1867.

*Whately*, for the defendants.—The order gave leave to the defendants to pay the money into court, and all costs were reserved. That order was rightly made, the case coming expressly within the terms of section 3 of the Act of 1896. Even if the plaintiff is right in his suggestion that the directors are acting unreasonably, he is not thereby prejudiced. The practice is that, when the company have paid the money into court, the claimant applies to the Chancery Division by petition or summons for payment out, under rule 5 of order 54c. In ordinary cases the company pay the money into court at their expense, and the claimant takes it out at his expense. But by rule 7, if the claimant "asks for payment of a further sum of costs by the company," he may serve the petition or summons on the company. The effect of the rules is that, on the hearing of the application for payment out, if the court should think that the company acted unreasonably in paying the money in, that matter may be set right by an order as to costs.

COLLINS, M.R.—I am of opinion that this appeal must be dismissed. The case clearly comes within the words of section 3 of the Life Assurance Companies (Payment into Court) Act, 1896. That section provides that "Subject to rules of court any life assurance company may pay into the High Court . . . any moneys payable by them under a life policy in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained." In this case an affidavit has been

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

made on behalf of the company which states that the board of directors are of opinion that no sufficient discharge can be obtained in respect of this insurance money otherwise than by payment into court under the Act. It is contended that the directors have not shown that they have any reasonable ground for being of that opinion. But the statute does not say that they need have any reasonable ground for their opinion. If it appears that they are in fact of that opinion, the directors bring themselves within the Act, and they are entitled to pay the insurance money into court and to obtain from the court an absolute discharge for the insurance money. This does not operate unfairly to the claimant, even though the company should have acted without sufficient reason in resorting to the Act, for the want of sufficient reason can be shown by the claimant in the subsequent proceedings for payment out in the Chancery Division, and then any prejudice to the claimant can be remedied by an order as to costs. If the plaintiff is right in his suggestion that the company are acting unreasonably, the result will be that the company will have obtained the protection of the court on payment of his costs.

MATHEW, L.J., concurred.

*Appeal dismissed.*

Solicitors for the plaintiff, *Church, Rendell, & Co.*

Solicitors for the defendants, *Powell & Burt*

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From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Oct. 27.

*In re* HUXTABLE.

HUXTABLE *v.* CRAWFURD. (*a.*)

*Will—Charitable legacy—Evidence—Admissibility.*

*A testatrix bequeathed £4,000 to C. "for the charitable purposes agreed upon between us":—*

*Held, that evidence was admissible to show what were the charitable purposes referred to in the will, but no further; and that as the subject-matter of the legacy on the face of the will was £4,000, evidence was not admissible to show that it was only the income of £4,000 that the testatrix had agreed should be applied for charitable purposes.*

*Decision of* Farwell, J., *on this point,* 50 *W. R.* 185, [1902] 1 *Ch.* 214, *reversed.*

Appeal from the judgment of Farwell, J. (reported 50 W. R. 185, [1902] 1 Ch. 214).

The testatrix, Mrs. Huxtable, by her will, dated the 7th of August, 1899, made the following bequest: "To my friend the Rev. Charles Hubert Payne Crawfurd I leave the sum of £4,000 sterling for the charitable purposes agreed upon between us." Testatrix died in March, 1901.

Crawfurd made an affidavit stating that about the year 1891 the testatrix first verbally informed him of her intention to leave him a sum of £4,000, the income of which he was to apply during his life for the relief of sick and necessitous persons, being members of the Church of England; and that he was to dispose of the capital after his death as his own private property. On subsequent occasions the testatrix declined to give him more specific directions about the income, stating that she was unwilling to fetter his discretion in the matter; but that at no time did she indicate any intention that the *corpus* of the bequest was to be applied for any charitable purpose.

The executors took out an originating summons in order to have the validity of the bequest to Crawfurd determined; the latter did not claim any beneficial interest whatever in the £4,000.

Farwell, J., held that the gift of the £4,000 to Crawfurd was for a limited charitable purpose, not for charitable purposes generally, and that evidence was admissible to show what the purpose was; and upon the evidence he held that there was a good bequest to the charitable purpose of the income of the £4,000 during Crawfurd's life; and that on his death the *corpus* would fall into the residuary estate.

The Attorney-General appealed.

*Sir R. B. Finlay, A.G.,* and *R. J. Parker,* for the appellant.—The will shows on the face of it a good bequest of the whole of the £4,000—not merely the income of it—for general charitable purposes. Evidence is not admissible to limit the general character of the gift expressed in the will. The whole fund is impressed with a charitable trust, and a scheme for the administration is necessary. [They were stopped by the court.]

*Butcher, K.C.,* and *Christopher James,* for the next-of-kin.—The gift is for a limited charitable purpose only, and evidence is admissible to show what that purpose was. The evidence of Crawfurd shows what the intention of the testatrix was, and is not inconsistent with the words of the bequest. Either the income of the £4,000 must be applied as the testatrix intended for limited charitable purposes, or the gift must fail altogether. To hold that this is a gift for general charitable purposes would be going beyond any of the cases, and would really be frustrating, not effectuating, the intention of the testatrix.

They referred to *Attorney-General* v. *Syderfen,* 1 Vern. 224; *In re White,* 31 W. R. 163, [1893] 2 Ch. 41; *In re Rymer,* 43 W. R. 87, [1895] 1 Ch. 19.

*Ashworth James,* for Crawfurd, did not claim any beneficial interest in the £4,000, but submitted he had a discretion as to the mode of application of the income thereof.

*Errington,* for the executors.

VAUGHAN WILLIAMS, L.J.—I regret to say that I cannot agree with the conclusion at which Farwell, J., has arrived. [The Lord Justice read the terms of the gift in the will, and continued:] I cannot doubt that the affidavit of Mr. Crawfurd is admissible in evidence, but it is admissible only for the purpose of proving matters which are not defined by the will. Evidence is admissible to show what in fact were the charitable purposes agreed upon between the testatrix and Mr. Crawfurd, but not to show what was the amount of the legacy. That is a matter which to my mind is disposed of by the plain words of the will. Then, when one looks at the affidavit and asks oneself what were the charitable purposes which were agreed upon between the testatrix and Mr. Crawfurd, those are perfectly plainly defined. They were primarily "for the relief of sick and necessitous persons, being members of the Church of England, and also towards the support of charities connected with the Church of England." To that extent this affidavit is admissible, and does define those purposes. But the affidavit goes on to deal with other matters. It deals with other matters which are plainly dealt with in the will by the testatrix herself, and which, to my mind, contradict her will in a very plain manner. By the will, what was left for these charitable purposes was a sum of £4,000. There is not a word about the subject-matter of the

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

legacy being only the income of that £4,000. But in the affidavit of Mr. Crawfurd, after stating the will, he says: "She intended to leave me a sum of £4,000, the income of which I was to apply during my life." Then he goes on to say: "I was to dispose of the principal after my death as my own private property." It seems to me that the effect of that statement is plainly to contradict the will of the testatrix. He substitutes for the £4,000, which was the subject-matter of the legacy, the income of that sum. And therefore, when I find in the judgment of Farwell, J., 50 W. R. 185, [1902] 1 Ch. 214, at p. 216, these words, "I do not see that there is any contradiction of the will in saying that 'the charitable purposes agreed upon' exhausted the whole income of the fund, but lasted only for a limited time, and did not go on for ever," I cannot agree with that statement. It seems to me that it does contradict the words of the will in which the subject-matter of the legacy for this purpose is the £4,000, and not the income of the £4,000.

Now, a good deal has been said about the question of whether there is a general charitable purpose here. I do not propose to say anything upon that subject at all, and for this reason: It seems to me that in this will, supplemented by so much of the evidence of Mr. Crawfurd as defines the object, you have plainly a limited charitable purpose defined, and that that charitable purpose so defined, in the absence of anything in the will to the contrary, is one which would go on for ever. If there was a difficulty as to how the money was to be applied, or anything else of that sort, I take it that there is amply sufficient definition here of the charitable purpose agreed upon to enable the court to direct that that purpose should be carried out, notwithstanding any deficiences there might be in the statement of the mode of application.

I think, therefore, that the decision of Farwell, J. must be reversed, and I think that there ought to be an order for a scheme here, not limited to the income of the fund, but dealing with the whole.

STIRLING, L.J.—I am of the same opinion, and really I have nothing to add. In fact I should say nothing were it not for the most unfeigned respect I feel for any judgment of Farwell, J., from whom on this occasion I am constrained to differ. Now, if there is anything which is plain on the face of this will it appears to me to be this, that the subject-matter of this legacy was £4,000 and not any limited interest in £4,000. The whole sum of £4,000 was to be devoted to the charitable purposes referred to, whatever they might be. In the face of that Farwell, J., has made an order by which he has held that what is applicable for charitable purposes is only the income of the fund during the lifetime of Mr. Crawfurd. I confess I am unable to see how that is consistent with the will. The question arises in this way: Mr. Crawfurd has made an affidavit to the admission of which I understand the Attorney-General makes no objection. Mr. Crawfurd says that conversations took place between the testatrix and himself with reference to the legacy of £4,000 which the testatrix said that she meant to leave him; and that he was to apply the income of that £4,000 during his own life for certain charitable purposes which he names, and at his death he was to be at liberty to dispose of it as his own private property. I am of opinion that that affidavit is only admissible for the purpose of ascertaining what the charitable purposes were which are referred to in the will, and no further. The fact that those charitable purposes were only to continue during the lifetime of Mr. Crawfurd, and that on his death the fund was to cease to be a charitable fund, is entirely irrelevant for the purpose for which this evidence is admissible. If the affidavit, for instance, had said that a conversation had taken place with reference to £2,000, and by her will the testatrix had left £4,000 for charitable purposes, it never could be contended, as it seems to me, that the legacy was to be cut down, and that the charities were only to have £2,000, because the conversation related to £2,000, whereas by her will she expressly said that £4,000 was to be applied to charity. It seems to me, in like manner, that as the will says that the capital sum of £4,000 was to be applied to charitable purposes, it is not competent for the court to look at this evidence for the purpose of cutting down the charitable interest to the income of £4,000 during the life of the legatee. For those reasons I entirely agree with what has been said by my lord, and I think that this appeal ought to be allowed.

COZENS-HARDY, L.J.—I agree. It seems to me that the will fixes absolutely the subject-matter of the gift—viz., £4,000, and that Mr. Crawfurd's affidavit may be referred to for one purpose only—*i.e.*, to ascertain what are the charitable purposes. Looking at that affidavit, those charitable purposes are perfectly clearly defined. I think, therefore, that the order of Farwell, J., must be reversed so far as it is complained of. There must be a declaration that the corpus and income of the £4,000 are held upon the charitable trusts mentioned in the affidavit of Mr. Crawfurd. And a scheme can be settled in chambers.

*Appeal allowed.*

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitors for the respondents, *H. S. Clutton & Johnson; Walters, Johnson, Bubb, & Whatton; Bridges, Sawtell, & Co.*

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## High Court of Justice.

Chan. Div. } Nov. 6.
Byrne, J. }

*In re* PYNE.
LILLEY *v.* ATTORNEY-GENERAL. (*a.*)

*Charity—Disposition—Trustees—Scheme by court or sign-manual.*

*Where a testator gives property to trustees on general charitable trusts, but indicates no definite objects, the proper mode of carrying out the objects of the testator is by a scheme of court and not by sign-manual.*

This was a summons to determine whether the trusts of a gift of the ultimate residue of a testatrix's estate (which the court had previously held to be a good trust for charitable purposes) should be carried out by a scheme under the court or by the king's sign-manual.

The facts of the case were as follows:

By her will, bearing date the 9th of September, 1897, Sarah E. Pyne appointed the plaintiffs executors and trustees thereof, and after certain specific devises and bequests, gave the residue of her freehold estates and all her leasehold estates (if any) and the residue of her personal estate to her trustees upon trust for sale and conversion, and directed that

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

after payment of debts and funeral and testamentary expenses the said trustees should stand possessed of the "residue or surplus thereof in trust for such charitable purposes and in such shares and proportions as may be hereafter set forth in any codicil or codicils to this my will." Testatrix died on the 4th of May, 1899, and the will was duly proved.

*Methold*, for the plaintiffs.—It is the usual practice in these cases to direct a scheme: *Moggridge* v. *Thackwell*, 7 Ves. 36; *Paice* v. *The Archbishop of Canterbury*, 14 Ves. 364; *In re White*, 41 W. R. 683, [1893] 2 Ch. 41.

*R. J. Parker*, for the Attorney-General.—*Moggridge* v. *Thackwell* is not clear, and the older cases are conflicting. It is desirable that the rights of the Crown as to directing a scheme by sign-manual, and of the court to direct a scheme should be determined.

[BYRNE, J., referred to *In re Davis*, 50 W. R. 378, [1902] 1 Ch. 876.]

BYRNE, J. (after stating the facts).—The leading case on the subject is *Moggridge* v. *Thackwell*. There a testatrix gave "all the rest and residue of my personal estate unto James Vaston, of Clapton, of Middlesex, gentleman, his executors and administrators, desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good character; and I appoint the said John Moggridge and Mr. Vaston before-mentioned executor of this my will; and I desire Robert Woodford, of Taplow, Bucks, Esq., and the aforesaid Richard Wicherley to aid and assist my executors." A decree was made by Lord Thurlow that the residue of the testatrix's personal estate passed by her will and ought to go and be applied in charity, regard being had to clergymen with good characters and large families, according to the recommendation in the will; and that the master should approve of a scheme to effect the purposes of the said charity, with liberty for the parties to lay a scheme before him for that purpose. The case was brought before Lord Rosslyn for directions on the master's report, and ultimately before Lord Eldon, who considered the question by what means the general charitable intention was to be carried into effect. After referring to cases on the question of the construction of the will, Lord Eldon says: "These cases call upon me to say that the general intention of the testatrix, who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity; and according to these precedents Vaston was only the means and instrument by which that general intention was to be executed; and therefore this court will carry this general intention into effect." He goes on: "The next question, by what means that is to be done, is a most difficult question; for it being established that when money is given to charity generally or indefinitely without trustees or objects selected, the king as *parens patriæ* is the constitutional trustee, it is very difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification and a case in which by matter *ex post facto* the gift stands before the court in consequence of that accident, as if it had originally been given indefinitely, without any means for carrying it into execution prescribed. All I can say upon it is, I do not know what doctrine could be laid down that would not be met by some authority upon this point; whether the proposition is that the Crown is to dispose of it, or the master by a scheme." Then, after referring to authorities, he concludes: "Therefore I rather think the decree is right. I have conversed with many persons upon it. I have great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted, but the general principle thought most reconcilable to the cases is, that when there is a general indefinite purpose not fixing itself upon any object, as this in a degree does, the disposition is in the king by sign-manual; but where the execution is to be by a trustee with general or some objects pointed out, then the court will take the administration of the trust." In *Paice* v. *The Archbishop of Canterbury* executors were appointed and the gift was "All the remainder of my different bequests I give and bequeath to the Archbishop of Canterbury and the Archbishop of York for the time being in trust for charitable purposes, and anything not specified I commit to the discretion of my executors." That is to my mind very similar to the gift in the present case, for I read it as equivalent to a gift for general charitable purposes. In giving judgment the Lord Chancellor (Lord Eldon) says: "Therefore, after the donation to be made by the executors to the poor, the extent of which is almost unlimited, the general residue is to go to charitable purposes, and must be the subject of a scheme before the master. Where the bequest is to trustees for charitable purposes, the disposition must be in that mode; but where the object is a charity without a trust interposed, it must be by sign-manual. That is the distinction which I adopted in the case of *Moggridge* v. *Thackwell*." So Lord Eldon explains any difficulty which might have arisen as to what it was he decided in *Moggridge* v. *Thackwell*. I think the present is a case in which a scheme ought to be directed.

Solicitors, *Alfred Jonas; Solicitor for the Crown.*

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Chan. Div.
Swinfen Eady, J. } Dec. 4.

*In re* SMYTHIES.
WEYMAN *v.* SMYTHIES. (*a.*)

*Will—Legacy—Ademption—Particular purpose.*

*A testator gave a legacy of £500 to his great-niece; by a subsequent settlement he settled a sum of £500 for her benefit.*

*Held, that the legacy was not adeemed.*

Originating summons.

This was an originating summons to determine the question whether a legacy of £500 given by a codicil had been adeemed by a subsequent settlement by the testator of a sum of £500 in favour of the legatee.

The testator, George Smythies, by a codicil dated the 23rd of June, 1896, bequeathed a legacy to his great-niece as follows: "I give and bequeath to Mrs. Georgina Sophia Smythies the legacy or sum of £500 free of all estate or other duty, in trust for my great-niece, Eva Marion Smythies, for her own sole use and benefit, and I direct that such legacy shall be paid to the said Eva Marion Smythies either in whole or in part at such time or times and in such manner as the said Georgina Sophia Smythies may in her discretion think fit."

By a settlement dated the 24th of October, 1900, and made between the testator of the one part, and Georgina Sophia Smythies of the other part, it was

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

provided that the said Georgina Sophia Smythies should retain a sum of £500 in trust to invest the same and to pay or apply the income arising therefrom to or towards the maintenance, education, and benefit of Eva Marion Smythies until she should attain the age of twenty-four years or marry under that age, and on her attaining that age or marrying to pay the principal to her.

The testator died on the 18th of December, 1900.

*Clare*, for the executors.

*Hon. Frank Russell*, for the residuary legatees.

*Brinton*, for the great-niece and her trustee.

SWINFEN EADY, J., in giving judgment, said: As the testator was not *in loco parentis* to his great-niece, the legacy is not adeemed unless it appears on the face of the codicil to have been given for a particular purpose. [His lordship referred to the cases of *Pankhurst* v. *Howell*, 19 W. R. 312, L. R. 6 Ch. App. 136, 138; and *In re Pollock*, 28 Ch. D. 552, at p. 556, 33 W. R. Dig. 242 ] A mere general legacy to A. for the benefit of B., an infant, is not given for a particular purpose within the rule. The legacy in question is not for a particular purpose. The legacy is therefore not adeemed.

Solicitors, *Chester & Co; Hewlett, Birch-Reynardson, & Bucknill.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) Nov. 3.

REX *v.* JUSTICES OF THE TEWKESBURY DIVISION OF GLOUCESTERSHIRE. (*a.*)

*Poor law—Rating—Appeal to special sessions—Notice of appeal to parish council—Parochial Assessment Act*, 1836 (6 *& 7 Will.* 4, *c.* 96), *s.* 6—*Local Government Act.* 1894 (56 *& 57 Vict. c.* 73), *s.* 6, *sub-section* 1; *s.* 52, *sub-section* 5.

*In all cases where an appeal is made under section* 6 *of the Parochial Assessment Act*, 1836, *to special sessions against a poor rate made in a rural parish having a parish council, it is, since the passing of the Local Government Act*, 1894, *a condition precedent that notice of appeal should have been given to the parish council.*

Rule for a *mandamus* to justices of the Tewkesbury Division of Gloucestershire calling upon them to hold a special sessions and hear a rating appeal.

On the 17th of October, 1901, a poor rate was made and published by the overseers of the parish of Leigh, which is a rural parish having a parish council, wherein William Clifford was rated in respect of the Swan Inn.

Clifford gave notice of objection to the valuation list to the assessment committee, but they refused to give any relief in respect of the matter of the objection.

Clifford then caused notice of appeal to the special sessions against the rate to be served on the assessment committee and on the overseers of the parish.

On the 12th of June, 1902, the appeal came on for hearing, when counsel for the assessment committee, who appeared as respondents, objected that the justices had no jurisdiction to hear the appeal, on the ground that it was a condition precedent to the hearing of the appeal that the parish council should be served with notice of the appeal, which had not been done.

The justices upheld the objection and dismissed the appeal.

The appellant thereupon obtained a rule *nisi* for a *mandamus.*

*C. F. Vachell* shewed cause.—It is, since the passing of the Local Government Act, 1894, a condition precedent to the hearing of an appeal at special sessions against a poor rate made in a rural parish having a parish council that notice of the appeal should have been served by the appellant on the parish council. By section 6 of the Parochial Assessment Act, 1836, the justices are to hold four special sessions in the year for hearing appeals against rates, and at such sessions they are to hear and determine all objections to any rate, provided that "no such objection shall be inquired into by the said justices in special session unless notice of such objection in writing under the hand of the complainant shall have been given seven days at least before the day appointed for such special session to the collector, overseers, or other persons by whom such rate was made." Then by the Local Government Act, 1894, it was provided by section 6, sub-section 1, that upon the parish council of a rural parish coming into office there should be transferred to it "the powers, duties, and liabilities of the overseers, or of the churchwardens and overseers of the parish with respect to . . . (i.) appeals or objections by them in respect of the valuation list, or appeals in respect of the poor rate." *Reg.* v. *De Grey*, 48 W. R. 348, [1900] 1 Q. B. 521, is distinguishable from the present case, as in the former the appeal was not to special sessions but to quarter sessions: see 17 Geo. 2, c. 38, s. 4. In *Reg.* v. *Justices of Kent*, 80 L. T. Rep. 622, 47 W. R. Dig. 108, it was held that notice to the parish council was necessary.

He also cited *Reg.* v. *The Justices of Surrey*, 29 W. R. 260, 6 Q. B. D. 100, and *Reg* v. *The Justices of Salop and Wood*, 12 Times L. R. 526.

*Brook Little*, in support of the rule.—The fact that an appellant has under section 6 of the Act of 1836 to give notice of appeal to the overseers does not constitute that obligation a power, duty, or liability of the overseers. Section 6 of the Act of 1894, therefore, does not substitute the parish council for the overseers as the persons on whom notice of appeal should be served. The expression "parish council" must not be read into section 6 of the Act of 1836 in place of the words "collector, overseers, or other persons by whom the rate is made." To do so would involve an absurdity, as the overseers still have to make a rate; the parish council have no power to do so. The Legislature never intended such a thing. "Overseers" can only be read as referring to the parish council where some "liability" of the overseers has been transferred to the parish council.

He referred to *Reg.* v. *Trafford*, 15 Q. B. 200, and *Reg.* v. *Eyre*, 5 W. R. 55, 6 E. & B. 992.

Lord ALVERSTONE, L.C.J.—In this case a rule for a *mandamus* was obtained calling upon the justices to hold a special session and hear a rating appeal. The principal question we have to consider is whether it is necessary that notice of appeal should have been given to the parish council.

Counsel in support of the rule contended, firstly, that even if the Local Government Act, 1894, had not been passed, the justices in session would still have been bound to hear and adjourn the appeal, because the provision in section 4 of the Poor Relief Act, 1743 (17 Geo. 2, c. 38), as to

(*a.*) Reported by E. G. STILLWELL Esq., Barrister-at-Law.

adjourning where reasonable notice has not been given must be taken to have been imported into the Parochial Assessment Act, 1836. In my opinion the Act of 1836 was intended to give a special remedy with special limitations. The language of the proviso is distinct. The justices are to hold four special sessions in the year for the hearing of appeals and objections to rates, "Provided always, that no such objection shall be inquired into by the said justices . . . unless notice of such objection in writing under the hand of the complainant shall have been given seven days at least before the day appointed for such special session," to the overseers. It is too late now to suggest that, although the justices are not to inquire into such an objection, they are bound to enter and adjourn the appeal.

Secondly, it was contended that even if notice to the overseers was necessary before the Act of 1894, it need not now be given to the parish council. Section 6, sub-section 1 (c), of the Act of 1894 provides that upon a parish council coming into office there shall be transferred to it "The powers, duties, and liabilities of the overseers . . . of the parish with respect to (i.) appeals or objections by them in respect of the valuation list, or appeals in respect of the poor rate, or county rate, or the basis of the county rate." It is difficult to see why these words do not include, with respect to appeals and objections, the duty of the overseers to maintain the correctness of the rate. There may no doubt be duties which are not transferred, but in my opinion this particular duty was so transferred. I think that it was intended by that section that the parish council should have a voice in saying whether an appeal should be resisted. Then, by section 52, sub-section 5, it is provided that "All enactments in any Act, whether general or local and personal, relating to any powers, duties, or liabilities transferred by this Act to a parish council . . . from justices, or the vestry, or overseers, or churchwardens and overseers," are to be construed as if any reference therein to justices or to the vestry, or to the overseers, or to the churchwardens and overseers referred to the parish council. It seems to me to be obvious, from the general words here used that they are meant to apply in all cases where it can reasonably be said that the duties transferred are duties in which the parish council are interested. If the duty of maintaining the correctness of the rates is one of the duties transferred, it is clear that it is one which relates to the powers of the parish council. I think that under the provisions of section 6 of the Act of 1836, and of section 6 of the Act of 1894, notice should have been given to the parish council. This rule must therefore be discharged.

WILLS, J.—I am of the same opinion.

CHANNELL, J.—I also agree.

*Rule discharged.*

Solicitors for the justices, *Badham & Comins*, for *Brookes & Badham*, Tewkesbury.

Solicitors for the prosecutor, *Peacock & Goddard*, for *Arthur Lamb*, Cheltenham.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — Nov. 3.

TROMANS (*Appellant*) v. HODKINSON (*Respondent*). (a.)

*Gaming—Betting—Place used for betting—Bar of public-house—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

*A bookmaker was in the habit of frequenting the bar of a licensed house at certain hours for the purpose of there carrying on a ready-money betting business with persons who resorted thereto, and who knew that he carried on such business there. The carrying on of this business was also known to the landlord, and pursued under some arrangement or understanding with him.*

*Held, that the bookmaker used the bar for the purpose of betting with persons resorting thereto, contrary to the provisions of section 3 of the Betting Act*, 1853.

Belton *v.* Busby, 47 *W. R.* 636, [1899] 2 *Q. B.* 380, *approved and followed.*

Case stated.

At a petty sessions held at Old Hill, in the county of Stafford, two informations were preferred against the appellant by the respondent Hodkinson (inspector of police) that the appellant on the 26th and 31st days of March, 1902, at Cradley Heath, in the county of Stafford, being a person using the Railway Inn, Cradley Heath, did unlawfully use the same for the purpose of betting with persons resorting thereto, contrary to section 3 of 16 & 17 Vict. c. 119 (the Betting Act, 1853).

At the same court four informations were also preferred by the respondent that one Thomas Insull, on the 26th and 31st of March and on the 1st and 5th of April, 1902, did at the Railway Inn commit offences against section 3 of the same Act similar to the offences preferred against the appellant, and four informations were also preferred at the same court by the respondent against one Thomas Scriven for permitting the Railway Inn to be opened, kept, and used for the purpose of betting on certain events and contingencies of and relating to certain horse-racing, contrary to section 3 of the same Act.

These informations against the appellant and Scriven and Insull were (at the request of the defendants) heard together in the month of April, 1902, when the justices convicted each of the defendants, and fined the appellant £200 and costs, Scriven £100 and costs, and Insull £25 and costs.

Upon the hearing of the informations the following facts were proved or admitted.

Thomas Scriven was occupier and proprietor of the Railway Inn, a fully-licensed house, in which among other rooms was a room known as the bar or taproom, to which customers of the hotel as such had access, and Scriven was the person licensed in respect thereof. The appellant was a ready-money professional bookmaker, and Insull was a clerk employed by the appellant in his said business.

The appellant was on the 26th of March, 1902, from about the hour of 1 p.m. until about 2.30 p.m., at the Railway Inn, and his clerk Insull was also there. The appellant was for part only of such time present in the bar or taproom of the hotel, but his clerk Insull was there present during the whole of such time. The appellant and Insull went to the bar or taproom for the purpose of making, and each of them there made ready-money bets with persons resorting thereto, and Insull in so acting was acting for and on behalf of the appellant, the payments—

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

being winnings on bets made on some former occasions—were then made by the appellant to applicants in the bar or taproom of the inn after referring to a certain book in his possession.

The appellant and Insull were on the 31st of March, from about 1.30 p.m. to 2 p.m., in the bar or taproom. Each of them went to the bar or taproom for the purpose of making ready-money bets with persons resorting thereto. Ready-money bets were there made by Insull, and payment being winnings on a bet made on the preceding day with Insull was there made by the appellant, and such bets and payments were made by Insull acting for and on behalf of the appellant.

The appellant was in the habit of frequenting the inn for the purpose of there carrying on, and he carried on in the bar or taproom thereof at stated hours, a ready-money betting business with persons resorting thereto, the carrying on of which in the bar or taproom was known to such persons, and was known to and pursued under some arrangement or understanding come to with Thomas Scriven, the landlord.

At the hearing before the justices no evidence was given that the appellant when at the inn obtained refreshments or used the house for that purpose or was a customer thereof, nor did it appear that the appellant had any interest in the Railway Inn or the business of the inn, or that he had any control over or took any part of the management of the inn, or that in the betting business carried on in the bar or taproom he occupied any specific part of the bar or taproom.

On the part of the appellant it was contended that he could not be convicted on the grounds that the bar or taproom was not a "place" within the meaning of 16 & 17 Vict. c. 119, and that the use of the bar or taproom by the appellant was not a user by him thereof for the purpose of betting with persons resorting thereto within the meaning of that Act.

The following cases were called to the attention of the justices: *Powell* v. *Kempton Park Racecourse Co.*, 47 W. R. 585, [1899] A. C. 143; *Belton* v. *Busby*, 47 W. R. 636, [1899] 2 Q. B. 380.

The justices, acting on the authority of *Belton* v. *Busby*, were of opinion and held that such bar was a "place," and that the appellant's actions amounted to a user of the same for the purpose of betting, contrary to the provisions of section 3 of that Act, and they convicted the appellant. From this decision the appellant now appealed.

The question for the opinion of the court was whether the justices, upon the above statement of facts, came to a correct decision in point of law.

*G. H. Stutfield*, for the appellant.—The decision of the justices was wrong. They did not find that the appellant had any control of, or that he was owner or occupier of the bar or part of the bar or of the place so as to bring him within the meaning of the Act. The person "using the same" means a person who is in control and occupation of the place using the same. In the present case the appellant was neither owner nor occupier, nor was he a person in control and occupation of this bar or taproom, and not being so, he cannot be convicted as a person using the same: *vide* judgment of Lord Halsbury, L.C., in *Powell* v. *Kempton Park Racecourse Co.* Standing by while the betting is taking place does not bring a person within the Act so as to make him a "person using the place" within the meaning of the Act. The appellant was present merely as an ordinary customer. In the case of *Belton* v. *Busby* there was much stronger evidence of a contract and of a user than in the present case. In that case the defendant had the permission of the landlord to use the bar for his betting business. In the present case the appellant ought not to be convicted as there is no evidence that he was in any way in possession, occupation, or control of the place.

*W. Shakespeare*, for the respondent, was not called upon.

Lord ALVERSTONE, L.C.J.—In this case, counsel for the appellant was not in a position to dispute that the bar of this public-house was a "place" within the meaning of the Act, but he contended that because the appellant had not been proved to have had a distinct license from the landlord of the house, he, therefore, had no interest in the house, and ought not to be convicted. It seems to me, however, that apart from the decision in the case of *Belton* v. *Busby* the facts found by the magistrates in the present case bring it within the rule laid down by this court, that if it is found that a person is using a place within the meaning of the Act for the purpose of carrying on his betting business, then the case does not come within the rule laid down in the case of *Powell* v. *Kempton Park Racecourse Co.* In the present case the magistrates have found that the appellant was in the habit of frequenting the inn for the purpose of there carrying on, and that he did carry on, in the bar or taproom thereof, a ready-money betting business with persons who resorted thereto for such purpose, and that the carrying on of such business was known to and pursued under some arrangement with the landlord. In my opinion such statement of facts conclusively shows that a breach of the statute took place. The decision in *Belton* v. *Busby* was upon similar facts to those in the present case, and is an authority to show that this ruling is a proper one upon such facts. I therefore think that the conviction in this case was right, and that this appeal ought to be dismissed.

WILLS, J.—I am of the same opinion. I also think that the decision in the case of *Belton* v. *Busby* was right. The mere fact that the appellant in this case did not take any refreshment does not seem to me to be a cardinal fact.

CHANNELL, J.—I also am of the same opinion. The facts found in this case clearly show that this place was used by the appellant as if it were a betting office, which, according to the test laid down in the case of *Powell* v. *Kempton Park Racecourse Co.*, is sufficient to bring the case within the Act.

*Conviction affirmed and appeal dismissed.*

Solicitors for appellant, *Judge & Priestley*, for *Philip Baker & Co.*, Birmingham.

Solicitors for respondent, *Wainwright & Co*, for *J. W. Clulow*, Brierley Hill.

## IN BANKRUPTCY.

K. B. Div. (Wright, J.) Dec. 3.

*In re* SALMON.
*Ex parte* THE TRUSTEE.

*Bankruptcy—Mortgage reserving right of consolidation—Subsequent mortgages of same property—Third mortgage including other property—Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 17.

*The provisions of section* 17 *of the Conveyancing Act,* 1881, *enabling a mortgagor to redeem one mortgage without redeeming other mortgages made by him, only applies where there are several mortgages on different properties of the same mortgagor.*

*Where a first mortgage contains a proviso excluding the operation of section* 17, *that proviso is to be applied to subsequent mortgages by the same mortgagor, though they may not contain similar provisions.*

Motion by the trustee in the bankruptcy of R. H. Salmon for a declaration that he was entitled to redeem the property comprised in a mortgage dated the 23rd of February, 1901, without redeeming two other mortgages dated the 9th of May, 1883, and the 19th of March, 1900.

On the 9th of May, 1883, the bankrupt executed a first mortgage of a freehold house, which contained a proviso that the mortgagor or any person taking title under him should not, "in respect of the redemption of the mortgage hereby created, have or be entitled to any of the powers expressed to be conferred on a mortgagor by section 17 of the Conveyancing Act, 1881."

On the 19th of March, 1900, the bankrupt executed a second mortgage of the same premises to the respondents to the present application; and on the 23rd of February, 1901, he executed another mortgage on the same house, an annuity, and a policy of insurance on his life to a third party. Neither the second or third mortgages contained any proviso excluding the operation of section 17 of the Conveyancing Act, 1881.

A receiving order was made against Salmon on the 24th of July, 1901, and he was subsequently adjudicated bankrupt.

By two indentures, dated respectively the 11th and 18th of August, 1902, the first and third mortgages were transferred to the respondents, the second mortgagees.

The trustee in the bankruptcy now claimed to redeem the third mortgage without redeeming the first and second.

*Hansell*, for the trustee.—By section 17 of the Conveyancing Act, 1881, a mortgagor seeking to redeem any one mortgage is entitled to do so "without paying any money due under any separate mortgage made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem." In the present case that section is only excluded by the proviso in the first mortgage, which must be limited to the property comprised in that mortgage, and cannot extend to the other mortgages, which comprise other property.

He cited *Farmer* v. *Pitt*, 50 W. R. 453, [1902] 1 Ch. 954.

*Clauson*, for the respondents.—Section 17 has no application to the present case; it is limited to cases where there are several mortgages on differen properties of the same mortgagor. Further, the proviso in the first mortgage expressly excludes the operation of that section.

He cited *Pledge* v. *White*, 44 W. R. 453, [1896] A. C. 187.

*Hansell* replied.

WRIGHT, J.—It seems to me that section 17 of the Conveyancing Act, 1881, does not apply to a case like this, but only to cases where there are several mortgages, each on different properties of the same mortgagor. I think the language of the section indicates that intention, and it seems to me that that view is borne out by sections 1 and 2. Moreover, in this case the first mortgage contains a clause which reserves the right of consolidation, an express contract excluding the operation of section 17. It has been argued that that clause should be limited to the property comprised in the first mortgage, but, in my view, if that contract were to be confined to the first mortgage it would have no effect at all, because it is impossible to give any effect to it until other mortgages come into existence to which it can be applied. In my judgment there is nothing here to exclude either the second or the third mortgage from the operation of the proviso in the first, and the respondents, therefore, by virtue of that contract, have expressly reserved to them the right to consolidate all three mortgages. It must follow, then, that the trustee cannot redeem the third mortgage without redeeming the first and second as well.

*Application dismissed. The order dismissing the application was, by consent of the trustee, drawn up in the common form of a foreclosure judgment.*

Solicitors for the trustee, *Simpson & Cullingford.*

Solicitors for the respondent, *Collyer-Bristow & Co.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

## Privy Council.

(*From the Supreme Court of Canada.*)

Nov. 13.

THE IMPERIAL BANK OF CANADA *v.* THE BANK OF HAMILTON. (*a.*)

*Banker—Cheque—Certification—Fraudulent alteration of amount—Negligence—Notice to bank giving credit—Mistake of facts—Actual knowledge.*

*A cheque for a specified sum drawn upon the Bank of H. was certified by that bank, but was afterwards fraudulently altered by the drawer to a larger amount than that for which originally drawn and certified, and was paid by him into his account at another bank, which gave him credit for the larger amount and passed the cheque so altered through the clearing house in the usual way, and obtained payment thereof from the Bank of H. The Bank of H. were not actually aware of the fraud at the time of payment, but ascertained it from their books next day, when they required repayment of the increase from the other bank.*

*Held, that as the money was honestly paid by the Bank of H. under a mistake of facts, it could be recovered back, there being no negligence or want of notice to prejudice this right.*

Appeal from the Supreme Court of Canada.

The facts are given in their lordships' judgment.

*Blake, K.C.*, and *Bucknill, K.C.* (both of Colonial bar), for the appellants.

*Sir R. Reid, K.C.*, and *Douglas, K.C.* (of Colonial bar), for the respondents.

The judgment of their lordships (Lords MACNAGHTEN, ROBERTSON, and LINDLEY, and Sir ARTHUR WILSON) was delivered by

Lord LINDLEY.—The question raised by this appeal is whether the Bank of Hamilton is entitled to recover from the Imperial Bank of Canada a sum of 495 dollars paid to it in respect of a cheque under the following circumstances:

One Bauer was a customer of the Bank of Hamilton, and he drew a cheque upon that bank for five dollars. The word five was written and a considerable space was left between that word and the next words printed on the cheque. The cheque was dated the 25th of January, 1897, and on that day Bauer took it to the Bank of Hamilton and got it marked or certified with the bank's stamp; he then took it away with him. The effect of this marking or certifying was examined and explained by this Board in *Gaden* v. *Newfoundland Savings Bank*, [1899] A. C. 281, at p. 285, 47 W. R. Dig. 9. The effect was to give the cheque additional currency by showing on its face that it was drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of Bauer who drew it the credit of the Bank of Hamilton on which it was drawn. The cheque was a good cheque for five dollars, and if it had not been altered the Bank of Hamilton would have paid it as a matter of course and no difficulty would have arisen. But after Bauer had got it marked, he wrote in the word "hundred" after the word five. The cheque then appeared to be a certified cheque for 500 dollars. There can be no doubt that the condition of the cheque when certified afforded opportunity for this fraudulent alteration; and if the principle laid down in *Young* v. *Grote*, 4 Bing. 253, could still be acted upon, the Bank of Hamilton would as between themselves and an innocent holder for value be estopped from denying that the cheque was a certified cheque for 500 dollars. But after the decision of the House of Lords in *Scholfield* v. *Earl of Londesborough*, 45 W. R. 124, [1896] A. C. 514, it was hopeless to contend that by the law of England the Bank of Hamilton was not at liberty to prove that the cheque had been fraudulently altered after it had been certified by the bank. Whether the French law which prevails in Lower Canada is the same in this respect as the law of this country and of Ontario has not to be determined, for the French law has no application to this case.

Bauer took the cheque as altered to the Imperial Bank of Canada and opened an account with it. The cheque was placed to his credit; he forthwith drew cheques upon the account so opened and those cheques were honoured in the usual course of business. The cheque in question was passed by the Imperial Bank of Canada through the clearing house at Toronto and was paid by the Bank of Hamilton on the morning of the 27th of January, 1897, the fraud not having been then discovered.

It is proved by the evidence that certified cheques apparently in order and presented through the clearing house are paid as a matter of course, and that it is not usual with bankers to turn to their customers' accounts on the day marked cheques are presented for payment through the clearing house to see whether there is anything wrong before paying them. It is, however, usual to check the returns with the customer's accounts the next day, and then to enter the cheques paid the day before. In conformity with this practice the Bank of Hamilton paid the cheque on the 27th of January without looking at Bauer's account in their ledger; but on the next day—*i.e.*, the 28th of January—they turned to it, and at once discovered the fraud. The Bank of Hamilton immediately gave notice to the Imperial Bank of Canada, and demanded repayment of 495 dollars, being the amount paid by the Bank of Hamilton in respect of the cheque less the five dollars for which it was drawn and certified. This demand not having been complied with, the present action was brought by the Bank of Hamilton to recover the 495 dollars. The action was defended on three grounds—viz., 1st, because the Bank of Hamilton was negligent in marking the cheque with the blank in it; 2nd, because the Bank of Hamilton was negligent in paying the forged cheque without first turning to Bauer's account; 3rd, because notice was not given to the Imperial Bank of Canada on the 27th of January, the day on which the cheque was paid.

The action was tried by McMahon, J., without a jury, and he gave judgment for the plaintiffs—*i.e.*, the Bank of Hamilton. From this judgment the Imperial Bank of Canada appealed, and the Court of Appeal affirmed the judgment of McMahon, J., but Armour, C.J., dissented. From this decision the Imperial Bank of Canada again appealed to the Supreme Court, which again affirmed the decision appealed from, Gwynne, J., however, dissenting. The present appeal is from their decision.

The learned counsel for the appellants did not seriously rely upon the first of the three grounds of defence, feeling it to be untenable after the decision in *Scholfield* v. *Earl of Londesborough*, to which reference has already been made. They relied on the second and third grounds, on which alone there was any difference of opinion in the courts below.

As regards negligence in paying the cheque: It cannot be denied that when the Bank of Hamilton paid the cheque on the 27th of January it had the means of ascertaining from its own books that the

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

cheque had been altered. But means of knowledge and actual knowledge are not the same; and it was long ago decided in *Kelly* v. *Solari*, 9 M. & W. 54, that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since, and their lordships consider it applicable to the present case. There was nothing on the face of the cheque to excite suspicion, nor to lead the clerk who cashed the cheque to take the unusual course of referring to Bauer's ledger account to see if all was right before cashing it. Moreover even if negligence in this respect could be imputed to the Bank of Hamilton, such negligence did not induce the Imperial Bank of Canada to treat the cheque as good and to give Bauer credit for its amount. That has been done already. These were the reasons which induced the courts below to decide against the second ground of defence, and their lordships have no hesitation in coming to the same conclusion.

There remains the third ground, which is based upon a supposed hard and fast rule referred to by Armour, C.J., who said: "In my opinion this case is governed by the rule laid down in *Cocks* v. *Masterman*, 9 B. & C. 902, where it is said 'But we are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or dishonoured bill, and that if he receives the money and is suffered to retain it during the whole of that day the parties who paid it cannot recover it back.' This rule, rigorous though it may be, has been adhered to in England ever since: see *Mather* v. *Lord Maidstone*, 18 C. B. 273, 4 W. R. C. L. Dig. 144; *Durrant* v. *Ecclesiastical Commissioners*, 29 W. R. 443, 6 Q. B. D. 234; *Leeds Bank* v. *Walker*, 11 Q. B. D. 84, 31 W. R. Dig. 8; *London and River Plate Bank* v. *Liverpool Bank*, [1896] 1 Q. B. 7, 44 W. R. Dig. 20; Byles on Bills (16th ed.), 353. The application of this rule does not at all depend upon whether the holder of the bill is or is not in fact prejudiced by the delay, for the conclusion in law is that he may be prejudiced, and this is the reason of the rule. In this case the defendants, the holders in due course of the cheque, presented it to the plaintiffs on the 27th of January through the clearing house, and it being due on presentation, the defendants were entitled to know on that day whether it was honoured or dishonoured. The plaintiffs paid the cheque through the clearing house on that day, but this payment was, in my opinion, conditional upon their right to dishonour the cheque during that day, but not having dishonoured the cheque during that day such payment became absolute, and the defendants having received the money for the cheque from the plaintiffs, and being suffered to retain it during the whole of that day, the plaintiffs cannot recover it back."

The prejudice which it is suggested that the Imperial Bank of Canada may have suffered from want of notice of dishonour on the 27th of January consists in their inability to take proceedings on that day against Bauer for the fraud which he had committed. But no one suggests that Bauer could have paid anything if he had then been proceeded against. The bank was not deprived of any of its rights against him, nor was its position altered by reason of notice of the forgery not being given until the day after the bill was paid. But quite apart from the fact that the appellants were not in any way prejudiced by want of notice on the day of payment, it appears to their lordships that the stringent rule referred to in the foregoing extract from the judgment of Armour, C.J., does not really apply to this case. The cheque as drawn and certified—*i.e.*, for five dollars—was never dishonoured, and no question arises as to that. The cheque for the larger amount was a simple forgery; and Bauer, the drawer and forger, was not entitled to any notice of its dishonour by non-payment. There were no indorsers to whom notice of dishonour had to be given. The law as to the necessity of giving notice of dishonour has therefore no application. The rule laid down in *Cocks* v. *Masterman*, and recently re-asserted in even wider language by Mathew, J., in the *London and River Plate Bank* v. *Bank of Liverpool* has reference to negotiable instruments on the dishonour of which notice has to be given to some one—viz., to some drawer or indorser who would be discharged from liability unless such notice were given in proper time. Their lordships are not aware of any authority for applying so stringent a rule to any other cases. Assuming it to be as stringent as is alleged in such cases as those above described, their lordships are not prepared to extend it to other cases where notice of the mistake is given in reasonable time and no loss has been occasioned by the delay in giving it.

Their lordships, therefore, will humbly advise His Majesty to dismiss this appeal and the appellants must pay the costs.

Solicitors, *S. V. Blake; Harrison & Powell.*

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## Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Nov. 11.

MOREL BROTHERS & CO. *v.* EARL OF WESTMORLAND. (*a.*)

*Married woman—Authority of wife to pledge husband's credit—Necessaries—Action against husband and wife jointly, severally, and in the alternative—Presumption of agency—Presumption of authority to pledge joint credit—Judgment against wife—Right to proceed against husband—Election—Practice—Ord.* 14, *r.* 5.

*A husband, by arrangement with his wife, made an annual allowance of a substantial sum for the expenses of their household. Tradesmen who supplied goods for the use of the household on the orders of the wife sued the husband and wife for the price, claiming against them jointly. The plaintiffs obtained judgment against the wife under order* 14 *and proceeded with the action against the husband.*

*Held, that the ordinary presumption that a wife has authority to pledge her husband's credit for necessaries was rebutted.*

*Held, also, that, even if any such presumption could be made, at any rate the presumption that the wife had authority to pledge the joint credit of her husband and herself could not be made.*

*Held, also, that, if the plaintiffs' claim could be amended by adding a claim against the defendants severally or in the alternative, the plaintiffs, having obtained judgment on their several claim against the wife, were debarred from setting up an inconsistent claim against the husband.*

*The special provision contained in ord.* 14, *r.* 5, *that a plaintiff who has obtained judgment under that order against one of two defendants may proceed with the action against the other, does not apply where the plaintiff claims against the defendants in the alternative.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Application by the defendant, the Earl of Westmorland, for judgment or a new trial in an action tried before Phillimore, J., with a jury.

The plaintiffs, who were wine merchants and provision dealers, brought the action against the Earl and Countess of Westmorland jointly to recover £455, balance of an account for goods sold and delivered between May, 1897, and September, 1901, on the orders of the Countess of Westmorland.

On an application under order 14 leave was given to the plaintiffs to sign judgment against Lady Westmorland. Judgment was signed accordingly, but was not satisfied.

The earl's defence, so far as material, was that no one had authority to pledge his credit for the goods; and that by suing the countess to judgment the plaintiffs had made their election and were not entitled to recover from him.

All the goods were in fact ordered by Lady Westmorland, and nearly all of them were delivered at Apethorpe Hall, Northamptonshire, where the defendants resided. During the whole of the period in question the defendants were living together as man and wife. In July, 1899, Lord Westmorland, finding that the expenditure of his household was extravagant, determined to limit it, and at the same time to make his wife a regular allowance for that purpose. His net income amounted to £2,500 a year, and Lady Westmorland had an income of her own of £400 a year. He accordingly agreed to allow his wife £2,000 a year for household expenses, and told her that if she incurred further expenses he would not be liable and would not pay them. In pursuance of this arrangement the annual sum of £2,000 was regularly paid into a banking account, and Lord and Lady Westmorland had power to draw on that account for household expenses only. This arrangement was not communicated to the plaintiffs.

At the trial certain questions were left by the learned judge to the jury, which, with their answers, were as follows:

1. Was the earl liable for goods supplied prior to July, 1899?—Yes.

2. As to goods supplied since that date—(*a*) Were they necessaries?—Yes; (*b*) Did the earl give his wife a sufficient allowance for household expenses?—Yes; (*c*) Did the earl prohibit his wife from incurring any household expenditure except out of the agreed allowance?—Yes; (*d*) Did the countess in ordering from the plaintiffs act as agent for the earl jointly with herself, or for the earl only, or for herself only?—For the earl and herself jointly; (*e*) To whom did the plaintiffs give credit?—To the earl in the name of the countess.

3. Is the earl liable for goods sent to the countess elsewhere than to Apethorpe?—No.

On further consideration Phillimore, J., gave judgment for the plaintiffs against Lord Westmorland for the price of the goods supplied both before and after July, 1899.

Lord Westmorland applied for judgment or a new trial.

*Gore-Browne, K.C.*, and *G. A. Bonner*, for the defendant, Lord Westmorland.

*Macaskie, K.C.*, and *Montague Shearman*, for the plaintiffs.

The following cases were cited: *Jolly* v. *Rees*, 12 W. R. 473, 15 C. B. N. S. 628; *Debenham* v. *Mellon*, 29 W. R. 141, 6 App. Cas. 24; *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504; *Scarf* v. *Jardine*, 30 W. R. 893, 7 App. Cas. 345.

COLLINS, M.R.—This is an appeal by the defendant, Lord Westmorland, from a judgment of Phillimore, J., in favour of the plaintiffs. The action, as appears from the writ, was based on a claim on the joint liability of the earl and countess in respect of necessaries supplied by the plaintiffs on the orders of the countess. The claim is divided into two parts, one part being for the price of goods supplied up to July, 1899, the other for goods supplied after that time. The action having been started on the footing of joint liability, Lady Westmorland submitted to summary judgment being signed against her under order 14. We must now consider the case against Lord Westmorland on the footing upon which the plaintiffs have all along put their case—viz., on that of a joint liability of husband and wife. It is for the plaintiffs to establish such joint liability, and to give evidence of it. With regard to the first part of the claim, the evidence does not point at all in the direction of joint liability. Up to July, 1899, Lord Westmorland is not introduced into the discussion at all. It appears that husband and wife lived together in a common establishment, and that goods were supplied to that establishment by the plaintiffs on the orders of the wife. At most this is some evidence of authority by the husband to the wife to pledge his credit, but it is no evidence of authority to pledge their joint credit. The plaintiffs now insist that the answer of the jury to the first question must mean that the earl was liable for the goods supplied prior to July, 1899, jointly with the countess. But that will not avail them, for, in my opinion, with regard to the first part of the claim, there is no evidence of joint liability.

I now come to the second part of the claim—viz., the price of goods supplied after July, 1899. Here the earl comes into the discussion. The evidence of his solicitor and confidential adviser shows that in July, 1899, the earl was much distressed at the great expenditure incurred in the household, and he came to an arrangement whereby the countess was not to pledge his credit any longer, and a fund was to be provided for the household expenditure. He was to provide out of his income an allowance of £2,000 a year for necessaries to be supplied to the household, and the countess was to have her own income of £400 a year for her personal expenses. That arrangement, as it appears to me, negatived her right to pledge his credit at all. It substituted the allowance of £2,000 a year for any possible implied or *primâ facie* authority she might otherwise have to pledge his credit. I think that the fair interpretation of the findings of the jury on this part of the case is that they thought that such was the arrangement.

The existence of any actual authority being thus rebutted, is there any evidence of any ostensible authority in the wife to pledge the joint credit of herself and her husband? It seems to me that there was no evidence of a holding out of the wife as having authority to pledge their joint credit, neither was the question of any such holding out left to the jury. The case must be treated as one of joint liability or nothing, and in my opinion there is no evidence of joint liability, neither do I think that the jury found it.

If, however, by an amendment the case could be treated on the footing of there being an alternative claim for a several or alternative liability on the part of the two defendants, I do not think that this would carry the plaintiffs any further. They have signed judgment against the wife for the whole amount claimed; and for the purpose of this part of the case the claim against the wife must be treated as a claim against her severally as a principal. The plaintiffs having obtained judgment against her as a principal cannot now turn round and say that she was an agent for the purpose of imposing liability on her husband as principal.

The judgment obtained against the lady seems to me to be a bar to the plaintiffs setting up any inconsistent alternative. In my opinion this is a case of election, and the plaintiffs, having taken judgment against the lady on a several cause of action, are debarred from setting up an inconsistent alternative for the purpose of making her husband liable. The plaintiffs sought to make out that this bar was removed by ord. 14, r. 5, which enables a plaintiff who has obtained judgment under that order against one of two defendants to go on with the action against the other; but in my opinion that special rule does not apply to a case of alternative liability, and the plaintiffs, having exercised their election, are debarred from proceeding with an inconsistent claim. The plaintiffs' case having entirely failed, judgment must be entered for the defendant, Lord Westmorland.

ROMER and MATHEW, L.JJ., concurred.

*Application for judgment allowed.*

Solicitor for the plaintiffs, *A. L. Rayner.*

Solicitors for the defendant, *Royds & Rawstorne.*

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From P. D. & Ad. Div. (Vaughan Williams and Mathew, L.JJ.) } August 11, 1902.

ASHCROFT *v.* ASHCROFT. (*a.*)

*Divorce—Husband's petition—Permanent alimony for wife—State of wife's health and other circumstances—Discretion of court—Matrimonial Causes Act,* 1857 (20 *&* 21 *Vict. c.* 85), *s.* 32.

*The court has an absolute discretion under section* 32 *of the Matrimonial Causes Act,* 1857, *as to ordering the husband to grant permanent alimony to his wife on a decree for dissolution of the marriage, and may suspend the making absolute of the decree until the husband makes provision for her if the wife is in ill-health and cannot support herself, even though she be the guilty party and his own conduct be irreproachable, and though he has derived no pecuniary benefit from the marriage and has obtained no damages from the co-respondent.*

Robertson *v.* Robertson, 31 *W. R.* 652, 9 *P. D.* 94, *discussed.*

This was an appeal from an order of Barnes, J.

The facts were as follows: A husband obtained a decree *nisi* for the dissolution of his marriage on the ground of adultery. No misconduct on his part was suggested. The wife afterwards made an application for permanent alimony. The parties had been married for over twenty years and had five children, the custody of the infants among whom, was given to the husband by the Divorce Court until further order. The wife had no means of subsistence or relatives of her own to support her and was in bad health; and the husband had only a business income of about £500 a year.

Barnes, J., held that the court had an absolute discretion as to the order to be made, and in view of the wife's health and the other circumstances refused to make the decree *nisi* absolute till the husband secured to the wife by deed £1 a week *dum sola et casta vixerit.*

The husband appealed, being granted leave to do so on the ground that the question was left open by *Robertson* v. *Robertson,* 31 W. R. 652, 8 P. D. 94.

*Newson,* for the appellant.—In no case has such an order been made for the benefit of a guilty wife unless the husband has also been guilty of misconduct or has benefited pecuniarly from the marriage or obtained damages from the co-respondent. The order here was not based on the conduct of the parties at all. The practice is correctly stated in the argument in *Robertson* v. *Robertson.*

He also cited *Latham* v. *Latham,* 9 W. R. 680, 30 L. J. P. & M. 43, 163; *Winston* v. *Winston,* 30 L. J. P. & M. 109, 9 W. R. Dig. 12; *Bent* v. *Bent.* 2 Sw. & Tr. 392, 9 W. R. Dig. 18; *Keats* v. *Keats,* 7 W. R. 377, 28 L. J. P. & M. 57; and *Parry* v. *Parry,* [1896] P. 37, 44 W. R. Dig. 52.

*Barnard,* for the wife, was not called on.

VAUGHAN WILLIAMS, L.J.—Under the terms of section 32 of the Matrimonial Causes Act, 1857, the court has an absolute discretion. The language of the section is quite plain. It enacts as follows: "The court may, if it shall think fit, on any such decree, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable." That being so, the objection that is made here to the order pronounced by the learned judge in the court below is really only based upon the practice of the court. It is said that that practice was correctly stated by Mr. Inderwick in his argument in the case of *Robertson* v. *Robertson,* 31 W. R. 652, 8 P. D. 94, at p. 95, thus: "The practice under the Divorce Act in this respect has not been similar to that of the House of Lords under the old law. Up to this time permanent alimony for a guilty wife has not been ordered except with the consent of the husband, or under special circumstances." Thereupon Jessel, M.R., says: "I am sorry to hear it. I am not giving a final opinion, but it appears to me that section 32 was intended to give the court discretion which was to be exercised according to the circumstances of each case, and that it was not intended that a guilty wife should be turned out in the streets to starve." Then, when the Master of the Rolls came to deliver his judgment, he says (at p. 96 of 8 P. D.): "Now, under the 32nd section the practice seems to have grown up of not allowing maintenance to the guilty wife unless a special case is shown. I am not prepared to say on the present occasion that this is the correct rule. I am not going to lay down that it is not. I should require further consideration and argument before doing so, but it appears to me that the 32nd section of the Act has left an absolute discretion in the court." Then he goes on to deal with the intention of the Legislature in passing the Act, and says he thinks the court ought to act on a rule similar to the old rule of the House of Lords, and at the end of that paragraph he says: "I am only stating my present impression that the court, under section 32, has full discretion, and is under no obligation to require special circumstances to be shown to entitle the guilty wife to some provision." Then he goes on to deal with the particular case then before the court, and he deals with it so that it was not necessary to decide as a part of that case whether there was the discretion referred to, for he says: "Now, considering the learned judge's acquaintance with all the facts, and his great experience in these matters, we should be very slow indeed to interfere with his discretion, either as regards enlarging the time or as regards the circumstances which in his opinion disentitled the wife on the merits to any allowance, and therefore it appears to me that we ought not to interfere." When you come

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law

to Lindley, L.J.'s, judgment you see that he refused in that case to give any sanction to what Mr. Inderwick had stated was the practice of the court, for he says (at p. 97 of 8 P. D.): "I agree. The question whether what we understand to be the ordinary practice in the Divorce Court is right or wrong is to be considered as left an open question; but I am not prepared to dissent from the conclusion of the President on the present occasion." Therefore the court has an absolute discretion and special circumstances need not be shown. In the particular case now before us there is no suggestion of misconduct on the part of the husband. But the learned judge in the court below was of opinion that it had been proved before him that the wife had no means of subsistence, and could not support herself or earn her own living. In some cases a guilty wife has no difficulty in obtaining employment and earning her own living. But there is a difference where the wife has not the health to earn her own living. In these circumstances we ought in my judgment to affirm the order of Barnes, J., on the ground that the court has an absolute discretion, and we cannot recognize any practice which interferes with that discretion.

MATHEW, L.J.—I am of the same opinion. The order for an allowance to the wife is purely a matter of discretion; and the learned counsel for the husband has been wholly unable to find judicial authority to limit the discretion of the judge. I think it is clear that to the exercise of that discretion there is no such limitation as is contended for. The learned judge saw the wife, heard the evidence, and had no doubt that she was wholly unable to support herself. The appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellant, *Jaques & Co.*, for *W. & E. W. Bullen*, Liverpool.

Solicitor for the respondent, *J. Sykes*, for *Pennington & Higson*, Liverpool.

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From Chan. Div. (Vaughan Williams and Mathew, L.JJ.) — Aug. 2, 1902.

CHURCH'S TRUSTEE *v.* HIBBARD. (*a.*)

*Practice—Attachment—Debtor—Committal for default to obey an order for the payment of money—Release of debtor by mistake—Second order for attachment—Re-arrest—One year's imprisonment—Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4.

*A debtor had, under section* 4, *sub-section* 3, *of the Debtors Act,* 1869, *been sentenced to imprisonment under a writ of attachment for default in payment of a sum of money in his hands which he had been ordered by the court to pay. Before the expiration of one year—the period limited for imprisonment by the section—he was released owing to a mistake by the governor of the prison.*

*Held, that attachment under section* 4 *of the Debtors Act,* 1869, *was in its nature punishment for an "offence," and, consequently, that there was no jurisdiction to issue a second writ of attachment against the debtor in respect of the same default.*

Semble, *an order for re-arrest might have been made under the original writ of attachment, but in that case the time during which the debtor had been at large should be included in the period of the twelve months' imprisonment limited by the section.*

Appeal from Swinfen Eady, J.

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

The question raised by this appeal was whether under the exceptions specified in section 4 of the Debtors Act, 1869, the court had jurisdiction to issue a second writ of attachment for the same default or contempt.

The plaintiff, the trustee in bankruptcy of Charles A. Church, on the 6th of December, 1901, obtained an order from Swinfen Eady, J., that the defendants, Montague Hibbard & Co., a firm of auctioneers, should pay to the plaintiff on a specified date the sum of £1,200 admitted by the defendants to be in their hands as agents for the plaintiff in respect of goods of the bankrupt sold by them. The defendants paid a portion of this sum, but made default in payment of the balance amounting to £775.

On the 12th of February, 1902, Swinfen Eady, J., on the motion of the plaintiff, gave the plaintiff leave to issue a writ or writs of attachment against Montague Hibbard and Harold Vickers, the partners in the defendant firm—who had entered an appearance in the action separately in their own names—for their contempt in not having paid the full amount specified in the order of the 6th of December, 1901. In pursuance of this order writs of attachment were issued against Hibbard and Vickers respectively on the 25th of February, 1902. On that day (25th of February) Hibbard was arrested and lodged in prison under a writ of attachment issued against him and Vickers in pursuance of an order of Byrne, J., dated the 7th of February, 1902, for contempt in not having complied with an order for delivery of accounts in another action.

On the 26th of February the sheriff lodged a warrant or detainer against Hibbard with the governor of the prison under Swinfen Eady, J.'s, writ of attachment, and made his return accordingly. Subsequently Vickers was also arrested and lodged in prison.

On the 15th of March, 1902, Byrne, J., made an order in the other action for the discharge from custody of Hibbard and Vickers in respect of the contempt committed in that action.

On the 18th of March Swinfen Eady, J., made an order in the present action for the discharge of Vickers alone, so far as concerned his contempt of the order the 6th of December, 1901. The governor of the prison misapprehending the effect of these orders, released both Hibbard and Vickers on the 18th of March, 1902.

The plaintiff then moved for leave to issue a further writ of attachment against Hibbard alone, for his contempt in not having complied with the order of the 6th of December, 1901, notwithstanding the issue of the previous writ of attachment under that order, the lodging of the warrant on the 26th of February, 1902, with the governor of the prison, and Hibbard's subsequent release from prison. Upon that motion, Swinfen Eady, J., on the 29th of July, 1902, made the following order:

"This court doth order that the plaintiff be at liberty to issue a further writ or writs of attachment against the said Hibbard in respect of his contempt in the said order of the 12th of February, 1902, mentioned: but that the writ or writs to issue under this order shall not authorize the imprisonment of the said Hibbard for any longer period than such time as with the period from the 26th of February, 1902, to the 18th of March, 1902 (being the time during which the said Hibbard was imprisoned under a writ of attachment issued on the 25th of February, 1902, pursuant to said order dated the 12th of February, 1902), shall together amount to one year; and notice to this effect is to be put in such writ or writs of attachment."

From this order Hibbard appealed.

*Bray, K.C.*, and *Eustace Smith*, for the appellant.—There was no jurisdiction to make the order now appealed from. The order of the 12th of February, 1902, was still in force and no further order for imprisonment can be made in respect of the same offence, under section 4 of the Debtors Act, 1869. When the penalty has once been inflicted by an order for imprisonment under section 4, the jurisdiction of the court ceases: *Horsnail* v. *Bruce*, 21 W. R. 296, L. R. 8 C. P. 378. Again, the order now appealed from is bad because it directs imprisonment for twelve months—the longest period allowed by section 4—without taking into account the time during which the debtor has been out of prison through the mistake of the governor, and that period should have been taken into consideration.

*Micklem, K.C.*, and *Edward Clayton*, for the plaintiff.—Attachment under the Debtors Act is a civil and not a criminal process: *Pooley* v. *Whetham*, 29 W. R. 296, 15 Ch. D. 435. [VAUGHAN WILLIAMS, L.J., referred to *Middleton* v. *Chichester*, 19 W. R. 369, L. R. 6 Ch. App. 152; and *In re Smith*, 41 W. R. 289, [1893] 2 Ch. 1, at p. 17, as showing that an order under section 4 of the Debtors Act was "punitive" in its character.] Still the remedy given is a creditor's remedy. The sheriff had no power to retake the debtor after being released by a mistake on part of the governor; but the creditor can pursue his remedy under section 7 of 8 & 9 Will. 3, c. 27: *Filewood* v. *Clement*, 6 Dowl. 508. Under the old practice of *ca sa* an application might be made either for an order under the old writ, or for a new writ, for rearrest of the debtor. The modern writ of attachment is merely the Chancery form of the old common law writ of *ca sa*.

VAUGHAN WILLIAMS, L.J.—In this case Eady, J., made the following order: [His lordship read the order, and continued:] The question which we have to determine is whether or not that was an order which the learned judge had jurisdiction to make, having regard to the provisions of the Debtors Act, 1869. I want at once to say that we have not to-day to decide in any way whether the creditor here has any right to ask that the debtor be sent back again to prison to endure the punishment which was awarded to him under the original writ of attachment which is mentioned in this order—that is, the writ of attachment of the 25th of February, 1902. We have not got to decide that. It may very well be that, if proper application was made, an order might be made by the court by which the debtor might be sent back to serve the residue of his imprisonment. Moreover, I do not express at the present moment any opinion whether the residue of that imprisonment—which we know cannot continue for more than the term of one year—would expire in one year from the date of the original writ of attachment, or whether it would not. The only question to which I propose to address myself is whether or not this was an order which the court had jurisdiction to make.

Now, in order to arrive at a conclusion upon this point, one must look at the Debtors Act, 1869. The 4th section runs thus: "Abolition of Imprisonment for Debt.—With the exceptions hereinafter mentioned, no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money." Then follow the exceptions: "There shall be excepted from the operation of the above enactment: (1) Default in payment of a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract. (2) Default in payment of any sum recoverable summarily before a justice or justices of the peace. (3) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control. (4) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order. (5) Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order. (6) Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made."

Now, it was remarked a long time ago by Lord Hatherley, L.C., in *Middleton* v. *Chichester* that in the case of every one of these exceptions "there is something of the character of delinquency pointed out, and one cannot see that it makes a shadow of difference with reference to the question of delinquency, whether the person has the money in his possession." That is a matter which is immaterial. But what is indicated by Lord Hatherley is that, in the case of all the exceptions from the abolition of imprisonment for debt, what the Legislature did was to except those cases where a debtor deserved to be punished. To use the words of Lord Hatherley, "the debts in question were debts the incurring of which was in some degree worthy of being visited with punishment." Then in *Marris* v. *Ingram*, 28 W. R. 431, 13 Ch. D. 338, Sir George Jessel, M.R., takes the same view. He says at p. 341 of 13 Ch. D.: "I wish to say one or two words about the view that I take of the law, because I do not think that the Debtors Act, 1869—which, though it abolished imprisonment for debt in certain cases, was, as it in fact says in so many words, legislation 'for the punishment of fraudulent debtors'—did not mean punishment. Now, when we come to look at the Act, we find that it contains different provisions to meet different classes of debtors, there being one set of provisions in the case of defaulting debtors of a certain class, and special provisions being made in the case of debtors guilty of misdemeanour or other misconduct, and, looking at these provisions, it is impossible to suppose that punishment for misconduct was not intended to be meted out. That it was contemplated by the Act is clear, because the fourth section, which abolished punishment for debt by imprisonment where a man could not pay, contains the following exceptions"—then he reads the exceptions, and as to the third—namely, default by a trustee ordered to pay money in his control, he says: "Why is such a person as the last excepted? Simply because he is a dishonest man. He need not perhaps be called a thief in so many words, but he is a man who takes or keeps money belonging to other people, and he is to be punished as such." Then the same view—I do not want to read any more quotations from cases at length—is confirmed by the judgment of Lindley, L.J., in the case of *In re Smith, Hands* v. *Andrews*, [1893] 2 Ch., at p. 17. After pointing out that Mellish, L.J., had taken a different view at one time, he says: "The punitive character of section 4 of the Debtors Act, 1869, which was pointed out in *Middleton* v. *Chichester*"—that is, in the judgment of Lord Hatherley which I have read—"has been since so often recognized that it cannot now be questioned: see *Marris* v. *Ingram*; *In re Gent*, 37 W. R. 151, 40 Ch. D. 190." And it is to be noted, as giving emphasis to these cases, that in most of them the application had relation to the discharge of a debtor from prison, or to his non-liability to be imprisoned, in cases where he had been adjudged bankrupt. The

decisions were that he was not entitled to freedom or to be discharged, for although the Bankruptcy Acts under certain circumstances relieve the debtor from every remedy against his person or property, they do not relieve him from the stringency of these orders under section 4 of the Debtors Act, 1869, inasmuch as those orders are not in the nature of remedies for the recovery of debts, but are in the nature of punishment.

Now, that being the nature of these cases, in my judgment you can only punish for fraudulent offences of this sort once; you cannot punish twice in respect of the same offence, or give two sentences in respect of the same offence. I say nothing about what you might or might not do in some cases of continued offences. Here, upon the face of this order, it is made perfectly clear that the offence for which the debtor is being attached is the identical offence for which he was punished under the first order that was made. The second order says so in terms. According to my judgment—a view which I will say is entirely in accordance with the decision in *Horsnail* v. *Bruce* there cannot be a second writ of attachment issued in respect of the same offence. In my judgment, therefore, this order was not an order which ought to have been made. As I said before, I am very far indeed from asserting that such an order might not be made as would cause the debtor here to serve the residue of his punishment. But, in my opinion, in these matters of the liberty of the subject it is essential that the form should be strictly followed. And, although it may very well be that the debtor under this writ would be no worse off than if he had simply been rearrested under the old writ, I do not think the fact that his position would be substantially the same, if such be the case, would justify us in supporting this order of Swinfen Eady, J., if such order is not an order which is justified under the Debtors Act, 1869. The appeal will therefore be allowed; but, under the circumstances, there will be no order as to costs.

MATHEW, L.J.—I am of the same opinion, and I have arrived at the conclusion not without considerable reluctance, because this is mere form. The debtor here has not expiated his offence to the court by enduring the imprisonment which was ordered to be inflicted upon him. And it has hardly been disputed that if another mode were taken for continuing his imprisonment, the result that is desired might be arrived at. But I agree with my lord that, before we hold that writs of attachment can issue in succession, we should see that the Act of Parliament—the Debtors Act, 1869—permits it to be done. Now, nothing is clearer to my mind than that the Act of Parliament only contemplated one writ of attachment. Any other conclusion would lead to this, that a judge or court might order an imprisonment in the first instance, say, for six months, and, if that were not found to be effective, might issue another attachment for another six months, and that is a thing which, although in the first instance twelve months' imprisonment might have been given, the Act of Parliament does not justify. With reference to the position of the delinquent in question, it does not appear to me to be open to much doubt—although I am not called upon to pronounce an opinion upon it—that the learned judge would have the power to order a rearrest under his original writ of attachment. The offence offered to the court has not been atoned. I am further of opinion that, if any such order should happen to be made, the period of imprisonment should end with the twelve months from the date of the original imprisonment, and that the order in question is irregular on the ground that it seeks to make the period of imprisonment last for twelve months, disallowing the period of time during which the debtor was at liberty. I agree that the appeal must be allowed.

*Appeal allowed.*

Solicitors for the appellant, *Dyson, Smith, & Marchant.*

Solicitors for the respondent, *Edward Lee, Davis, & Lee.*

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## High Court of Justice.

Chan. Div. Kekewich, J. — Dec. 5.

PARDY'S MOZAMBIQUE SYNDICATE (LIMITED) v. ALEXANDER. (a.)

*Practice—Discovery—Several defendants—Discovery by one defendant—Deposit—Inspection by co-defendant—R. S. C.*, 1883, *ord.* 31, *rr.* 12, 14-18, 26.

*Where one of several defendants has obtained discovery from the plaintiff on payment of the usual deposit, it is competent for the court to order the production to another defendant of such documents relating to the matters in question between the plaintiff and that particular defendant as the plaintiff has admitted in his affidavit to the first defendant to be in his possession or power, without any further affidavit of documents, on the terms that, notwithstanding the order, the plaintiff may be at liberty to withhold on oath or seal up documents not relating to the matter in issue between the plaintiff and that particular defendant.*

Moore v. Peachey, 39 *W. R.* 592, [1891] 2 *Q. B.* 707, *discussed.*

Action by the plaintiff company against five defendants, of whom L. C. Alexander and E. B. Chave were two, claiming a declaration that the defendants were jointly and severally liable to pay to the plaintiff company the maximum value of certain shares allotted to and secured by the defendants.

The defendant Alexander had obtained an order for discovery of documents upon payment of the usual deposit, and the plaintiffs' secretary had filed an affidavit stating the documents which were in the possession or power of the plaintiff company relating to the matter in question in the action, and specifying in Part I. of a schedule thereto, the documents which the plaintiffs were willing to produce.

On the 19th of November, 1902, the defendant E. B. Chave gave notice to the plaintiff company to produce the documents mentioned in Part I. of this schedule.

The plaintiff company, however, refused to produce them.

The defendant E. B. Chave thereupon applied in chambers for an order on the plaintiff company to produce these documents at the office of her solicitors, and that the applicant might be at liberty to inspect and peruse them and take copies and abstracts and extracts therefrom, and that in the meantime all further proceedings might be stayed against her.

This application was opposed by the plaintiff company and was adjourned into court.

*A. R. Kirby*, for the applicant.—This application is justified by the rules. Rules 15 to 18 of order 31, as to the production of documents, were very

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

general, and even if these are to be read in a more limited sense, rule 18 (2) of itself would be sufficient. *Moore* v. *Peachey*, 39 W. R. 592, [1891] 2 Q. B. 707, is really in our favour, though it is true that there the documents were referred to in an affidavit answering interrogatories instead of, as in this case, in an affidavit as to documents, but rule 26 applies to both. That case shows that unless there is an evasion of the rule as to deposit an application such as this is justified by the rules. An application under rule 12 might have been met by the objection that the plaintiffs had already made a sufficient affidavit. The procedure under rule 14 is shown in *Quilter* v. *Heatly*, 31 W. R. 331, 23 Ch. D. 42.

*Mark Romer*, for the plaintiff company.—The applicant is attempting to obtain discovery without making the necessary deposit, and this the court will not allow: *Moore* v. *Peachey*. The deposit is not only for the costs of the affidavit, but also for the costs of producing the documents. This application is really an attempt to get general discovery of documents by this defendant, and the plaintiffs should be protected by the deposit. The procedure is different under rules 12 to 14, and rule 15, as was pointed out in *Quilter* v. *Heatly*. Documents to be within rule 15 must be more than such as are merely disclosed in an affidavit of documents.

KEKEWICH, J.—This application was adjourned by me into court because of its importance and novelty. It was admitted by counsel before me in chambers, and is admitted here, that there is no direct authority on the point. The action is for a declaration of the liabilities of the defendants in respect to certain shares. I need not go into the merits of the case. It is enough to say that there are several defendants; one of them has obtained an order against the plaintiffs for discovery of documents. Another defendant seeks to have produced to her, without any further affidavit of documents, the documents disclosed in the affidavit made on behalf of the plaintiff company. It is certainly strange that the point should not have arisen before; but, although it is of some importance, I think, now that I have had the benefit of argument on both sides, I may safely say that it is not in terms provided for by the rules. They lay down a general practice, but are silent on the particular point.

The first objection that the plaintiffs urge is that this is really an application for discovery, that upon such an application security for costs should be given by the applicant—that is to say, £5 unless the court thinks necessary to order a larger sum; and that this defendant is taking advantage of an application made by her co-defendant without making such payment herself. This is said to be an evasion of the rule and to be a hardship on the plaintiffs, because costs will be incurred in producing these documents, and the rule is intended as an indemnity against the costs not merely of making the affidavit but of production as well. If I saw any reason to suppose that there was any intention to evade the rule as to deposit, I should take the course indicated by the judges in *Moore* v. *Peachey* and should protect the party against whom the application was made and provide that there should not in fact be an evasion of the rule. But the decision in *Moore* v. *Peachey* does not seem to me to be an authority in the plaintiffs' favour. There interrogatories had been delivered and the deposit of £5, as required by ord. 31, r. 26, on an application for discovery of documents, had been made. The affidavit in answer to interrogatories referred to certain documents, and the court held that there was no occasion for the applicant there, seeking for inspection only, to make a further deposit. It is quite true that the case is distinguishable from the present, because there the documents were referred to in the affidavit in answer to interrogatories, whereas here they are referred to in the affidavit of documents. But ord. 31, r. 26, is applicable in each case, and I think that *Moore* v. *Peachey* is a decision that, unless there is evasion of the rule as to deposit, there is no reason why there should be a further deposit in a case of this sort.

Then it is said that the rules do not meet this case, and may be in a manner inconsistent with the right which is claimed. I think that is so. It is quite possible to read the rules and show that there are many passages which point to this particular application not being within them. But I do not think that is enough. I think there are rules which sufficiently cover the point and enable me to make the order. In the first place ord. 31, r. 12, enables the court to refuse to make the order for discovery of documents where it is satisfied that there is no occasion for an affidavit of documents, and the applicant's counsel anticipates, with some reason, that if the applicant were to apply that an affidavit of documents should be made by the plaintiffs, they would say, and the court would uphold them, that they had already made an affidavit of documents and stated what documents were in their possession, and that they ought not to be asked to do that again, even though a further deposit were paid. I am not sure that, if the present application were to fail, the applicant's anticipation would be well grounded; but I think it affords some reason for saying that the application ought not to fail. According to the general practice of the court, a party ought not to be put to do what the court would refuse to order, and the court would refuse to make an order for a further affidavit when a further affidavit is not necessary. Rule 14 is in very general terms. [His lordship read it, and continued:] Now we know by an affidavit—that is to say, by a document of record in this action—that the plaintiffs have certain documents in their possession or power. Why should the court be powerless on an application of a defendant to make the order to which rule 14 points? It is quite true that there are other rules, beginning with rule 15 which deals with the particular case of documents to which reference is made in pleadings or affidavits, and these rules go on to provide that the party requiring the documents should give notice, and then, under rule 18, the court may make an order for production. It seems to me to be essential for the administration of justice that there should be power in the court to prevent a further affidavit of documents being made, and on the application of a second defendant to order the plaintiff to produce to him documents which, in answer to the first defendant, he has admitted to be in his possession or power. Surely there are good grounds for this jurisdiction. The words of rule 14 are clear and without qualification: "Such documents in his possession or power relating to the matter in question as the judge shall think right." But that, of course, means documents relating to the matters in question between the plaintiff making the affidavit and the defendant on whose application it is made. It is possible, and indeed every practitioner must know that it is not at all an uncommon thing that documents which are relevant to questions between the plaintiff and defendant A. may not be relevant to questions between the plaintiff and defendant B. It is likely to occur where many defendants are sued on different grounds. I think it would be extremely hard to make a plaintiff produce to B. all the documents which he has admitted to be in his possession or power as against A., notwithstanding that they may have nothing to do with the case against B. The

court always guards against production and discovery of any documents which are not relevant to the matters in question. I think, therefore, that when a defendant in the position of B. makes an application of this kind he can only do so on the terms that, notwithstanding the order, the plaintiff may be at liberty to withhold on oath or seal up documents not relating to the matters in question between the plaintiff and the particular defendant, and the order to be now made must be so framed.

Solicitors, *G. M. Folkard; Cheston & Sons.*

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Chan. Div. } Feb. 12, 13.
Farwell, J. }

*In re* NEWEN (DECEASED). (a.)

*Solicitor—Client—Agency—Solicitor's power as agent to compromise actions.*

*A solicitor has a general power to compromise an action on behalf of his lay client, provided* (a) *he acts reasonably and* bonâ fide, *and* (b) *that he is not restrained by any express prohibition; and this rule applies equally to the solicitor on the record acting as agent for the solicitor of the lay client.*

Motion.

In December, 1902, a summons was taken out in the district registry of Liverpool in the matter of the estate of George Newen, deceased, and of the trusts of his will. Two of the trustees, Carruthers and Clark, were plaintiffs, and the two tenants for life with a Mr. Davey, a remainderman and trustee, were defendants. The summons asked for directions to the trustees in regard to notices served upon them by two railway companies proposing to take part of the trust property, and also asked that the trustees might be given powers to oppose the railway companies' application to Parliament, costs being granted out of the trust estate. The tenants for life a few days later took out a summons to remove the proceedings from the Liverpool District Registry to London.

Messrs. Smiles & Co., the London solicitors, acted for the tenants for life and instructed Messrs. Jevons & Ryley, of Liverpool, to act as their agents in the matter. On the 10th of January they further instructed Mr. Ryley as follows: "Failing an order dismissing Mr. Carruthers' application with costs and giving costs on our application, you will please adjourn the matter to the judge." Both summonses came before the registrar on the 12th of January. Mr. Ryley attended as agent for Smiles & Co., and, though it is not quite clear as to what took place, the summonses were indorsed thus: "Defendants desiring that no further opposition to the bills should be offered by trustees, no order, except that costs of all parties be paid out of the estate.

Though the words "by consent" had been accidently omitted, yet the plaintiffs contended that this was a consent order; but the defendants took the opposite view, and now moved to discharge it on the ground that it was never intended to be a consent order.

Mr. Ryley in evidence said that he had had no instructions to compromise, but had submitted to the the registrar's ruling.

His lordship, after consultation with the registrar, held that it was a consent order.

(a.) Reported by ALFRED THOMAS, Esq., Barrister-at-Law.

*Upjohn, K.C.*, and *Rutherford*, for Carruthers.—There were two points to be considered—(1) What was the general authority of the solicitor on the record, and how limited; (2) if the solicitor on the record is agent for any other solicitor, is his general authority in any way affected? We submit that the solicitor on the record has a general authority to compromise actions which can only be limited by express prohibition; and also, the fact that the solicitor on the record was a town or country agent for another solicitor makes no difference.

They cited the following: *Latuch* v. *Pasherante*, 1 Salk. 86; *Prestwich* v. *Poley*, 13 W. R. 753, 18 C. B. N. S. 806; *Fray* v. *Voules*, 7 W. R. 446, 1 E. & E. 839; *Griffiths* v. *Williams*, 1 T. R. 710; *Chown* v. *Parrot*, 11 W. R. 668, 14 C. B. N. S. 74, at p. 83; *Withers* v. *Parker*, 28 L. J. Ex. 292; *Harvey* v. *Croydon Sanitary Authority*, 32 W. R. 389, 26 Ch. D. 249; *Hickman* v. *Berens*, [1895] 2 Ch. 638, 44 W. R. Dig. 41; *Huddersfield Bank* v. *Lister*, 43 W. R. 567, [1895] 2 Ch. 273; *Lewis's* v. *Lewis*, 39 W. R. 75, 45 Ch. D. 281; *Tamplin* v. *James*, 29 W. R. 311, 15 Ch. D. 215; *Goddard* v. *Jeffreys*, 30 W. R. 269; *Wilding* v. *Sanderson*, 45 W. R. 675, [1897] 2 Ch. 534; *Ainsworth* v. *Wilding*, 44 W. R. 540, [1896] 1 Ch. 673; and *Neale* v. *Gordon Lennox*, *ante*, p 140, [1902] A. C. 465.

*Butcher, K.C.* and *Mather*, for Clark, adopted Upjohn's arguments.

*R. J. Parker* and *Spence*, in support of the motion, argued that the country or town agent was not the solicitor on the record, and had therefore no general authority to compromise: ord. 12, r. 10; ord. 4 and vol. 2, p. 2, form; Annual Practice, vol. 2, pp. 11 and 12, form. There was no privity of contract between the agent and the lay client: *Wray* v. *Kemp*, 32 W. R. 334, 26 Ch. D. 169.

*W. H. Cozens-Hardy*, for Mr. Davey, also supported the motion.

FARWELL, J.—In reality this is an appeal from the decision of this district registrar about costs which amounted to about £20. The registrar suggested, when the matter came before him, that it would be better, to save the parties further expense, that no order should be made, and that the costs should come out of the trust funds. I am satisfied that this course was assented to by all parties; but by some slip the words "by consent" were left out, and now the defendants move to discharge the order. It has been argued that it would not be right to the defendants to treat this as a consent order. Has there been any mistake? I can see none; and I cannot really understand why the matter is being now contested. The Liverpool agent was the only witness called, and he gave no evidence of mistake. The agent in Liverpool had received a letter from the London solicitors which was said to be an absolute prohibition of assent to any order but that suggested in the letter. I do not agree. The prohibition must be explicit, and that in the letter was not so. A solicitor has a general power to compromise actions, provided he acts *bonâ fide* and reasonably, unless there were an express prohibition. Then it was contended that Mr. Ryley had no authority to settle. *Prestwich* v. *Poley* was the best case to cite. The head-note ran: "An attorney has a general authority to compromise an action on behalf of his client provided he acts reasonably and *bonâ fide* and not in defiance of the direct and positive instructions of the client"; and Sir Montagu Smith, at 18 C. B. N. S., p. 816, says: "The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause. Everyone must reasonably expect that a

cause may not be carried to its natural conclusion, and that it is proper and usual and often necessary to compromise. The authorities seem to me to establish clearly that the attorney has power to compromise the action in a fair and reasonable manner." It is clear, then, that the solicitor had general authority. But then it was said Mr. Ryley was only the Liverpool agent. No doubt there was no privity of contract between the Liverpool agent and the said client. But ord. 12, r. 10, makes it necessary to have someone at hand, and Mr. Ryley had entered an appearance and been served with notice. I do not agree with Mr. Parker's contention, that the solicitor on the record, as agent for the principal solicitor, had not the same power as between himself and the lay client as existed between the principal solicitor and the lay client. Where is the line to be drawn? The Court of Exchequer in *Withers* v. *Parker* must have intended what they said then in their *dicta*. Pollock, C.B., said, 28 L. J. Ex., at p. 294: "I think it is of considerable importance that we should not open a facility for disputing arrangements of this description by creating a difference between the assent of the attorney and the assent of the agent. It might lead to very inconvenient consequences if we did not consider for the purposes of the suit, the agent and the attorney identically the same"; and Martin, B., at p. 295, said: "I do protest against any distinction being drawn between the act of the London agent and the act of the country attorney. If we make such a distinction I don't know where we shall stop." If the learned barons did not mean what they there said, I do not know for what purpose these *dicta* were uttered. It would be calamitous to the conduct of business to hold otherwise.

*Application dismissed with costs.*

Solicitors, *Carruthers*, Liverpool; *Collins, Robinson, & Duffield*, Liverpool; *Robins, Billing, & Co.*, for *J. Pughe & Davey*, Pontypridd; *Smiles & Co.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) Nov. 3.

HUMPHERY v. YOUNG. (*a*.)

*Local government—"Drain"—Semi-detached house—Pipe used for draining—"One building only"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4 *and* 41.

*The question whether a pair of semi-detached houses are "one building only" within the meaning of section* 4 *of the Public Health Act*, 1875, *which provides that "'drain' means any drain of and used for the drainage of one building only," is a question of fact, and depends upon the circumstances of each case.*

Case stated.

On the 18th of April, 1902, an information was preferred by Joseph Humphery (the appellant), inspector of nuisances for the borough of Reigate, on behalf of the mayor, aldermen, and burgesses of the borough, being, by their council, the urban district council for the borough and the local authority for the district, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41, against Douglas Young (the respondent), for that on the appellant's written application to the authority stating that a drain belonging to Nos. 36 and 38, Somers-road, within the borough, was a nuisance and injurious to health, the local authority did empower him (the appellant), after twenty-four hours' written notice to the occupiers of the premises, to enter the same and cause the ground to be opened and examine the drain; that upon examination the drain appeared to be in a bad condition and to require alteration or amendment; that the local authority did, on the 25th of February, 1902, cause notice in writing to be given to the respondent, the owner of the premises, requiring him before the 4th of March then next to do the following necessary works—that is to say, relay the drain with soundly-jointed 6in. glazed stoneware pipes on a bed of 6in. of cement concrete, the drain to be jointed so as to stand the water test; and that the notice had not been complied with, and the works had not been executed.

Upon the hearing of the information the following facts were proved or admitted before the justices:

The written application to the local authority was made as required by section 41 of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

The local authority thereupon by writing empowered the appellant, who was their inspector of nuisances, after the notice to the occupiers required by the same section, to enter the premises mentioned in the application and cause the ground to be opened and examine the drain or sewer mentioned in the application, which the appellant accordingly did.

Upon such examination the drain or sewer appeared to be in a bad condition, and to require alteration or amendment.

Thereupon the local authority forthwith caused notice in writing to be given to the respondent, who was the owner of the premises, requiring him before the 4th of March (being a reasonable time) to do the necessary works, which necessary works were specified in such notice and in the information.

Such notice was not complied with.

The premises in question were a pair of semi-detached houses, built apparently at the same time, having one continuous roof and divided by a party wall which did not go up through the roof. At the time of the erection of the houses the local authority did not require the party wall to be carried up above the roof. At the point of division there was a recess in the front wall down which a water-pipe ran. The houses had gardens in front and behind, which were divided by fences.

The houses had always been the subject of separate lettings, and occupied by separate tenants; and they were separately assessed and rated for the poor and other rates.

The drain or sewer in question was used for the drainage of both houses. It commenced at the point of junction of two separate drains which drained the respective houses, ran thence under the garden of one of the houses into and under a public road called Somers-road, and was connected with a public sewer which ran along that road.

On the part of the appellant it was contended that the two houses were one building only, and that the drain or sewer was a drain within the meaning of section 41 of the Public Health Act, 1875.

On the part of the respondent it was contended that the two houses were two buildings not within the same curtilage, and that the sewer or drain was not a drain within the meaning of section 41, but was a sewer vested in and repairable by the local authority.

The following cases were cited: *Travis* v. *Uttley*, 42 W. R. 461, [1894] 1 Q. B. 233; *Hedley* v. *Webb*, [1901] 2 Ch. 126, 49 W. R. Dig. 101; and *Woodford Urban District Council* v. *Stark*, 86 L. T. Rep. 685, 50 W. R. Dig. 98.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The justices found as a fact (if and so far as it was a question of fact) that the two houses were two separate buildings and not within the same curtilage, and they were of opinion, on the authority of *Travis* v. *Uttley*, that the drain or sewer in question was a sewer within the meaning of the Public Health Act, 1875, vested in the local authority, and that the respondent could not be required to alter or amend it. They therefore dismissed the information.

The question for the opinion of the court was whether the justices upon the above statement of facts came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), it is provided as follows:

Section 4.—"Drain" means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. "Sewer" includes sewers and drains of every description, except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act.

Section 41.—"On the written application of any person to a local authority, stating that any drain, water-closet, earth-closet, privy, ashpit, or cesspool on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise) the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises, with or without assistants, and cause the ground to be opened and examine such drain, water-closet, earth-closet, privy, ashpit, or cesspool. . . . If the drain . . . on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding ten shillings for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses."

*Bray, K.C.* (*G. Humphreys* with him), for the appellant.—The decision of the justices was wrong. *Hedley* v. *Webb* is in favour of the appellant. In that case Cozens-Hardy, J., held that a pair of semi-detached houses were "one building only" within the meaning of section 4 of the Public Health Act, 1875, and that the pipe which drained the two houses was a drain, and not a sewer. The decision in that case is binding on the justices. In the present case there is no evidence that these houses are separate buildings. They were built at the same time and are under one continuous roof and have one continuous front wall. Buildings of this nature are of frequent occurrence, and the court should lay down as a proposition of law whether such houses are one building or not within the meaning of section 4.

*Macmorran, K.C.* (*Naldrett* with him), for the respondent.—The question in cases such as this is one purely of fact and depends upon the circumstances of each individual case. *Hedley* v. *Webb* was decided on a point of fact. The justices were right in holding this pipe was a sewer.

*Bray, K.C.*, replied.

Lord ALVERSTONE, L.C.J.—We have been invited by counsel for the appellant to lay down a general rule as to whether a pair of semi-detached houses is to be regarded as one building only or more than one. I for one decline to lay down any such rule. It is in every case a question of fact. Counsel has argued that we must find that these semi-detached houses were one building only, because they were built at the same time and are both under one continuous roof and have one continuous front wall, and that there was no evidence before the justices on which they could find that they were separate buildings. I doubt whether it was intended that the word "building" in the Act should have so wide a meaning. Section 4, which contains the definition of a drain, says that "drain" means any drain of and used for the drainage of one building only or premises within the same curtilage, and "sewer" includes sewers and drains of every description except drains to which the word "drain" as above defined applies. If it had been intended to deal with the question of structure I think some more distinct definition would have been given. I have, however, come to the conclusion that it must be a question of fact in each case for the justices, and in the present case they have found as a fact that the two houses were two separate buildings and not within the same curtilage, and I think it is impossible to say that there was no evidence upon which they could so find. In *Travis* v. *Uttley* it was held that three houses were not "one building only," and that a drain passing through private ground, but receiving the drainage of three houses, was a sewer within the meaning of the Act. That case seems to me to be an authority here, at least to the extent of showing that it is a question of fact, and that each case has to be dealt with on its own facts. *Hedley* v. *Webb*, which was relied on by counsel for the appellant, in so far as it is an authority at all in the present case, is rather against the appellant. In that case Cozens-Hardy, J., held that the pair of semi-detached houses with which he had there to deal were one building, but that is an instance of a finding of fact by the learned judge. As further showing that it must be a question of fact, I may refer to the case of *Rogers* v. *Hosegood*, 49 W. R. 659, [1900] 2 Ch. 388, where the Court of Appeal held that for some purposes a block of residential flats was not one dwelling-house.

WILLS, J.—I am of the same opinion. In cases of this kind the facts are very seldom identical and the question whether the structure is one building or two must be treated as one of fact. As to the view that I appear to have taken in *Travis* v. *Uttley*, that because part of the pipe was undoubtedly a sewer the whole of the drain was a sewer from end to end, I may point out that I modified and corrected that view in the subsequent case of *Beckenham Urban District Council* v. *Wood*, 60 J. P. 490.

CHANNELL, J.—I also am of the same opinion. I agree that it is a question of fact in each case. No doubt it would be very useful if we could lay down a general rule which would apply to such a case as this, but we have not the power to do so.

*Appeal dismissed.*

Solicitors for appellant, *Nicol, Son, & Jones*, for *C. J. Grece*, Redhill.

Solicitors for respondent, *Pettiver & Pearkes*.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) May 13, 1902.

COUNCIL OF CITY OF WESTMINSTER v. WATSON. (a.)

*Local government—Buildings—Surveyors fees—Supervision of temporary wooden structures — Whether power transferred to borough councils—District surveyors—London Building Act,* 1894 (57 & 58 *Vict. c. ccxxiii.*), *s.* 84—*London Government Act,* 1899 (62 & 63 *Vict. c.* 14), *s.* 5 ; *Schedule II., Part I.*

*The transfer, by section 5 of the London Government Act,* 1899, *of the licensing power over temporary wooden structures, under section* 84 *of the London Building Act,* 1894, *from the London County Council to the borough councils, does not operate as a transfer of the powers and duties of the district surveyors, though those powers and duties are substantially diminished thereby. The district surveyors are officers under the London Building Act,* 1894. *They are therefore entitled, under section* 145 *of that Act, to receive notices of structures falling within section* 84, *and, in a proper case, are entitled to inspect and receive a fee for such inspection.*

Case stated under section 29 of the London Government Act, 1899.

The City of Westminster was created in pursuance of section 1 of the London Government Act, 1899, which gave power to the Crown to create such areas and to make such re-arrangements for boundaries as would be found necessary, and the first schedule to such section defined those boundaries.

By section 5, sub-section 1, the powers and duties of the London County Council, under the enactments mentioned in Part I. of the second schedule to that Act, subject to the conditions mentioned in that schedule, were transferred to the borough council.

That schedule is as follows:

Part I.—Powers and duties to be transferred from county council; powers and duties transferred; power under section 84 of the London Building Act, 1894, to take proceedings for default in obtaining or observing the conditions of a licence under that transfer.

Section 84 is one of a series of five sections—82-86 in Part VII. of the London Building Act—giving to the London County Council power to licence temporary structures, and providing for the deposit of plans and also providing for the recovery of penalties.

By the London Building Act, 1894, s. 138, it is provided, "subject to the provisions of this Act, and to the exemptions contained therein, every building or structure . . . shall be subject to the supervision of the district surveyor appointed to the district in which the building or structure is situate."

By section 145: "In the following cases and at the following times—that is to say: (a) When a building or structure is about to be begun, then two clear days before it is begun; and (b) when a building or structure or work is after the commencement thereof suspended for any period exceeding three months, then two clear days before it is resumed; and (c) when, during the progress of a building or structure or work the builder employed thereon is changed, then two clear days before a new builder enters upon the continuance thereof, the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structural work."

By section 154: "(1) There shall be paid by the builder, or in his default by the owner or occupier, as the case may be, of the building or structure in respect whereof the same are chargeable, to every district surveyor in respect of the several matters mentioned in Parts I. and III. of the third schedule to this Act the fees therein specified, or such other fees as may be directed by the London County Council."

By the third schedule—Fees payable to district surveyors on wooden and temporary structures: "On inspection of any wooden structures or on inspection of any structure or erection put up on any public occasion, the same amount as for a new building, calculated on the area of the structure or erection, without reference to the area of any building to which it may be attached or in or on which it may be put up."

Prior to the transfer of the administration of section 84 to the metropolitan boroughs it was the practice of the London County Council to make any grant of licence or approval conditional on the work being done subject to the approval of the district surveyor; and the Westminster council had by their licence made the approval of structures falling within section 84 subject to the approval of their own surveyor.

By Part IX. of the Act of 1894 provision is made for dangerous and neglected structures.

The district surveyors have the duty to report to the London County Council information received by them that the structure is in a dangerous state, and may be required by the London County Council to survey such structure.

Fees are provided for the district surveyors for surveys and subsequent action, but no fee is provided merely for reporting information, and the provision as to the fees in question is made by section 113 of the Act coupled with Part II. of the third schedule.

The questions which have arisen between the council of the city of Westminster and the district surveyors who are parties in this case are, firstly, as to whether the powers, duties, and liabilities of the surveyors with respect to the supervision or inspection of wooden structures falling within section 84 of the Act of 1894 have been transferred to the city council and its officers; secondly, as to whether wooden structures falling within section 84 are works of which the district surveyor should have notice under section 145 of the Act, and as to which he has duties of inspection and supervision independently of the terms of any licence; and thirdly, as to whether the right to receive the fees for such supervision and inspection has been transferred to the Westminster City Council, or is still retained by the district surveyor independently of the terms of the licence granted.

*Manisty, K.C.* (*Craies* and *B. O. Bircham* with him), for the city of Westminster.—The duties of the district surveyor have been transferred as regards section 84, which alone deals with these temporary wooden structures. The notice to the district surveyor under section 145 only applies to structures in the nature of a building, and these are temporary structures.

He referred to *Venner* v. *McDowell*, 45 W. R. 267, [1897] 1 Q. B. 421, and *Westminster, City and Council of* v. *London County Council*, 50 W. R. 428, [1902] 1 K. B. 326.

*Macmorran, K.C.* (*Ryde Hilliard* with him), for the district surveyors.—The surveyors' rights under section 84 have not been taken away, and they therefore have still the right to receive notices under section 145. They are not the servants of the county council, but have to perform their statutory duties under the Act. If the contention of the city council is right, and the right of supervision has passed to them, the

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

power of supervision would depend upon the terms of the licence, and if no condition as to supervision were inserted there would be no power in anyone to supervise these structures.

Lord ALVERSTONE, L.C.J.—This is a difficult case. The necessities of modern legislation have rendered it absolutely necessary that there should be legislation by reference, and one of the difficulties unavoidably imposed on the courts is that they frequently have to construe Acts of Parliament which incorporate sections of other Acts by mere reference. We have in this case to deal with a question which is raised in consequence of such legislation. The second schedule of the London Government Act, 1899, transferred from the county council under the words "Powers and duties to be transferred" the power under section 84 of the London Building Act, 1894, to license the setting up of wooden structures, and power to take proceedings for default in obtaining or observing the conditions of a licence under that section. Section 84 contemplated that the licence should contain provisions with reference to the structure and the time for which it should be allowed to continue. It is not denied that the city of Westminster obtained something under that transfer, and we decided in *Westminster Council* v. *London County Council* that the right of licensing or imposing conditions in the licence, and of taking proceedings in the event of not obtaining or observing a licence, had been transferred to the city of Westminster. At the time of transfer there were existing a number of provisions regarding the duties of district surveyors, duties partly defined by Act of Parliament and partly regulated by bye-laws made under the Act. They are duties imposed upon persons who are not strictly speaking servants of the county council though their deputies had to be appointed subject to its approval. They are public officers under the London Building Act, 1894, with important duties to perform. I do not think that it was intended to transfer the powers of the district surveyors to the Westminster City Council. Far stronger language would have been required to effect such a transfer. But by the transfer the powers of the district surveyors may have been to a certain extent destroyed, or some of them may have been taken away. What is, therefore, the true view of the law having regard to the respective positions of the county council, the surveyors, and the city of Westminster; and what was intended to be transferred under section 84 of the London Building Act. I repeat that the city council can specify the conditions of the licence, and if any duties are imposed upon anybody by the licence, they are not imposed upon the district surveyors as such. At the same time, the transfer from the county council does not destroy any of the duties or powers of the district surveyors, except in so far as the actual necessity of the transfer involves the alteration or destruction of those duties.

It is now necessary to consider (in the light of these general observations) the three questions put to us in the case. The first is, as to whether the powers, duties, and liabilities of the surveyors with respect to the supervision or inspection of wooden structures falling within section 84 have been transferred to the city council and its officers. In so far as those duties depend upon the terms of the licence it is not a question of transfer at all; it is a question of duties which are imposed upon the officers of the city council if there are any such named by the terms of the licence. They are not duties which are taken away from the district surveyors; and therefore it follows that the district surveyors do not have either the right, power, or duty of performing any of the duties prescribed by the licence, unless the licence indicates by its terms that they are the persons to fulfil its duties; for instance, it might be quite possible for the city council to say that they would direct these structures to be erected subject to the supervision of the district surveyor. My answer to the first question is, that the powers and duties of the district surveyors are not transferred to the city council and its officers, and that the district surveyors have no powers or duties or liabilities under the licence which is granted by the city of Westminster.

The second question is whether wooden structures falling within section 84 are structures of which a district surveyor should have notice under section 145 of the Act, and as to which he has duties of supervision and inspection independently of the terms of any licence. On the whole I think that the district surveyors are entitled to the notice under section 145, not, of course, of everything specified in that section, because some of the provisions are not applicable; but there may be questions, notably of dangerous structures, possibly of interference with some street or street lines, possibly of some of the other matters which may be involved, that may impose (in a proper case) upon the district surveyor the right and duty of inspecting under the Act—a right and duty not in any way based upon the licence. It must not be thought that I suggest that because notice is given the surveyor has the right of going in and purporting to exercise functions under the Act which have no relation to the structure which is actually being erected or to its character, and I must not be thought to express an opinion that simply because a notice may be given a surveyor would be entitled to say, "I will go in and inspect and will claim my fee," although there was no reasonable ground for suggesting that there was any danger of any infraction of any conditions in the statute. I do not mean to express an opinion that a surveyor would be entitled to claim a fee under such circumstances. I think it is impossible for us to say, having regard to the duties of the surveyor, that he is not entitled to notice.

The last question is, as to whether the right to receive fees for supervision and inspection mentioned in the case has been transferred to the city council or has lapsed or is still retained by the district surveyor. I am of opinion that the right has not been transferred to the city council or its officers; that follows from the earlier part of my judgment. I do not think, either, that it has altogether lapsed. The reasonable and proper course for the county council to take would be to exercise their powers under section 154 of the Act of 1894 of allowing a lesser fee where the duties to be performed by the district surveyor would obviously be very much less than those he would have to perform under the circumstances contemplated by the statute. I am of opinion that the right to proper fees is not taken away, and that if in a proper case, for good cause, the surveyor, on information he has received, has the duty cast upon him to inspect, or if some question arises which may properly give him the right to inspect in order to see whether the provisions of the Act have been infringed, then he would be entitled to a fee. I can do no more than indicate my opinion as to what ought to be done with regard to the amount of fees, but I wish it to be understood that I do not, in recognizing this right of district surveyors, suggest that they are entitled, simply because they are district surveyors and have certain duties to perform under the Act, to claim fees in respect of every building which may be erected. The case is, no doubt, one of difficulty in consequence of the transfer of the duties from the

county council without any special reference to the duties of district surveyors. I have answered the questions, and I trust my answers will be sufficient to enable persons to ascertain what their rights are.

DARLING, J.—I am of the same opinion. With regard to the district surveyor inspecting one of these temporary wooden buildings and obtaining a fee for doing so even after notice, during the argument it taxed the ingenuity of counsel to suggest even a hypothetical case in which one of these erections would infringe the provisions of the Act of 1894, and so really require the attention of the district surveyor. That is enough to satisfy me that there will really be no unnecessary interference by district surveyors with buildings such as these.

CHANNELL, J.—I do not think it is correct to say that any powers, duties, or liabilities of the surveyors have been transferred by the London Government Act, 1899, because the district surveyors are persons having a statutory position and duty cast upon them; they are not mere servants of the London County Council. The result seems to be that the transfer of the powers and duties of the London County Council cannot possibly operate as a transfer of the powers and duties of the district surveyors. But incidentally the transfer of powers to the city of Westminster which but for that transfer would have been exercised by the county council has, in my opinion, very substantially diminished the duties of the district surveyors. Under the former proceedings, when the right of licensing was in the London County Council, it was undoubtedly their practice so to frame the licence that the district surveyor would be the person who would have the very substantial work of seeing whether or not the structure was erected in accordance with the licence. But the effect of taking away that power and giving it to another body—which is now in fact exercising it in a way which is only natural, namely, by appointing its own officer to do the work—is to substantially diminish the work of the district surveyor. The duty cannot be said to be transferred because, so far as it is an independent statutory authority, it necessarily still exists. It seems to me, therefore, that the way to answer these questions is as follows: As to the first, that nothing has been transferred, but that so far as any duties would formerly have been imposed upon the district surveyors by the fact that such buildings were licensed by the London County Council, no such duties are now imposed upon them, but are imposed by the licence upon the Westminster city surveyors. It is impossible to answer the question in accordance with its exact terms, because nothing has been transferred. With regard to other duties imposed upon the district surveyor, especially with regard to dangerous structures, they remain as they were. As to the second question, in my opinion, the district surveyors are entitled to have notice of works mentioned in the question. It would be sufficient notice to say, "Two days hence I am going to erect a building, or temporary structure, which the city of Westminster has licensed, and which it has directed me to build according to the satisfaction of their own surveyor." That notice would at once tell him that he has very little to do in connection with the structure, but that he may have duties of inspection and supervision independently of the terms of the licence. I think the matter is quite clear. The structures may be dangerous, and if they are the district surveyor has a right to inspect them. As to the right to recover fees, if in any case he inspects property—and not when he knows that there is nothing for him to inspect and inspects merely for the purpose of obtaining a fee—he is entitled to his fee. I agree with the suggestion made by my lord that the proper way for the London County Council to meet this case is, inasmuch as incidentally the operation of transferring the licensing of these matters from them to the city of Westminster and the other metropolitan boroughs is very greatly to diminish the duties which in point of fact will be likely to fall upon the district surveyor, to make a direction under section 154, which says the district surveyor is to have the fees specified in the schedule, or such other fees, not exceeding the amounts therein specified, as may be directed by the council. If the London County Council would make a direction imposing a smaller fee to the district surveyor when the structure was in fact licensed by the city of Westminster or other Metropolitan authority, and not by themselves (which would undoubtedly greatly diminish his work), the whole difficulty, it seems to me, would be met.

*Judgment accordingly.*

Solicitors for Westminster City Council, *Caprons, Hitchins, Brabant, & Hitchins.*

Solicitors for district surveyors, *Hicklin, Washington, & Pasmore.*

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Prob. Div. & Adm. Div. Probate. } Nov. 24.

*In the Goods of* JOSEPH BAXTER. (*a.*)

*Probate—Will—Nomination paper—Industrial and Provident Societies Act,* 1893 (56 & 57 *Vict. c.* 39), *s.* 25, *sub-sections* 1, 2.

*The Court admitted as a valid will a nomination paper executed by a member of a co-operative society which was registered under the Industrial and Provident Societies Act,* 1893, *although it was invalid as a nomination paper, because the deceased's credit with the society stood at a greater sum than* £100, *in contravention of section* 25, *sub-section* 1, *of the Act.*

This was a motion to revoke letters of administration which had been granted to the next-of-kin as upon intestacy, and to admit to probate as a will a nomination paper which was invalid under the Industrial and Provident Societies Act, 1893. The facts were shortly as follows: Joseph Baxter died on the 21st of September, 1901, having on the 6th of January, 1899, signed a nomination paper, being at that time possessed of certain shares of about £100 in the Runcorn Co-operative Industrial and Provident Society (Limited), the paper being in the form prescribed by the society, whereby he purported to give the whole amount standing to his credit at the time of his death to his nephew, John Baxter.

Section 25, sub-section 1, of 56 & 57 Vict. c. 39 provides that: "A member of a registered society, not being under the age of sixteen years, may by a writing under his hand delivered or sent to the registered office of the society, during the lifetime of such member, or made in any book kept thereat, nominate any person or persons other than an officer or servant of the society (unless such servant is the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator) to or among whom his property in the society, whether in shares, loans, or deposits, or so much thereof as is specified in such nomination if the nomination does

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

not comprise the whole shall be transferred at his decease, provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling.

Sub-section 2 provides: "A nomination so made may be revoked or varied by any similar document under the hand of the nominator delivered, sent, or made as aforesaid, but shall not be revocable or variable by the will of the nominator or any codicil thereto."

The nomination paper was as follows:

"I, Joseph Baxter, of Alvanley, near Frodsham, labourer, a member of the Runcorn Co-operative Society (Limited), and No. 3,252 in the said society, do hereby nominate the following as the only person or persons (none of them being an officer or servant of the society, unless such person is the husband, wife, father, mother, child, brother, sister, nephew, or niece of me, the nominator) to or among whom shall be transferred my property in the society whether in shares, loans, or deposits at my decease in such proportion as is set forth below opposite their respective names:

| Name. | Description or Occupation. | Address. | Proportion. |
|---|---|---|---|
| John Baxter | Nephew | Alvanley | All. |

"If the above-mentioned John Baxter does not survive the above Joseph Baxter, then the whole of the shares of the said Joseph Baxter to be paid to his nephew Robert Baxter, of Alvanley.

"As witness my hand this the 6th day of January, 1899. "Joseph Baxter.

"(Witnesses) Thos. Clare and J. J. Shaw."

To the credit of the deceased in the society at the time of his death was £120. plus interest at £1 10s. 5d.

John Baxter, on the death of the deceased, applied to the society for payment, but was refused on the ground that, as the amount standing to the deceased's credit exceeded £100, the nomination was invalid.

On the 1st of December, 1901, a grant of letters of of administration was issued to the deceased's sister as his next-of-kin, she having sworn that the deceased died intestate, and on the 2nd of February, 1902, the society paid over to her the sum of £121 10s. 5d.

The court was now moved, on behalf of John Baxter, to revoke the grant of letters of administration and to pronounce for the nomination paper of the 6th of January, 1899, as a will duly executed by the deceased in accordance with the provisions of the Wills Act (1 Vict. c. 26).

*Pritchard*, for the administratrix, contended that the document could not be considered a will, as a will was essentially of a revocable character, and nominations under the Industrial Societies Act, 1893, s. 25, were not revocable.

*Barnard*, for the applicant, cited *Bartholomew and Brown* v. *Henley*, 3 Phillim. 317.

BARNES, J., in giving judgment, said that in his opinion the document was a testamentary one. It failed under the provisions of the Industrial Societies Act, 1893, to operate as a nomination paper. Under that Act a member of the society might, by writing under his hand, nominate a person or persons to whom his interest in the society was to go after his death, provided the amount credited to him in the books of the society did not at the time he executes the nomination exceed £100. An affidavit by the secretary of the society was to be filed to that effect. If this document had been operative as a nomination, sub-section 2 of section 25 of the Act of 1893 would have taken effect, and the document would not have been revocable by any will or codicil. But as the document was not operative as a nomination, the sub-section had no effect in this case; and that being so, there was no reason why it should not be accepted as a will. The two witnesses who signed it had made affidavits showing that the terms of the Wills Act were in effect complied with. The letters of administration which were granted to the sister of the deceased would therefore be revoked, and the document of the 6th of January, 1899, would be admitted as a will, and administration with the will annexed would be granted to the applicant as the sole beneficiary thereunder. The costs of both parties would come out of the estate.

Solicitors for the applicant, *Grundy, Kershaw, Samson, & Co.*, for *Linaker & Linaker*, Runcorn.

Solicitors for the administratrix, *F. Venn*, for *C. E. Nield*, Liverpool.

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Prob. Div. & Adm. Div. Admiralty. } Nov. 3, 7.

"THE HARMONIDES." (a.)

*Ship—Collision—Assessment of damage—Value of vessel where no market value.*

*Where a vessel has been totally lost and there is no market value for her at the time immediately preceding her loss, the real test as to what she was worth is, What was her value to her owners as a going concern at the time she was lost?*

This was a motion by way of appeal from the finding of the Liverpool District Registrar assessing the value of the steamship *Waesland* at £18,000 under the circumstances hereinafter appearing.

The question for the court was, what questions should be taken into consideration in order to arrive at the true value of the vessel. The facts of the case were as follows:

On the 5th of March, 1902, the steamship *Harmonides* ran into and sank in the St. George's Channel the steamship *Waesland*. *The Waesland* was an iron screw steamship of 4,856 tons gross, and on the 10th of April her owners and others brought an action of damage against the owners of *The Harmonides*, and the court held that vessel alone to blame.

On the 12th of May the owners of *The Harmonides* obtained a decree limiting their liability at £8 per ton on 3,391 tons to £27,128 with interest at 4 per cent. from the date of the collision until payment into court. The claims brought in for assessment amounted to £80,477 13s. 5d., which sum included an item of £31,640 claimed as the value of *The Waesland* and her stores.

Before the Liverpool District Registrar objection was taken to the sum at which *The Waesland* was valued.

Evidence was then given that the vessel was built in 1867, at Glasgow, by Messrs. J. & G. Thomson, for the Cunard Line, being then called *The Russia*, of 2,920 tons.

In 1879 she was purchased for £18,000 by the Société Anonyme de Navigation Belge-Americaine,

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

of Antwerp, who owned her at the time she was lost.

In 1880, Messrs. Harland & Woolf, of Belfast, lengthened her, and she was re-engined by Messrs. John & James Thomson, of Glasgow, at a total cost of £50,531.

In 1889 she was fitted with triple expansion engines, of 582 nominal horse-power, at a cost of £23,295, making a total sum expended upon her of £91,826. Six per cent. was deducted from this sum for depreciation, and a sum of £1,508 7s. 2d. added for stores, less £80 for boats salved, bringing the net value of the vessel, her stores and outfit, to £31,205 7s. 2d.

At the time of her loss *The Waesland* was insured for £30,000 upon a value of £40,000, and, adding the proportion of the net premium from the date of the collision to the expiry of the insurance, £435 2s. 11d., together with £310 9s. 5d. as the net freight at risk and lost by the collision, the total claim amounted to £31,950 19s. 6d. The official Admiralty valuer, after valuing the particulars of *The Waesland* as set out in Lloyds' book, fixed her "market" value at the time of her loss exclusive of equipment for passengers at £16,500.

On the 6th of August, 1902, the registrar in his report assessed the total claims at £67,734 9s. 11d., the value of *The Waesland* being fixed at £18,000, with an addition of £310 9s. 5d., being the amount of net freight lost and £1,508 7s. 2d. for stores, less £80 for boats salved, or a total of £19,738 16s. 7d. The owners of *The Waesland* appealed as to so much of the report as dealt with their claim, and on the 3rd of November, by consent, the appeal to increase the sum of £18,000 to £29,777 came on for hearing by motion, and an application was then made by affidavit to add to the £29,777 a sum of £1,426, being the value of the refrigerating machinery which had previously been left out of consideration; and on the hearing of the motion evidence on behalf of the appellants was given as to *The Waesland's* success in earning profits for her owners, and further it was contended that the "market" value was not the true test, for if the ship was taken out of the particular trade for which she was intended (namely, the Atlantic trade) she would very likely have to be sold at a breaking up price. On behalf of the respondents evidence was called as to what was the market value of the vessel, and evidence was given that in the opinion of the witnesses she was an obsolete Atlantic liner, and if sold would fetch little more than scrap-iron, and in view of the alterations in structure since her building she was nothing more nor less than an abortion.

*Pickford, K.C.*, and *Lewis Noad*, in support of the motion, on behalf of the owners of *The Waesland*, the appellants.

*Aspinall, K.C.*, and *Stubbs*, *contra*, for the respondents.

BARNES, J., in giving judgment, said: The owners of *The Waesland* in the limitation suit claimed to have their vessel valued at the sum of £31,640, that sum including stores on the voyage outward; and it was objected on the reference by the cargo-owners of *The Waesland*, or some of them, that the value placed on *The Waesland* was too high, because if they could reduce that value their dividends would be larger. Thereupon a contest arose as to what was the true value to be placed on *The Waesland* for the purpose of her owners claiming a share of the fund in court. The litigation in this court has, I think, been brought about by the case being treated too scantily before the district registrar, and I therefore considered it desirable that further evidence should be called before me, and now that I have seen the witnesses I think I am in a much better position to deal with the case than the registrar was when it was before him. There is no real dispute between the parties as to the principle upon which the matter should be dealt with. I entirely concur with the observations which were cited from the case of *The Ironmaster*, Swa. 441, 8 W. R. Adm. Dig. 21. There is no doubt that in this class of case the best evidence is that of those who know the ship, and the next best evidence is that of those who have experience of the market, but who do not know the vessel except from the shipping records. There are other *criteria*, such as the amount of profits and so forth. All these matters have to be considered, to my mind, when it impossible to say that there is a real market test of the value of such a vessel as this. If one goes to the root of the matter it is obvious that what the shipowners lose if a vessel like this is run into and sunk is what it would cost to replace them in the position they were in before the accident. But where a ship like this has gone to the bottom, you cannot, speaking from a business point of view, replace them in the position they were in before, because you cannot replace the vessel which is at the bottom of the sea; you cannot buy another like her in the market; you cannot get another made immediately; and if you bought another ship she would be new, and consequently more valuable, because she would start as a new ship from that day, and therefore you would have to discount her value down. So that the real test, where there is no market, is, as counsel on both sides agree, what is the value to the owners, as a going concern, at the time the vessel was sunk. You cannot get at this with any great certainty, for you cannot get at it from the market value. Possibly, for such a ship at such a time there would be no buyers, and she would have to be sold for old iron. You cannot deal with it like an ordinary commodity being sold every day. You must look at it and see what is the loss to the owners. It has been pointed out that you may look at the original cost plus the money expended on her, and so forth. That is of assistance, but it is not complete assistance, because it is a rough and ready method. You may look and see also how the ship is paying.

That, however, is not a complete test, because you cannot be sure that the way she has been paying will continue. But one thing is absolutely certain—viz., you cannot say the test is her market value. I think the registrar has come to an erroneous view about this case because he has not had it sufficiently threshed out before him. I have considered it with great care, and by the light of the class of ship, and of the considerations which ought to be taken into account in arriving at what the ship was really worth to her owners, my opinion is that the appellants have not overstated their case. I think the vessel was worth £31,000, and I therefore propose to vary the report by increasing the sum of £18,000 to £31,000. The appellants to have their costs of appeal.

Solicitors for the owners of "The Waesland," *Hill, Dickinson, & Dickinson*, for *Hill & Roberts*, Liverpool.

Solicitors for respondents, the owners of part cargo on board "The Waesland," *Stokes & Stokes*, for *Batesons, Warr, & Wimshurst*, Liverpool.

## Court of Appeal.

From K. B. Div.
(Vaughan Williams, Stirling, and Mathew, L.JJ.) } Feb. 3.

WAKEFIELD CORPORATION *v.* COOKE AND OTHERS. (*a.*)

*Local government—Street—Paving expenses—Decision of justices that street is a highway repairable by the inhabitants at large*—Res judicata—*Wakefield Corporation Act*, 1887 (50 & 51 *Vict. c. lxxi.*), *ss.* 29, 30 31—*Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.

*Upon an objection by the owners of premises in a street to a scheme for certain private street works which the local authority proposed to execute under a local Act (which contained provisions identical with sections* 6, 7, *and* 8 *of the Private Street Works Act*, 1892), *the justices decided that the street was a highway repairable by the inhabitants at large, and upheld the objection. Subsequently the local authority proposed to execute private street works in the street under a different scheme.*

*Held, upon objection taken by the owners of premises in the street, that the matter was* res judicata, *by reason of the former determination of the justices.*

Reg. *v.* Hutchins, 29 *W. R.* 724, 6 *Q B. D.* 300, *distinguished.*

*Judgment of the* Divisional Court (50 *W. R.* 254, [1902] 1 *K. B.* 188) *reversed.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.) upon a special case stated by justices for the city of Wakefield: reported in 50 W. R. 254, [1902] 1 K. B. 188.

At a meeting of the general works committee of the corporation of Wakefield in November, 1900, a resolution was passed in pursuance of section 29 of the Wakefield Corporation Act, 1887,* that the corporation should do the following private street works in the private street known as Sludge-lane, extending from Eastmoor-road for a distance of 350 yards—namely, sewer, level, metal, flag, kerb, channel, and make good the street. This resolution was confirmed at a meeting of the corporation, and at a subsequent meeting of the committee the city surveyor laid before the committee a specification of the works, with plans, an estimate of the probable expense, and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith. The committee recommended the corporation to approve the same, and at a subsequent meeting of the corporation a resolution was passed approving thereof, and the resolution was duly published and copies thereof served on the owners of the premises specified in the provisional apportionment. Several of the owners of the said premises duly objected to the proposals of the corporation on the grounds (1) that Sludge-lane was not and did not form part of a street within the meaning of the Act; and (2) that Sludge-lane was a highway repairable by the inhabitants at large.

The justices, upon the application of the corporation after the time limited for sending in objections had expired, appointed a time for hearing and determining the objections, and upon the objections coming on for hearing it was contended on behalf of the objectors that the matter was *res judicata* by reason of a decision of certain justices of the city of Wakefield on the 6th of January, 1898, that Sludge-lane was a highway repairable by the inhabitants at large, which decision was pronounced upon a similar objection raised by the owners of premises in Sludge-lane upon a scheme then brought forward by the corporation for executing private street works in Sludge-lane under the Wakefield Corporation Act, 1887.

It was admitted as a fact that the resolution, plans, and notices for the works on the second occasion related not only to so much of Sludge-lane as was the subject-matter of the proceedings of the 6th of January, 1898, but also to an additional length of eighty yards in a straight line and continuous therewith. The same objectors were present or represented at the hearing on the second occasion as were present or represented at the hearing on the 6th of January, 1898, except that one objector on the second occasion was not an objector at the former hearing, though he was then the owner of the same property. Some of the other properties had changed hands, but the owners were present or represented on both occasions.

It was contended on behalf of the objectors that, as the court of summary jurisdiction on the 6th of January, 1898, had found as a fact that Sludge-lane was a highway repairable by the inhabitants at large, and as the parties—namely, the corporation and the owners of the property abutting on the road—were the same, the matter was *res judicata*, and the corporation were, therefore, estopped in the present proceedings by the determination of the court on the 6th of January, 1898.

It was contended on behalf of the corporation, on the authority of *Reg.* v. *Hutchins*, 29 W. R. 724, 6 Q. B. D. 300, that the court on the 6th of January, 1898, had no power to try the question whether Sludge-lane was a highway repairable by the inhabitants at large, that the subject-matter was not the same by reason of the corporation having taken a greater length of road than on the previous occasion and proposing to do the work in a different manner, and that the parties were not the same, as some of the properties had changed hands since the previous hearing, and one owner objected now who did not object then. The corporation further urged that they had discovered and intended to adduce in evidence certain additional facts relevant to the objection that Sludge-lane was a highway repairable by the inhabitants at large.

The justices were of opinion that the principle of *Reg.* v. *Hutchins* did not apply, as the question determined by the justices on both occasions was whether Sludge-lane was a highway repairable by the inhabitants at large, and that the fact that the corporation extended the portion of the road, the manner in which it was proposed to be dealt with, the change of ownership of some of the property, and the fact that one of the owners objected on the second occasion and not on the former, did not affect directly the question between the parties and immediately before the court.

They were also of opinion that the objection that Sludge-lane was a highway repairable by the inhabitants at large referred to in the proceedings on the second occasion was the same question which was decided on the former occasion, and they therefore determined that the matter was *res judicata* and declined to go into the merits of the objection, and ordered the corporation to pay the costs of the objectors.

The question was whether the justices were right in law.

The Divisional Court held that the matter was not

* Sections 29, 30, and 31 of the Wakefield Corporation Act, 1887, are identical with sections 6, 7, and 8 of the Private Street Works Act, 1892.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-Law.

*res judicata*, and that the previous determination was no bar to the present proceedings.

The objectors appealed.

*Danckwerts, K.C.*, and *J. A. Compston*, for the objectors.—The procedure under the Wakefield Corporation Act, 1887, which is the same as under the Private Street Works Act, 1892, is wholly different from that under the Public Health Act, 1875, upon which *Reg.* v. *Hutchins*, was decided by the Court of Appeal, reversing the decision of the Divisional Court (28 W. R. 595, 5 Q. B. D. 353). The present Act gives an opportunity for all the frontagers to take objection to the proposed works before they are commenced, and the provisions in the Act indicate that the decision of the court, upon an objection, for instance, that the street is a highway repairable by the inhabitants at large, is to be final. On the 6th of January, 1898, the status of Sludge-lane was determined once for all. It is similar to the adjudication of justices as to the settlement of a pauper: *Reg.* v. *Hartington Middle Quarter*, 3 W. R. 285, 4 E & B. 780.

They also referred to *Reg.* v. *Haughton*, 1 W. R. 164, 1 E. & B. 501; *Reg.* v. *Blakemore*, 2 Den. C. C. 410; *Reg.* v. *Hickling*, 7 Q. B. 880.

*Macmorran, K.C.*, and *Senior*, for the corporation.—The change in procedure under the Wakefield Corporation Act, 1887, has not altered the law as laid down in *Reg.* v. *Hutchins*, that a decision of justices, upon an objection that the street is a highway repairable by the inhabitants at large, does not create a *res judicata* so as to raise an estoppel in subsequent proceedings. The justices had no jurisdiction directly to decide that the street was a highway repairable by the inhabitants at large. The only alteration has been in the procedure. Formerly an objection could only be taken after the works had been completed and the apportionment made. Now the objection must be taken before the works are begun. The objection, however, is the same, though the time when it must be taken is altered, and the decision of justices upon this objection has the same consequences as before. All that the justices had to do on the 6th of January, 1898, was, if they upheld the objection, to quash the resolution for the works. There was no such final determination as would raise an estoppel. The justices had no jurisdiction to determine any question of title, but only to say whether or not the objection was well founded: *Attorney-General for Trinidad* v. *Eriché*, [1893] A. C. 518.

They also referred to *Rishton* v. *Haslingden Corporation*, [1898] 1 Q. B. 294, 46 W. R. Dig. 108.

*Danckwerts, K.C.*, replied.

VAUGHAN WILLIAMS, L.J.—I regret to say that I have arrived at a different conclusion from that at which the Divisional Court arrived. The judgment of the court, delivered by the Lord Chief Justice, is really based upon the decision in *Reg.* v. *Hutchins*, and he says that the provisions of the Wakefield Corporation Act, 1887, have not altered the law as laid down in that case. The present special case was stated in respect of proceedings under a local Act, which is in terms, so far as material to the present case, identical with the Private Street Works Act, 1892. Although the Private Street Works Act, 1892, is an Act which, though a public Act, only applies if adopted by the urban authority, I think that the Legislature, by passing the Act, indicated their view with respect to these matters, and it is not an unreasonable inference to draw from the sections in that Act that the Legislature when it passed the Act intended to furnish a means of dealing with the difficulties of procedure which in times gone by had become apparent. With regard to all those various matters the doing of which is cast upon the local authority in the interests of the inhabitants of the locality, it has been found desirable that as much finality as is possible should be obtained at the earliest possible date. If the then existing procedure was of such a nature that an objection to the proposed works could not be tested until the works had been completed and the expense incurred, it is obvious that it was a great misfortune both to the local authority and to the persons objecting to the works. In that state of things it has occurred again and again that some person took an objection which was merely personal to himself after the works had been completed and the expenses incurred. In other cases the objection taken was one which went to the root of the right of the local authority to execute the particular works. For instance, an objection that the alleged street is not a street within the meaning of the Act, or that it is a highway repairable by the inhabitants at large, is an objection that is not merely personal to the objector, but one which goes to the root of the whole matter and strikes at the right of the local authority to put in force their statutory powers. This being the nature of the objections that could be made, it was obviously inconvenient, if the objection was of a personal nature—for instance, that the particular objector had been wrongly included as a frontager, or that a particular frontager had been wrongly excluded—that a work for the benefit of the whole of the district should have to be abandoned by reason of such a defect in the scheme. We have to construe the legislation in such a way as, if possible, to provide a remedy for the defects which were obviously in the mind of the Legislature when it passed the Act of 1892. In the case of *Reg.* v. *Hutchins*, the decision seems to me to have been simply that in the particular case the only power the justices had was to decide whether or not a particular person ought to be ordered to pay a sum of money. There was no authority given by the Act under discussion in that case, to deal directly with any other question; and in these circumstances the question whether the street was a highway repairable by the inhabitants at large, though collaterally and incidentally it had to be raised and determined, was not the subject-matter of direct decision before the justices. In addition to that, the objection was one which was made by a frontager on his own account, and, though the decision might raise an estoppel as between the same parties, the objection was not in form one which would bind the other frontagers or the local authority as representing the inhabitants of the district. I mention this last matter because I think that upon that ground Lord Selborne, who delivered the judgment of the court, differed from Lush and Field, JJ., in the court below. The latter dealt with the case somewhat upon the lines of *Reg.* v. *Haughton* and *Reg.* v. *Hartington Middle Quarter*, which were decisions of a public matter, and it was held that in cases like that the finding ought to be treated as conclusive evidence in every court. If not in form a judgment *in rem*, it was so in all its essentials. It affected a status in which the whole of the public were interested. In the present case we have a decision of a competent court upon the application of a public body having a duty in the matter. Lord Selborne, I think, inferred that that could not be said in the case of *Reg.* v. *Hutchins*, where the justices had only to say whether a certain person should pay a sum of money, though in considering that question they had to decide a collateral and incidental matter—namely, whether a certain street was a highway repairable by the inhabitants at large. That was not a direct decision as to the status of the highway like the decisions in the cases I have referred to. I accept

entirely the decision in *Reg.* v. *Hutchins*, and in what I am saying I am following the spirit as well as the letter of that decision. I am far from saying that, if the objection in the present case had arisen now without fresh legislation, this court would not have been bound to follow that decision. I desire also to add that in the case of *Attorney-General for Trinidad* v. *Eriché* it seems to me that the judgment of the Privy Council takes exactly this view of the decision in *Reg.* v. *Hutchins*, and the view which I have tried to enunciate as to what is a decision binding upon all courts.

I now turn to the Wakefield Corporation Act, 1887. It cannot be denied that the state of the law at the time when *Reg.* v. *Hutchins* was decided was very unsatisthere was a waste of money and time. It was also very factory. Whatever mode of objection was adopted, desirable that it should be possible in proper cases to obtain a decision once for all binding upon every one. Section 30 of the same Act states the nature of the objections that may be made to the proposals of the corporation. Objections (*a*), that the alleged street is not a street within the meaning of the Act, and (*b*), that the street is a highway repairable by the inhabitants at large, are root objections—that is to say, they are of such a character that nothing can cure them. The other objections specified in section 30—namely, (*c*), (*d*), (*e*), and (*f*), are such as can be remedied. Then comes section 31. It seems to me that it is impossible to read that section without seeing that it is a section drawn with reference to the specified objections set forth in section 30 as being the objections which must be made within the limited time. If the objection is a root objection, the justices are intended to deal with it by allowing or negativing it; if it is not a root objection, but one which can be put right, the justices may, and ought, to apply the remedy indicated in section 31. It might be that the best remedy in some cases would be to begin all over again, because to go on upon the old lines might lead to confusion; or the defect might be possible of correction, as, for instance, by striking out or adding the name of a frontager. It is obvious that the Legislature intended that the objections should be once for all dealt with, and they should be dealt with, not with the object of defeating the scheme and depriving the locality of the benefit of it, unless indeed the objection is fatal to the scheme. In my judgment, if there is an objection, such as the one in this case—namely, that the street is a highway repairable by the inhabitants at large, and that, therefore, the proposed works are not within the jurisdiction of the local authority—the Act intended that the decision should be pronounced once for all. I do not myself see that any evil consequences will follow from so holding. The Legislature having provided for every person affected being present, and having given the justices power to quash or amend the resolutions, plans, &c., it is in the interests of everyone that the objection should be decided once for all. I do not think there is anything in *Reg.* v. *Hutchins* which prevents us from coming to that conclusion. It is, in my opinion, the natural inference to be drawn from the words of the Act. The appeal must accordingly be allowed, and the decision of the justices must be upheld.

STIRLING, L.J.—I am not prepared to differ from the conclusion arrived at by the other members of the court, but at the same time I feel bound to say that I have considerable doubts whether the effect of section 31 of the Wakefield Corporation Act, 1887, is as extensive as it is now stated to be. I doubt whether it does more than provide a speedy means of allowing the scheme of the corporation to proceed, and for that purpose only of having objections to the proposed works decided. I doubt whether the Legislature intended to leave it to justices to decide once for all whether a particular street was a highway repairable by the inhabitants at large. But as my lord and my brother Mathew are agreed, I do not differ.

MATHEW, L.J.—I am of the same opinion. I do not think that the case of *Reg.* v. *Hutchins* is applicable, because in the first place it was a decision upon a different statute, the Public Health Act, 1875, under which the liability to pay the apportioned expenses had to be determined in each individual case, and it was open to each person to raise a variety of objections. That was found to be a most inconvenient state of things, the procedure taking the form of proceedings to recover the apportioned expenses from the individual. The Queen's Bench Division in *Reg.* v. *Hutchins* held that, as the decision of the justices that the street was a highway repairable by the inhabitants at large was between the same parties, it was conclusive of the matter upon the second application and could not be raised again. When the case came before the Court of Appeal, it was there held that the justices had on the first occasion no jurisdiction to adjudicate directly upon the question whether the street was a highway repairable by the inhabitants at large, that it was at the most a matter incidentally cognizable by them, there being other persons affected by the decision who were not before the court, and who had no opportunity of being heard, and that the only jurisdiction of the justices was to make or refuse an order for the payment of a sum of money. Lord Selborne there said: "To hold the Crown or the urban authority estoppel for ever from claiming payment of the defendants' quota of any other expenses of a like character afterwards incurred in respect of the same street because on the 7th of May, 1874, the justices in petty sessions held the street to be a highway repairable by the inhabitants at large, would (if it were not really such a highway) be to deprive the other adjoining landowners, who were not parties or privies to the proceeding, of their statutable right to have a rateable contribution from the defendant and his successors in estate to all future expenses apportionable among all the adjoining landowners, under section 150 of the Public Health Act." Has that case any application to the present? It was decided in 1881. It is obvious that under that decision there was no finality about the matter, and so the Wakefield Corporation Act, 1887, was passed, and, what is more important, the Private Street Works Act, 1892, was passed later on. Elaborate precautions are taken in those Acts that the proceedings before the justices shall not be proceedings between the local authority and an individual. The Act provides for every frontager having any opportunity to raise objections to the proposed works, and of being heard before the justices upon the objections. In the present case the justices decided in 1898 that the street in question was a highway repairable by the inhabitants at large, and the corporation subsequently brought in a new scheme, and the objection that the street was a highway repairable by the inhabitants at large was again taken. The justices held that the matter was *res judicata*, and refused to go into it. In my judgment the second proceedings were between the same parties as the former proceedings, and the justices were right. Sub-section 2 of section 31 seems to me strongly to bear out this view. The provisions in the Act enabling all the frontagers to raise objections to the proposed works, and for bringing them all before the court,

and for putting a stop to any objection which could have been raised from being raised subsequently, all point to a decision binding upon everyone. For these reasons I think that the appeal should be allowed.

*Appeal allowed.*

Solicitor for the objectors, *S. F. Taylor*, for *J. B. Cooke*, Wakefield.

Solicitors for the corporation, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *C. J. Hudson*, Wakefield.

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From K. B. Div.
(Vaughan Williams, Stirling, and Mathew, L.JJ.) Jan. 31.

MERCER *v.* LIVERPOOL, ST. HELEN'S, AND SOUTH LANCASHIRE RAILWAY CO. (*a.*)

*Lands Clauses Acts—Injurious affection—Taking lands—Notice to treat—Lease of adjoining land subsequently to service of notice—Right of lessee to compensation for injurious affection—Lands Clauses Consolidation Act,* 1845 (8 *& 9 Vict. c.* 18), *ss.* 18, 68.

*Where a notice to treat for land has been given under section* 18 *of the Lands Clauses Act,* 1845, *compensation must be assessed once for all under the notice both in respect of the land taken and also under section* 68 *for the injurious affection of other land belonging to the same owner, and the owner cannot, after the notice to treat and before the assessment of the compensation, grant a lease of or sell the land adjoining the land taken so as to confer upon the lessee or purchaser a right to claim compensation for the injurious affection of the land so leased or sold by the execution of the works.*

*Therefore, where, after the service of a notice to treat for land, and before the compensation had been assessed, the owner granted a lease of the adjoining land, and subsequently a sum was agreed upon between the owner and the undertakers as to the compensation payable to the owner under the notice to treat, the lessee is not entitled to compensation for the injurious affection of the demised land.*

*Judgment of* Lord Alverstone, L.C.J. (50 *W. R.* 155, [1901] 2 *K. B.* 753), *reversed.*

Appeal by the defendants from the judgment of Lord Alverstone, L.C.J., at the trial without a jury of an action upon an award under the Lands Clauses Act, 1845: reported in 50 W. R. 155, [1901] 2 K. B. 753.

The following are the facts of the case as set out in the judgment of the Lord Chief Justice:

The action was brought by a Mrs. Mercer to recover the sum of £371 10s., the amount of an award made under the Lands Clauses Act, and the costs subject to taxation of the arbitration. The award was made on the 5th of March, 1897, in respect of the injurious affection of certain leasehold land and houses adjoining Birchley-street, St. Helen's, belonging to the plaintiff. The land in question forms part of the estate of Lord Gerard, and previously to the granting of the lease hereinafter referred to was in his possession as owner.

Before the year 1886 certain streets had been laid out and partially constructed, and at the time of the application to Parliament in 1886, hereinafter mentioned, a certain street known as Standish-street was already in existence. Certain other streets communicating with Standish-street, and among others Birchley-street, had already been laid out though not constructed. In the years 1885 (see St. Helen's and Wigan Junction Act, 1885, 48 & 49 Vict. c. cxxi.) and 1886 applications were made to Parliament by the predecessors of the defendant company for powers to construct a railway from St. Helen's to Wigan, and by the St. Helen's and Wigan Junction Act, 1886 (50 Vict. c. xxxiii.), s. 4, powers were granted to construct, among others, Railway No. 4, in the township of Windle, commencing by a junction with a certain other line of railway, and terminating at or near the intersection of College-street and Corporation-street, which is a short distance to the south of Standish-street. In the passage of that Bill through Parliament an agreement was come to by Lord Gerard and the promoters which was embodied in section 13 of the Act of 1886. By sub-section 3 of that section the company became bound within twelve months from the passing of the Act to purchase certain land, indicated upon a certain plan, and the section contained provisions (sub-sections 4, 5, and 6) whereby the company were to take the land, and make, sewer, and flag half of Birchley-street, construct a bridge to carry the railway over Standish-street, and, by sub-section 13, lower the other streets and adjoining building land to correspond with the streets which had to be lowered to be passed under the railway. The Act incorporated the Lands Clauses Acts, and section 21 contained the usual limits of three years for exercising the compulsory powers.

By the St. Helen's and Wigan Junction Railway Act, 1889 (52 & 53 Vict. c. xci.), the name of the company was changed to the Liverpool, St. Helen's, and South Lancashire Railway Co. (section 4), and the twelve months mentioned in section 13, sub-section 3, of the Act of 1886 was extended for one year from the 26th of July, 1889, to the 26th of July, 1890 (section 18); and by the Liverpool, St. Helen's, and South Lancashire Railway Act, 1891 (54 & 55 Vict c. cxv.), the powers of compulsory purchase under the Acts of 1885 and 1886, which had become vested in the defendants, were extended until the 20th of July, 1893. But there was no further extension of the twelve months mentioned in the said section 13.

Prior to the year 1891 nothing had been done by the railway company to carry out the agreement embodied in section 13 of the Act of 1886. On the 23rd of October, 1891, the defendants served upon Lord Gerard a notice to treat to take the land necessary for the railway. The plan annexed to the notice to treat was for the purpose of this case identical with the plan referred to in section 13 of the Act of 1886. The notice did not refer to section 13, nor was it in any way given under that section: it was an ordinary notice to treat given by the defendants under their compulsory powers to acquire compulsorily the land shown upon the plan. On the 12th of January, 1892, Lord Gerard sent in his claim under the notice to treat. This claim was made subject to and upon the basis of the company carrying out the provisions of section 13 of the Act of 1886.

In the month of February, 1892, Lord Gerard's agent agreed with one John Gleave, the predecessor in title of the plaintiff, to let him certain land on the east side of Birchley-street opposite the land in respect of which notice had been given by the railway company for a term of 999 years. The land was let for the purpose of building. On the 14th of June, 1892, a lease was granted pursuant to that agreement, the term reserved being from the 1st of January, 1892, and the lease contained provisions that the lessees should within twelve calendar months build a certain number of houses upon the land demised. Some of the houses were in fact built during the summer of 1892, and some of those houses were occupied by tenants of Gleave prior to October, 1892.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

On the 14th of October, 1892, an agreement was made between Lord Gerard and the defendants in respect of the land included in the notice to treat, and under that agreement Lord Gerard agreed to sell the land shown upon the plan annexed to the notice to treat, a copy of which was also annexed to the agreement, for the sum of £23,000, such sum to include all satisfaction and compensation for all damages sustained by the vendor by reason of the severing of the property purchased from the vendor from the vendor's other property, or otherwise injuriously affecting such other property by the exercise of the statutory powers. By clause 4 of the agreement the purchase was to be completed on the 30th of November, 1892. The agreement provided, by clause 6, that the company should make, sewer, flag, and channel the western half of Birchley-street. The purchase was not completed on the date contemplated. In 1893 Lord Gerard commenced proceedings to obtain specific performance of the agreement of the 14th of October, 1892, and subsequently, upon the 27th of February, 1894, a deed of conveyance was executed by Lord Gerard, whereby, after reciting that the defendants had agreed with him, the vendor, for the purchase of the land thereinafter conveyed, and among others of the rights conferred by section 13, sub-section 3, of the Act of 1886, for the sum of £24,299, which sum it had been agreed should include all satisfaction and compensation for all damages sustained by the vendor, or by reason of the severance of the property purchased from the vendor's other property, or otherwise injuriously affecting such other property by the exercise of the statutory powers, Lord Gerard conveyed the land the subject of the notice to treat to the defendants.

Subsequently to October, 1894, the defendants contructed the railway, lowered the level of Standish-street and of the northern end of Birchley-street so as to bring it to the same level at the junction of Standish-street with an upward incline towards the south, and put up a retaining wall to support the plaintiff's houses. The result of these operations by the defendants was that the access to the plaintiff's houses was permanently interfered with.

On the 12th of November, 1895, the plaintiff gave a notice claiming compensation for injurious affection under the 68th section of the Lands Clauses Act, and appointed an arbitrator, and, the usual formalities having been observed, the umpire in due course made his award, awarding to the plaintiff the sum of £371 10s. in respect of the damage and injury sustained by the plaintiff in or to her lands, messuages, and hereditaments by reason of the execution of the works of the company, and by reason of such lands, messuages, and hereditaments being injuriously affected.

Lord Alverstone, L.C.J., held that the service of the notice to treat did not prevent the owner of the property, to which the notice to treat related, from dealing with property other than that included in the notice, and that a person who *bonâ fide* acquired an interest in such other property was not deprived of his right to compensation for injurious affection by works subsequently executed simply because the defendants had made a settlement with the vendor in respect of the land taken and injurious affection of his other property. He accordingly gave judgment for the amount of the award.

The defendants appealed.

*Horridge, K.C.*, and *J. K. F. Cleave* (*McCall, K.C.*, with them), for the defendants.—The notice to treat fixes the date at which all the compensation is to be assessed. In the case of land about to be taken the owner cannot create a new interest in it after the service of the notice to treat so as to make that new interest a subject for compensation: *Ex parte Edwards*, 19 W. R. 1047; *Wilkins* v. *Mayor, &c., of Birmingham*, 32 W. R. 118, 25 Ch. D. 78. The landowner cannot throw a greater burden on the undertakers than was imposed upon him at the date of the notice to treat. That doctrine applies to land not taken as well as to land taken. The compensation, whether for lands taken or for lands injuriously affected, must be assessed once for all under the notice to treat, with the possible exception of damage which was not and could not have been foreseen: *Croft* v. *London and North-Western Railway Co.*, 11 W. R. 360, 3 B. & S. 436, and *Todd* v. *Metropolitan District Railway Co.*, 19 W. R. 720. Therefore the land which adjoined that taken by the defendants from Lord Gerard, and which was demised after the service of the notice to treat, was not the subject-matter for compensation to the lessee under section 68 of the Lands Clauses Act, 1845. All compensation had been assessed once for all at the sum agreed to be paid to Lord Gerard.

They also referred to *Cowper Essex* v. *Acton Local Board*, 38 W. R. 209, 14 App. Cas. 153.

*Cripps, K.C.*, and *W. D. McConkey*, for the plaintiff.—The notice to treat only binds the land included in it and prohibits the owner from creating a new interest in that land so as to render that new interest a subject for compensation. It does not affect land other than that included in the notice. If it did, the effect would be to prevent a landowner from dealing with his land. The date to be looked at is the date at which the compensation is assessed under the notice to treat. The amount of the compensation has to be assessed as at that date: *Adams* v. *London and Blackwall Railway Co.*, 2 Mac. & G. 118; *Lancashire and Yorkshire Railway Co.* v. *Evans*, 15 Beav. 322; and *Reg.* v. *Poulter*, 36 W. R. 117, at p. 118, 20 Q. B. D. 132, at p. 138 (Fry, L.J.). If a landowner sold his adjoining land after the date of the notice to treat and before the assessment of the compensation, he could not get compensation for the injurious affection of that land. The purchaser would get compensation. It is clear that if the landowner has been paid compensation and then disposes of part of his land, the assignee cannot claim any compensation. The reason is that the date of the assessment of the compensation is the date at which the right of all parties to compensation is fixed. Lord Gerard therefore, having leased the adjoining land to the plaintiff for 999 years before the date when the compensation was assessed, had no claim to compensation for injurious affection of it, and the sum agreed to be paid to him by the defendants did not include such compensation. Even if it did, it could not affect the plaintiff's right to compensation.

They also referred to *Harding* v. *Metropolitan Railway Co.*, 20 W. R. 321, L. R. 7 Ch. App. 154.

*McCall, K.C.*, replied.

*Cur. adv. vult.*

Jan. 31.—VAUGHAN WILLIAMS, L.J.—I have had the advantage of reading the judgment written by Stirling L.J., and I so entirely agree with it that I do not think any useful purpose would be served by delivering a judgment of my own. I desire, however, to add one observation after the judgments of my brethren have been delivered.

STIRLING, L.J., read the following judgment: The material facts to be borne in mind are these. On the 23rd of October, 1891, the defendants served on Lord Gerard, the owner in fee, under their special Acts, a notice to treat in respect of certain specified lands, the notice in accordance with section 18 of the

Lands Clauses Act, 1845, demanding from him particulars of his estate and interest in such lands and of the claims made by him in respect thereof, and stating that the defendants were willing to treat for the purchase thereof and as to compensation to be made for damage that might be sustained by reason of the execution of the works. On the 12th of January, 1892, Lord Gerard sent in his claim. On the 14th of October, 1892, an agreement was made between Lord Gerard and the defendants as to the amount of the compensation, and on the 27th of February, 1894, a conveyance of the land by Lord Gerard to the defendants was executed. On the 14th of June 1892, before the above-mentioned agreement was made or the conveyance was executed, a lease was granted by Lord Gerard to the plaintiff of building land, not comprised in the notice to treat, on which the plaintiff proceeded to erect houses. It is to be taken that the plaintiff had no knowledge of the notice to treat having been served when the lease was granted; nor had the railway company any notice of the lease when the agreement with Lord Gerard was entered into or the conveyance executed. Subsequently to the date of the conveyance the defendants executed works which necessitated the lowering of a street on which the plaintiff's land abutted, and thereby injuriously affected such land. The plaintiff thereupon claimed from the defendants compensation under section 68 of the Lands Clauses Act, 1845, and the sum of £371 10s. was by the award of an arbitrator found as the amount of compensation. The question is whether the plaintiff is entitled to this amount.

No case has been cited which exactly covers the point which arises for decision; but the effect of a notice to treat as regards lands proposed to be taken has been frequently considered. The result of the decisions appears to me to be stated with perfect accuracy by Kindersley, V.C., in *Haynes* v. *Haynes*, 9 W. R. 497, at p. 499, 1 Dr. & Sm. 426, at p. 450: "I consider that the notice to treat constitutes, as between the landowner and the company, the relation of vendor and purchaser to a certain extent and for certain purposes (that is the language of Lord Cottenham in *Adams* v. *London and Blackwall Railway Co.*, 2 Mac. & G. 118, at p. 129), and that some of the consequences which flow from an actual contract also follow upon the notice to treat; such as that the particular lands which the company are to take, and which the landowner must give up to the company after certain steps prescribed by the Act shall have been taken, are fixed, and that neither party can get rid of the obligation, the one to take and the other to give up the lands specified in the notice; and that such is the meaning to be attributed to those expressions, which may have dropped from learned judges, which seem to intimate that it is a contract; but in no other sense and to no further extent does the notice constitute a contract, at least on the part of the landowner." It is, at the same time, to be observed that the rights and obligations created by the service of a notice to treat, if they fall short in some respects of those which arise under an ordinary contract of sale, are in other respects much greater. For example, under section 85 of the Land Clauses Act, 1845, the promoters may, upon complying with the requirements of the section and before the purchase-money has even been ascertained, enter upon and use the lands; and it has been expressly decided that after such entry a railway company has a legal interest in the land: *Worsley* v. *South Devon Railway Co.*, 16 Q. B. 539; see also the observation of Lord Campbell in *Marquis of Salisbury* v. *Great Northern Railway Co.*, 17 Q. B. 840, at p. 849, and the remarks of Lord Bramwell in advising the House of Lords in *Tiverton and North Devon Railway Co.* v. *Loosemore*, 32 W. R. 929, at p. 937, 9 App. Cas. 480, at p. 511. Indeed, it seems to me on principle that the rights and obligations so created, being derived from a statute, must of necessity be legal, in the sense that courts of law no less than courts of equity are bound to recognize and give effect to them. Now, at law, a contract for the sale of land creates merely a personal obligation between the vendor and purchaser, and does not bind the land. In equity such a contract binds the land, and that not only as against the vendor, but also as against all persons claiming under him with notice of the existence of the contract. On the other hand, legal rights and interests in and to land bind all persons, whether with notice or not; and I apprehend that rights and interests arising under a notice to treat fall within this rule. It is for this reason, as it seems to me, that it has been held that an interest in land, which has been created by the owner after service of a notice to treat, is not a subject for compensation under the Lands Clauses Act, 1845: see, for example, *Ex parte Edwards; Wilkins* v. *Mayor, &c., of Birmingham*. In accordance with the same principle it was laid down by Lord Romilly in *Carnochan* v. *Norwich and Spalding Railway Co.*, 26 Beav. 169, that the purchaser of land in respect of which a railway company has served a proper notice to treat, and in respect of which the company has entered into possession, is "in truth but the purchaser of an interest in the purchase-money."

So far I have dealt only with the effect of the notice to treat with respect to land required to be taken. As regards compensation for damage to be sustained by the landowner by reason of the execution of the works, the scheme of the Lands Clauses Act, 1845, appears to be that an assessment of such compensation shall be made once for all and finally; so that on payment of the compensation thus ascertained the promoters are to be free from all further claim by the landowner, except, possibly, in respect of damage entirely unforeseen by the parties: see *Croft* v. *London and North-Western Railway Co.*; *Todd* v. *Metropolitan District Railway Co.* It would entirely defeat this scheme if the landlord, after being paid such compensation, were to create interests in persons who could make claims for damage which the promoters were bound to include in the notice to treat and pay for in advance. It appears to me, therefore, that what the Legislature has done is to create in favour of the promoters of undertakings a right unknown to the common law—viz., a right upon certain conditions being satisfied to execute works so as to damage the property of a landowner on whom a notice to treat is served. This right is a legal as distinguished from an equitable, right, not indeed falling within the definition of an easement, but bearing a close analogy thereto. The result, therefore, would be that, if the compensation claimed by Lord Gerard had been ascertained and paid in precise accordance with the terms of the Lands Clauses Act, 1845, the defendant company would have acquired a legal right to execute the work which they did; and it was admitted (and, in my opinion, properly admitted) by Mr. Cripps, in his argument that neither Lord Gerard nor any one claiming under him by an instrument executed subsequently to the assessment of compensation could have claimed any further compensation, except, perhaps (as I have said) in respect of damage entirely unforeseen.

It is said, however, that the case is different where the interest is created before the assessment of the compensation, because the damage is always ascertained at the date of assessment. If, for example, a claim for damage by severance is made, and if before assessment the landowner has sold the severed

portions of his property, it is said that the landowner can recover no compensation for severance. This may be so; still, it does not seem to me that the case is concluded. According to this argument the right to compensation is made to depend on whether the landowner does or does not obtain compensation. But the case of *Croft* v. *London and North-Western Railway Co.* appears to me to show that the landowner after assessment under the notice to treat is precluded from claiming further compensation in respect of any matter which might have been brought forward at the time of the assessment, whether it was so brought forward in fact or not. After payment of the assessed compensation the right of the promoters to execute the work (with the possible exception already stated) is absolute, and being a legal right in the nature of an easement prevails against legal interests created by the landowner subsequently to the assessment and payment of compensation. This being so, it is difficult to see why the right of the promoters should not prevail against a legal title derived from the landowner subsequently to the notice to treat, but before the assessment of compensation. The landowner cannot escape from the obligations imposed on him by the notice to treat; and one of these is an obligation to bring forward and and have determined all claims in respect of damage to lands of his arising from the execution of the proposed works. If, as the cases already referred to show, he can only deal with the land which he is required to give up subject to the obligations imposed by the notice to treat, I do not see why he should be permitted to disregard those obligations when dealing with land which he is not required to give up, but which may be damaged by the execution of the works.

It remains to say a few words on the special circumstances of the present case. The Act of 1886 contained a clause (section 13) for the protection of the estate of Lord Gerard, of which sub-section 7 was in these terms: "The company shall, to the reasonable satisfaction of the owner, lower all the other streets and the adjoining building land to correspond with the streets which have to be lowered to be passed under the railway, and may use in making the railway the material which will have to be removed in performing these works." It appears from this sub-section that the possibility of damage to building land of Lord Gerard's by the lowering of streets was contemplated both by Lord Gerard and by the defendant company. By his claim of the 12th of January, 1892, Lord Gerard did not specify any amount of compensation as claimed in respect of such damage, but did say this: "The claim is made subject to the company carrying out the provisions contained in the 13th section of the St. Helen's and Wigan Junction Railway Act, 1886." By the agreement of the 14th of October, 1892, Lord Gerard agreed to sell the lands by the notice to treat required to be taken for £24,299, "such sum to include all satisfaction and compensation for all damage sustained by the vendor by reason of the severing of the property purchased from the vendor's other property or otherwise injuriously affecting such other property by the exercise of the powers of the said Acts." But it was provided that the agreement should not (save as expressly mentioned) in any wise alter or interfere with any of the rights of the vendor under provisions contained in the defendant company's Acts of 1885 and 1886 respectively for the protection of Lord Gerard or his estate therein referred to. By the conveyance of the 27th of February, 1894, Lord Gerard released the defendant company from the provisions of sub-section 8 of section 13 of the Act of 1886, but did not release them from the other sub-section. It therefore appears that the company and Lord Gerard came to terms (as they were entitled to do, see section 21 of the Lands Clauses Act, 1845) as to the amount of compensation, and that under such agreement Lord Gerard received no money payment in respect of damage to arise from the lowering of his building land, but reserved to himself the right to insist on the performance by the company of the provisions of section 13, sub-section 7, of the Act of 1886. It is admitted by the defendants that, in accordance with that stipulation, they are liable to lower the site of the plaintiff's houses if they are called on by Lord Gerard so to do; but they insist that this is the sole right of Lord Gerard or the plaintiff in respect of what they have done in the execution of the powers conferred by the Act, so far as those relate to the lowering of streets. In my opinion, this contention is well founded, though unfortunately the existence of this obligation will not benefit the plaintiff. For these reasons I am unable, to my great regret, to agree with the decision of the Lord Chief Justice.

MATHEW, L.J., read the following judgment: At the time when the notice to treat was served on Lord Gerard, he was entitled, in the absence of any agreement to the contrary, to require the company to lower the land laid out for building to the level of the streets mentioned in the statute. The object of imposing this obligation upon the company was to secure access to and from the streets to the houses proposed to be built on the estate. When the amount of compensation had to be settled, Lord Gerard was, it seems to me, no longer in a position to require the company to perform this statutory duty; for after the notice, houses had been built under leases which had been granted to the plaintiff and others, and those houses the company were under no obligation to remove. It was plain that without some further agreement the buildings might lose their access to the streets when lowered, and it would have been open to Lord Gerard, when negotiating with the railway company, to put forward any claim that he had on this account. But it is clear that no such claim was made. It is not necessary to consider why. The company were not informed upon the subject, and were not concerned to inquire. It may be that Lord Gerard was advised that any claim for loss of access had been transferred from him to his tenants. If this were the reason, the company, it seems to me, would be in no way prejudiced, and could not be supposed to have agreed that any part of the claim for compensation was to be reserved for future settlement. It was not disputed that, if Lord Gerard had himself built the houses in question, he would not be entitled to demand further compensation. The case of *Croft* v. *London and North-Western Railway Co.*, is an authority upon this point, which does not seem to have been questioned. But it was contended for the plaintiff that, though the owner might have no claim, his tenants were in a different position. It was said that their leasehold interests gave them the right to be compensated for a depreciation of the value of their property by the execution of the company's works. It was admitted that after a notice to treat for land proposed to be taken by the company the owner could not create upon it independent interests. But it was urged that this principle did not apply to adjoining land which was not taken but was injuriously affected. But if this contention were well founded, the company might be compelled in such a case as the present to compensate tenants however numerous and whatever the terms of their tenancies might be. This would clearly be a position of grave hardship and difficulty to the railway company. In

addition to the cost of litigating the various claims the company might be compelled to disburse a much larger amount than the value of the landowner's interest in the premises at the date of the notice to treat. I see no reason why the principle as to land taken by the company should not apply to land injuriously affected. It was asked in argument if a landowner was to be disabled from dealing with his adjoining land because of a mere proposal to indemnify for depreciation. The answer would seem to be that he is not so prohibited, but only that he is prevented from dealing with his land in such a way as to add to the burden of the company. It seems to me that either when the land is taken or when it is injuriously affected the owner cannot derogate from the obligation created by the notice to treat. It is true that he is not deprived of the possession of the adjoining land, but it may be said to be partly taken, in the sense that a portion of its value is lost by the exercise of the company's powers. There is a partial appropriation. It was said that there was no authority for the contention of the company. That would appear to be so, though it is probable that the claim might have been made in many cases. In my judgment in such a case as the present it must be regarded as a settled rule of law as between landowner and railway company that there can be but one proceeding for compensation, and that after notice to treat no onerous interest either in the land taken or in that injuriously affected can be created by the owner to the prejudice of the railway company. The appeal must be allowed.

VAUGHAN WILLIAMS, L.J.—The observation which I wish to add to Stirling, L.J.'s, judgment is, that I cannot agree with the conclusion of the Lord Chief Justice that the agreement embodied in sub-section 7 of section 13 ceased by lapse of time to be of any effect after the date of the last statutory extension. I think that the limit of time might be, and was, waived by Lord Gerard, in whose favour it was introduced. It is true that Lord Gerard could not by waiver enlarge the obligation of the company. He could not compel them to pull down houses built after the lapse of time, but he could, in my judgment, insist on the performance of the other terms of the agreement, such as the lowering of the "other streets."

*Appeal allowed.*

Solicitors for the plaintiff, *Bell, Brodrick, & Gray*, for *J. Haslam Fox*, St. Helen's.

Solicitors for the defendants, *Maples, Teesdale & Co.*, for *Oppenheim & Malkin*, St. Helen's.

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From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) } July 4, 5, 28, 1902.

GREAT WESTERN RAILWAY CO *v.* TALBOT. (*a.*)

*Railway company — "Accommodation works" — Level crossing—Extent of right of user—Grant of easement —Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 16, 68-76.

*A railway company's line severed an owner's land and crossed on the level a tram-line of the owner by which goods and traffic from the owner's land and coals from a colliery not on his land were conveyed to a neighbouring port. The railway company, when purchasing the premises, entered into an agreement, dated the* 13*th of March*, 1868, *with the owner that they would construct and maintain, "for the accommodation of the owners and occupiers for the time being of the lands adjoining the railway," certain works, including a level crossing for the tram-line. The defendant, the owner's successor in title, afterwards claimed to be entitled to convey over the level crossing goods and traffic brought on to her land from other places, whether situate on her estate or not.*

*Held, that the defendant was not entitled to use the level crossing for the purpose of conveying goods and traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at, or previously to, the date of the agreement of the* 13*th of March*, 1868, *or as since enjoyed by the defendant or her predecessors in title, if, owing to acquiescence or otherwise, such subsequent enjoyment was binding on the plaintiff company.*

Dictum *of* Fitzgibbon, L.J., *in* Great Northern Railway Co. *v.* M'Alister, [1897] 1 *Ir. R.* 587, *at p.* 605, *approved.*

Appeal from Kekewich, J.

The question raised was as to the extent of the defendant's right to use a level crossing over the plaintiffs' line at a point where a tramway belonging to the defendant crossed the plaintiffs' railway.

The facts of the case were stated in the judgment of the court as follows:

It appeared that the railway now vested in the plaintiff company was originally constructed in the neighbourhood of the place in question by the South Wales Railway Co. (incorporated by the South Wales Railway Act, 1845). The railway intersected the Talbot estate, of which the defendant was now the owner; and a contract was entered into between the South Wales Railway Co. and Mr. Christopher R. M. Talbot, the defendant's predecessor in title, for the purchase by the company of certain lands required by the company for the purposes of the undertaking, and it was at the same time agreed (as stated in the deed of the 13th of March, 1868, presently mentioned) that the company "should make certain works for the accommodation of the owners or owner for the time being of the lands adjoining their railway on both sides thereof where it intersected the lands of the said C. R. M. Talbot." The South Wales Railway Co. was amalgamated with the Great Western Railway Co. in 1863. Before the amalgamation the purchase-money for the land agreed to be sold was paid, and the accommodation works stipulated for were executed by the South Wales Railway Co., but no conveyance was made of the lands bought by that company. By two indentures dated the 13th of March, 1868, C. R. M. Talbot and other persons interested in the Talbot estate duly conveyed these lands to the Great Western Railway Co., and by a deed of even date, made between the Great Western Railway Co. of the first part, C. R. M. Talbot of the second part, Theodore Mansel Talbot of the third part, and William Llewellyn of the fourth part, the Great Western Railway Co. entered into covenants with the other parties that they, their successors and assigns, would from time to time and at all times thereafter maintain respectively all the works specified in the schedule thereto "for the accommodation of the owners and occupiers for the time being of the lands adjoining the said railway."

The schedule included the following:

"The level crossing for the highway to Courtycha Farm and Port Talbot. The level crossing for the railway leading from the Oakwood Ironworks to Port Talbot. The level crossing for the tramroad leading from the Margam Tinworks to Port Talbot."

At the date of the deed these three level crossings ran side by side. At present the two latter had been

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

united into one, and it was as to it that the question arose.

It appeared on the face of the deed of covenant of the 13th of March, 1868, that the works specified in the schedule were executed in pursuance of an agreement between the railway company and the landowner whose lands were about to be intersected by the company's railway, and that those works were to be "for the accommodation of the owners and occupiers for the time being of the lands adjoining the railway."

The plaintiff company claimed a declaration that the defendant Miss Talbot was not entitled to use the level crossings for the purpose of bringing over them any goods or traffic from the Cwm Avon works or to or from any other works or place not served by one or other of the two lines of tramways which in 1868 passed over the level crossings; and an injunction to restrain any such user; and alternatively a declaration that the defendant was not entitled to use the level crossings except for the purpose of bringing goods or traffic to or from places on her own estate; and an injunction to restrain any other than such user.

The Cwm Avon works were situated on land belonging to the Earl of Jersey, not to the defendant.

The defendant claimed to be entitled to bring over the level crossings goods and traffic brought on to her land from the Cwm Avon works and other places, whether those places were or were not served by either of the tramways in 1868, and whether they were or were not situate on her own estate.

It appeared from the evidence that at and prior to the date of the deed of 1868, the tramroad leading from the Margam Tinworks to Port Talbot was, with the assent of Mr. Talbot, the defendant's predecessor, used for the purpose of bringing coals to Port Talbot from coal pits at Tewgoed situate on land belonging to the Earl of Jersey.

Kekewich, J., held that the deed of covenant was a grant by the plaintiff company to Mr. Talbot and his successors of the use of the level crossings for all time; that it was part of the price paid to him for the purchase of his land, and that the defendant was at liberty to use the level crossings for any purpose she pleased, provided the user did not interfere with the traffic of the plaintiff company; and he gave judgment for the defendant, with costs.

The Great Western Railway Co. appealed.

*Cripps, K.C., P. O. Lawrence, K.C.*, and *Howard Wright*, for the appellant company.—The level crossing is an "accommodation work" within section 68 of the Railways Clauses Consolidation Act, 1845, and as such its user is limited. It is for the accommodation of the landowners and occupiers whose lands are severed by the railway having regard only to the condition and user at the time the severance took place, and not to the state of things at present existing: *Rhondda and Swansea Railway Co.* v. *Talbot*, [1897] 2 Ch. 131; *Midland Railway Co.* v. *Gribble*, 44 W. R. 133, [1895] 2 Ch. 827; *Reg.* v. *Brown*, 15 W. R. 988, L. R. 2 Q. B. 630; *London and North-Western Railway Co.* v. *Runcorn Rural District Council*, 46 W. R. 121, [1898] 1 Ch. 34; *Great Northern Railway Co.* v. *M'Alister*, [1897] 1 Ir. R. 587. The cases of *United Land Co.* v. *Great Eastern Railway Co.*, 23 W. R. 896, L. R. 10 Ch. App 586; *Finch* v. *Great Western Railway Co.*, 28 W. R. 229, 5 Ex. D. 254; and *Dand* v. *Kingscote*, 6 M. & W. 174, are distinguishable, for these decisions turned upon the special words of the grants. The defendant is not entitled to bring traffic arising outside her own land across the plaintiffs' line.

*Warrington, K.C., S. T. Evans, K.C.*, and *Romer*, for the defendant.—The question depends, not merely upon what statutory rights arise in respect of an "accommodation work," but upon the true construction of the contract between the parties. The effect of that contract was that the land required by the company (including the portion of the tram-road crossed by the railway) should be sold to them, but that the right of user of the tramway should continue as before, subject only to the reasonable user of the railway: *United Land Co.* v. *Great Eastern Railway Co.* There is nothing in the contract to limit the user of the level crossings, and the defendant is entitled to use them for any reasonable purpose, provided no additional burden is thereby imposed upon the plaintiff company.

They cited *Williams* v. *James*, 15 W. R. 928, L. R. 2 C. P. 577; *Chadwick* v. *Marsden*, 15 W. R. 964, L. R. 2 Ex. 285; and *Mitcalfe* v. *Westaway*, 13 W. R. 181, 34 L. J. C. P. 113.

July 28.—STIRLING, L.J., delivered the judgment of the court, and after stating the facts proceeded: By the group of clauses (sections 68-76) of the Railway Clauses Consolidation Act, 1845, under the heading "And with respect to works for the accommodation of lands adjoining the railway," the Legislature has imposed on railway companies an obligation to make and maintain such accommodation works in cases where the railway causes interruptions to the use of lands through which it is made; and by section 16 of the same Act powers for the purpose of constructing such works are conferred. On the other hand, the Legislature has not seen fit expressly to authorize a railway to make general grants and easements over lands acquired for the purpose of its undertaking; and in *Mulliner* v. *Midland Railway Co.*, 27 W. R. 330, 11 Ch. D. 611, at p. 623, it was laid down by Sir G. Jessel, M.R., that (with some exceptions which do not affect the present question) a railway company has no right to sell, grant, or dispose of such land, or any easement, or right of way over it, except for the purpose of the company's Act—that is, with a view to the traffic of the company; and it was there held by him that a grant of such a right of way was *ultra vires*. The principle of this case was approved by Lord Blackburn in *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623, at pp. 634, 635, 32 W. R. Dig. 112, and has recently been applied by the Court of Appeal in *Great Western Railway Co.* v. *Solihull Rural District Council*, 86 L. T. Rep. 852, 50 W. R. Dig. 65. Bearing these considerations in mind, we think that the natural meaning of the expression "works for the accommodation of owners of lands adjoining" the plaintiffs' railway in the deed of covenant is works of the kind contemplated by sections 68 to 76 of the Railways Clauses Consolidation Act, 1845; and that the object of the deed was to secure the maintenance by the plaintiff company of works which had been executed by their predecessors in title in order to fulfil the obligation imposed on them by those sections. Now, as is pointed out by Lindley, L.J., in *Rhondda and Swansea Railway Co.* v. *Talbot*, it has been decided in *Reg.* v. *Fisher*, 11 W. R. 59, 3 B. & S. 191, and *Reg.* v. *Brown*, that the "accommodation works which the company may be required to make are such accommodation works as are required at the time the land is taken, having regard to its then use, and not accommodation works which may be required when the character of the land, and perhaps the nature of the neighbourhood, is entirely altered years afterwards." Further, it has been decided, first by the Vice-Chancellor and then by the Court of Appeal in Ireland, in *Great Northern Railway Co.* v. *M'Alister*, that the landowner having obtained

accommodation works (in that case, as in this, a level crossing) suitable for his land at a time when it was used for agricultural purposes, was not entitled to use the works for the purposes of traffic in minerals quarried from the same lands. In the course of his judgment FitzGibbon, L.J., thus defines the rights of the landowner: "The owner of the adjoining lands was entitled, when the railway was made, to a convenient passage over the railway sufficient to make good, so far as possible, any interruption which the construction of the railway caused by severance in the working of his farm, including, I should say, any alteration or extension of that working which could or ought to have been contemplated by the parties when the accommodation works were made and accepted." With that decision and definition we agree.

It appears that at and prior to the date of the deed of covenant the tramroad leading from the Margam Tinworks and Forges to Port Talbot extended beyond those works to a point where the River Avon is crossed by a bridge and was there connected with another tramroad, which crossed the bridge and ran on land belonging to Lord Jersey to certain coalpits at Tewgoed, demised by him to the same person who was lessee under Mr. C. R. M. Talbot of the Margam works; and further, that the tramway was used with the assent of Mr. Talbot for bringing goods, consisting principally of coal, from these pits, not only to the Margam works but also to Port Talbot, where the coal was shipped for the benefit of the lessee. The Margam works have been discontinued, but the defendant claims the right to bring over the level crossing goods and traffic from Tewgoed Colliery, and states that by so doing she will not increase the burden of any easement hitherto enjoyed by her or her predecessors in title over the crossing. The plaintiff company disputes the validity of this claim; but it seems to us that such a user must be taken to have been fairly within the contemplation of the parties at the time when the works were executed. The defendant, however, further claims in par. 6 of her defence, "to be entitled to bring over the said crossing in manner aforesaid, goods and traffic brought on to her land from other places, whether such places were or were not served by either of the said tramroads in the year 1868 or 1877, whether they are or are not situate on her estate." The defendant does not state that the burden of the easement hitherto enjoyed by her will not be increased by such user of the crossing, and we think it plainly may be, for if this claim be valid the defendant will be entitled to carry over this crossing the whole traffic of the recently constructed Port Talbot Railway, which has a station close to her level crossing. Such a case, in our opinion, goes far beyond anything which could have been within the contemplation of anyone when the works were made.

This conclusion does not seem to us to conflict with the decision in *United Land Co.* v. *Great Eastern Railway Co.*, which turned on the provisions of a very special enactment requiring the railway company to construct such convenient communications over or under the railway as in the judgment of the Commissioners of Woods and Forests might be necessary for the convenient enjoyment and occupation of the lands there in question, which were common property.

We think, therefore, that the appeal should be allowed, and that an order ought to be made to the following effect: Discharge the order appealed from. Declare that the defendant is not entitled to use the level crossing in the pleadings mentioned for the purpose of conveying goods and traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at or previous to the 13th of March, 1868, or as since enjoyed by the defendant or her predecessors in title, if, owing to acquiescence or otherwise, such subsequent enjoyment is now binding on the plaintiffs. And declare that the defendant is entitled to bring goods from the works in the pleadings mentioned across the level crossings substantially as the same were brought at or previous to the 13th of March, 1868, but so that the burden of the easement is not increased as aforesaid.

As regards the costs, if this declaration had been made in the court below, each party would in part have succeeded and in part failed. In this court the appellants succeed to a substantial extent. There will, therefore, be no order as to costs in the court below, but the respondent will be ordered to pay the appellants' costs of the appeal.

Solicitor of the appellants, *R. R. Nelson.*

Solicitors for the respondent, *Cheston & Sons.*

## High Court of Justice.

Chan. Div.
Byrne, J. } Nov. 4.

*In re* COOPER, COOPER, & JOHNSON (LIMITED). (*a.*)

*Company — Winding up — Voluntary winding up — Scheme of arrangement involving reduction of capital —Joint Stock Companies Arrangement Act,* 1870 (33 & 34 *Vict. c.* 104).

*A reduction of capital involved by a scheme of arrangement must be carried out in accordance with the statutes specially dealing with reduction of capital.*

Petition.

A receiver and manager of this company had been appointed in actions brought by debenture-holders, and this receiver and manager had also been appointed liquidator in the voluntary winding-up of the company.

A scheme of arrangement was prepared involving a reduction of the company's capital under the Companies Act, 1867 and 1877, and a resumption of business by the company with a reduced capital.

This petition was presented under the Joint Stock Companies Arrangement Act, 1870, for obtaining the sanction of the court to the above-mentioned scheme; the petition was intituled in the matter of the Joint Stock Companies Arrangement Act, 1870, and in the matter of the Companies Acts, 1862 to 1900.

*Gore-Browne, K.C.*, and *F. Shewell Cooper* appeared in support of the petition.

BYRNE, J., said that the statutes specially dealing with the reduction of capital must govern a reduction of capital involved by a scheme of arrangement, and directed the petition to stand over with liberty to amend by intituling it also in the matter of the Companies Acts, 1867 and 1877, and liberty to the liquidator to call such meetings of shareholders as he might be advised.

Solicitors, *Worthington Evans, Bird, & Co.*

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

Chan. Div. }
Buckley, J. } Jan. 22, 28.

*In re* LORD ELLENBOROUGH.
TOWRY-LAW *v.* BURNE. (*a.*)

*Settlement—Voluntary settlement—Assignment of* spes successionis—*Validity.*

*A* spes successionis *is not property, and a voluntary settlement, even though it be by deed, purporting to assign it, does not operate as a contract enforceable against the settlor if and when the settlor becomes entitled to the property.*

Meek *v.* Kettlewell, 1 *Hare* 464, 1 *Ph.* 342, *is not overruled on this point by* Kekewich *v.* Manning, 1 *De G. M. & G.* 176.

Adjourned summons.

On this summons the question was raised whether a voluntary settlement of a mere expectancy can be enforced as against the settlor.

The following statement of facts is taken from the judgment:

On the 22nd of December, 1893, there were living Charles Lord Ellenborough, and Gertrude Edith Towry-Law, brother and sister of the applicant upon this summons. They were entitled respectively to certain property absolutely. In their property the applicant had then no property or interest of any kind. The applicant had an expectation arising from the fact that owing to the relationship between them and herself and to their state of health she might be (as was subsequently the case) the survivor, and might, under their respective wills or intestacies, become entitled to their property. She had neither a future interest nor a possibility coupled with an interest capable of being disposed of under section 6 of 8 & 9 Vict. c. 106. She had only a *spes successionis*. In that state of facts the applicant, on the 22nd of December, 1893, executed a voluntary settlement by deed, by which she granted to the trustees, who are the respondents on this summons, the real estate, and assigned the personal estate, to which the applicant in the event of the death of her brother and sister respectively in her lifetime might become entitled under their respective wills or intestacies. That deed could not operate by way of grant, but could in a court of equity operate as an agreement on the part of the applicant to grant and assign that which in fact could not by the deed be granted or assigned. The brother and sister are now dead, intestate, and the applicant has become entitled by devolution. The property coming to the applicant from her sister has been handed over to the trustees, and the applicant does not say that she can get it back. The property of the brother has not so been handed over, and the applicant does not desire to hand it over unless she is compelled to do so. The question to be determined upon this summons is whether she can be called upon by the trustees to assign and hand over to them that which has come to her by devolution from the late Lord Ellenborough, or whether she can refuse to do anything further to perfect that which was a mere voluntary deed. In order to raise the question in proper form, a writ has been, or will be, issued by the trustees against the applicant, seeking to recover the funds, and the order will be drawn up on this summons and in that action.

*Astbury, K.C.*, and *A. Cordery*, for the plaintiff.—At the date of the execution of the settlement the plaintiff had a mere *spes successionis* to the property, which, not being a possibility coupled with an interest, did not lie in grant within 8 & 9 Vict. c. 106, s. 6. The purported assignment does not operate as a contract to settle the property which is enforceable in equity: *Meek* v. *Kettlewell*, 1 Hare 464, 1 Ph. 342 In that case Wigram, V.C., held that a voluntary assignment of an executory interest was not enforceable because notice had not been given to the trustees. Lord Lyndhurst affirmed him on the ground that the settlement was voluntary. The note in White and Tudor's Equity Cases (7th ed., vol. 2, p. 851) to the effect that *Meek* v. *Kettlewell* has been overruled by *Kekewich* v. *Manning*, De G. M. & G. 176, requires qualification, for *Meek* v. *Kettlewell* is overruled only on the point of notice. The two cases are entirely different—in *Meek* v. *Kettlewell* there was no property, and therefore no assignment; in *Kekewich* v. *Manning* there was property which had been completely assigned.

They also referred to *In re Tilt*, 74 L. T. Rep. 163, 44 W. R. Dig. 147; *In re Parsons*, 38 W. R. 712, 45 Ch. D. 51; Fearne on Contingent Remainders, p. 551; and Lewin on Trusts, chapter 6.

*Buckmaster, K.C.*, and *Wrangham*, for the trustees.—If the settlement had been for value, it would have effected an assignment of the property and not merely a contract to assign it, for it is possible to assign property which has no existence at the date of the assignment: *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 App. Cas. 523 (per Lord Watson, at p. 533). But if the property has been assigned, it is immaterial whether the assignee is or is not a volunteer. In neither case need he come into a court of equity to perfect his title.

*Cur. adv. vult.*

BUCKLEY, J., stated the facts as above set out, and continued: The deed was purely voluntary. The question is whether a volunteer can enforce a contract made by deed to dispose of an expectancy. It cannot be, and is not, disputed that, if the deed had been for value, the trustees could have enforced it. If value be given, it is immaterial what is the form of assurance by which the disposition is made, or whether the subject of the disposition is capable of being thereby disposed of or not. An assignment for value binds the conscience of the assignor. A court of equity as against him will compel him to do that which *ex hypothesi* he has not yet effectively done. Future property, possibilities, and expectancies are all assignable in equity for value: *Tailby* v. *Official Receiver*, 13 App. Cas., at p. 548. But when the assurance is not for value a court of equity will not assist a volunteer. In *Meek* v. *Kettlewell*, affirmed by Lord Lyndhurst, the exact point arose which I have here to decide, and it was held that a voluntary assignment of an expectancy, even though under seal, would not be enforced by a court of equity. "The assignment of an expectancy," says Lord Lyndhurst, 1 Ph., at p. 347, "such as this is cannot be supported unless made for a valuable consideration." It is, however, suggested that that decision was overruled or affected by the decision of the Court of Appeal in *Kekewich* v. *Manning*, and a passage in White and Tudor's Equity Cases was referred to upon the point. In my opinion *Kekewich* v. *Manning* has no bearing upon that which was decided in *Meek* v. *Kettlewell*. The assignment in *Kekewich* v. *Manning* was not of an expectancy, but of property. "It is on legal and equitable principles," said Knight-Bruce, L.J., "clear that a person *sui juris*, acting freely, fairly, and with sufficient knowledge, ought to have and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

delivery, whether in possession or reversionary, and howsoever circumstanced." The important words there are "of his property." The point of *Meek* v. *Kettlewell* and of the case before me is that the assignment was not of property, but of a mere expectancy. On the 22nd of December, 1893, that with which the grantor was dealing was not her property in any sense. She had nothing more than an expectancy, a *spes successionis*, which is not property in English law: *In re Parsons*. In *In re Tilt* there was again a voluntary assignment of an expectancy, and the point was not regarded as arguable. "It was rightly admitted," said Chitty, J., "that as when this plaintiff executed the deed of 1880 she had no interest whatever in the fund in question, which was a mere expectancy, the deed was wholly inoperative both at law and in equity, being entirely voluntary." By "wholly inoperative" there the judge, of course, did not mean that, if the voluntary settlor had handed over the funds, the trustees would not have held them upon the trusts, but that the grantees under the deed could not enforce it, as against the settlor, in a court of equity or elsewhere. In my judgment the interest of the plaintiff as sole heiress at law and next-of-kin of the late Lord Ellenborough was not effectually assigned to the trustees by the deed, and the trustees cannot call upon her to grant, assign, transfer, or pay over to them his residuary real and personal estate.

Solicitors, *Burgess, Taylor, & Tryon.*

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Chan. Div. Joyce, J. } Jan. 21, 22.

*In re* CLINTON.
CLINTON *v.* CLINTON. (*a*)

*International law—Jurisdiction—British colony—Personalty and real property out of the jurisdiction—Will—Construction—Trust.*

*A testator domiciled in a British colony left real and personal property in the colony. In an action instituted in England by the heir-at-law and next-of-kin of the testator against persons who had taken possession of the personal and real estate in the colony of the testator, all parties to the action being resident in England,*

*Held, that the English court had jurisdiction in the action to determine questions* (1) *as to the title to the real estate as well as the personalty situate in the colony, the two being so mixed together under the will that they could not be dealt with separately; and* (2) *as to whether a trust of the real estate had been created by the will or not.*

Action.

The testator, James Clarke Clinton, had carried on business at Assinee, on the West Coast of Africa, in the French territory known as the Ivory Coast Colony, and also at Axim, Ankobra, and Secondee, in the British Gold Coast Colony.

At the date of his death he was possessed (*inter alia*)—(1) Of the above-mentioned businesses; (2) of certain freehold dwelling-houses and premises at each of these places; (3) of certain freehold and leasehold concessions for mining and other purposes of large tracts of land in the Gold Coast Colony; (4) of personal estate in England of the value of over £3,000.

By his will, dated the 2nd of November, 1899, the testator, after appointing his wife, the defendant Emma Charlotte Clinton, the sole executrix of his will, and bequeathing her all the furniture and household effects in his house at Axim, continued: "I bequeath to my wife all my moneys in the bank, the interest to be used for the education of my wife's children. The principal moneys to be held in trust by my wife for the use and benefit of my children. I bequeath to my wife the sum of £200 per annum, to be paid out of the proceeds of the firm. The business to be carried on by Charles Clinton and Willie Clinton, Charles Clinton being senior; my wife to receive the rents of the houses and the house in which we live. I advise that Charles Clinton should sell the business at Assinee."

The testator died on the 2nd of November, 1899, a British subject domiciled in the Gold Coast Colony.

The will was proved on the 6th of November, 1899, in the Gold Coast Colony, and on the 12th of March, 1901, in England.

The plaintiffs were the three infant children of the testator suing by their next friend.

The defendants were the testator's widow, Emma Charlotte Clinton, and Charles Warner Clinton and William Nicholas Clinton, described in the will as Charles Clinton and Willie Clinton.

By an agreement dated the 23rd of July, 1900, and made between the defendant Emma Charlotte Clinton of the one part, and the defendants Charles Warner Clinton and William Nicholas Clinton of the other part, after reciting the said will of the said James Clarke Clinton (deceased) to the effect abovementioned, and reciting that the said James Clarke Clinton did not by his said will specifically devise or bequeath the residue of his said business, nor the leasehold and freehold concessions, and that he did not by his said will make any provision for the remuneration of the services of the defendants Charles Warner Clinton and William Nicholas Clinton should they accept the trusts of the said will, and reciting that the defendants Charles Warner Clinton and William Nicholas Clinton had alleged that it was the intention of the said James Clarke Clinton to give and bequeath to them absolutely the said business subject to the annuity of £200 to be paid to the defendant Emma Charlotte Clinton, and that the said defendant had claimed that the said business, leaseholds, and real property was residue divisible amongst the heir-at-law and next-of-kin of the said James Clarke Clinton according to the Statute of Distribution, and reciting that it was considered advisable by all parties interested in the estate of the said James Clarke Clinton, deceased, that a compromise should be effected so as to save the estate from the expense of litigation, and after certain further recitals, not material to be here stated, it was agreed between the parties thereto as follows:

Clause 1.—The defendant Emma Charlotte Clinton agreed to assign the business of the said James Clarke Clinton that was carried on at Axim and all other places, stations, branches, or factories in the Gold Coast Colony, together with the book debts, stock-in-trade, plant, mortgages, promissory notes, and all other securities for money, and to surrender the said annuity of £200 to the defendant Charles Warner Clinton and William Nicholas Clinton absolutely.

Clause 2.—The defendant Emma Charlotte Clinton agreed to grant, convey, or assign to the defendants Charles Warner Clinton and William Nicholas Clinton, their heirs, executors, administrators, or assigns, all concessions in the Gold Coast Colony aforesaid, whether they might be leaseholds or freeholds, and whether they were in the name of the said James Clarke Clinton or in the names of J. & C. Clinton & Co., and would execute all documents necessary to transfer the said concessions to the defendants Charles Warner Clinton and William Nicholas Clinton, their heirs, executors, administra-

(*a*.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

tors, or assigns, all freeholds in Secondee, in the Gold Coast Colony aforesaid, being expressly excepted.

Clause 3.—The defendant Emma Charlotte Clinton agreed to assign all her right, title, and interest in and to the business of the said James Clarke Clinton that was being carried on at Assinee aforesaid, as well as to grant her interest in the concessions and freehold property in Assinee aforesaid to the defendants Charles Warner Clinton and William Nicholas Clinton, their heirs, executors, administrators, or assigns, upon the said defendants procuring a release to her the defendant Emma Charlotte Clinton from certain claims which might be made upon the estate of the said James Clarke Clinton.

Clause 4.—The defendants Charles Warner Clinton and William Nicholas Clinton jointly agreed to pay to the said Emma Charlotte Clinton, her heirs, executors, or administrators, the sum of £5,000 within four years from the date of that agreement by four equal yearly instalments of £1,250 each, the first of which was to become due and payable on the 4th of July, 1901, the second on the 4th of July, 1902, the third on the 4th of July, 1903, and the fourth on the 4th of July, 1904, with interest as therein mentioned.

Clause 5.—The defendants Charles Warner Clinton and William Nicholas Clinton agreed to pay to the defendant Emma Charlotte Clinton, her heirs, executors, or administrators, such fair annual rent as might be agreed upon in manner therein mentioned for the houses at Axim, Ankobra, and Secondee wherein the business of the said James Clarke Clinton was carried on.

Clause 6.—The defendants Charles Warner Clinton and William Nicholas Clinton agreed to pay all debts due from and owing by the business of the said James Clarke Clinton carried on under the style or firm of J. & C. Clinton & Co., and to pay to the defendant Emma Charlotte Clinton forthwith, upon the signing of the agreement, the following—(*a*) The annuity due to her as provided in the will of the said James Clarke Clinton from the month of December, 1899, to the date of that agreement after deducting such payments as had already been made to her; (*b*) the rent of the houses as aforesaid for the same period; (*c*) the value of the furniture of the principal house at Axim as agreed between the defendants, which included everything in the said house excepting as therein mentioned; (*d*) all payments that had been made to the defendants Charles Warner Clinton and William Nicholas Clinton or either of them in respect of the judgment therein mentioned.

Clause 7.—The defendant Charles Warner Clinton agreed to surrender a bank deposit receipt for £250 given by the Bank of British West Africa (Limited), Liverpool, in respect of a deposit made by the said James Clarke Clinton out of the assets of the Assinee business to the defendant Emma Charlotte Clinton to meet the expenses therein mentioned in connection with the estate of the said James Clarke Clinton.

Clause 8.—The defendants Charles Warner Clinton and William Nicholas Clinton agreed to withdraw all letters written by them to any bank or banks which might have the effect of stopping or delaying the payment of any sum or sums of money to be made payable to the defendant Emma Charlotte Clinton, which money had been deposited in the said bank or banks by the said James Clarke Clinton either in his name or in the name of J. & C. Clinton & Co.

Clause 9.—The defendants Charles Warner Clinton and William Nicholas Clinton would procure the firm of Millward, Bradbury, & Co. to release the defendant Emma Charlotte Clinton from the debts due to the said firm from the estate of the said James Clarke Clinton and to pay the claim of Messrs. Herschell & Co., of Liverpool, and to look for payment of their debt as well as repayment of the moneys that might be so advanced by them to the defendants Charles Warner Clinton and William Nicholas Clinton.

Clause 10.—The defendants Charles Warner Clinton and William Nicholas Clinton would procure the said Millward, Bradbury, & Co. to give a written guarantee to the defendant Emma Charlotte Clinton for the due payment of the said sum of £5,000 to the said defendant, her heirs, executors, and administrators, by the defendants Charles Warner Clinton and William Nicholas Clinton, and to undertake to pay the said sum when any instalment thereof should become due if the said defendants should make default in payment for one calendar month after such instalment should become due.

In 1901, in pursuance of this agreement, and in consideration of the said sum of £5,000, the defendant Emma Charlotte Clinton, as executrix and in her sole right, purported to convey to the defendants C. W. and W. N. Clinton the leasehold and freehold concessions of the testator in the Gold Coast Colony. The defendants C. W. and W. N. Clinton upon this entered into possession of the said businesses and concessions.

The plaintiffs thereupon commenced this action claiming a declaration that the defendants C. W. and W. N. Clinton took no beneficial interest in the testator's businesses and concessions, and asking for a declaration that the agreement of the 23rd of July, 1900, and the assignment and conveyance executed in pursuance thereof were not binding on the plaintiffs and were void as against them, and claiming an account against the defendants C. W. and W. N. Clinton. These defendants entered an appearance to the action and by their defence contended that the court had no jurisdiction to adjudicate on the plaintiffs' claim in so far as it related to the land, houses, and concessions situated in the Gold Coast Colony and elsewhere in West Africa or any of them. This point of law was ordered to be set down for argument before the court before further proceedings were taken in the action, and now came on for argument.

*Warmington, K.C.*, and *Mark Romer*, for the plaintiffs.—We submit that the will makes no disposition of the testator's property other than the moneys in the bank and the annuity of £200 to the wife. The court has clearly jurisdiction, as, though it will not adjudicate as to real estate in a foreign country, yet it will do so as regards the agreement of the 23rd of July, 1900. The case is covered by *Lord Cranstown* v. *Johnston*, 3 Ves. 170. "Courts of equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here": per Lord Herschell, L.C., in *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602, at p. 626; and in *Duder* v. *Amsterdamsch Trustees Kantoor*, 50 W. R. 551, [1902] 2 Ch. 132, *Cranstown* v. *Johnston* was treated as good law. If that case is good law it covers this one, because here there is a contract between persons who are in this country respecting land in a foreign country; the court therefore has jurisdiction just as if the land was in this country. In *Ewing* v. *Orr Ewing*, 32 W. R. 573, 9 App. Cas. 34, it was held that a decree could be made here for the administration of a Scotch estate.

*Younger, K.C.*, and *J. Austen Cartmell*, for the defendants C. W. and W. N. Clinton.—The court has no jurisdiction in respect of real estate out of the jurisdiction. This case goes beyond any one in which the court of equity has purported to act. This claim to recover immovable property abroad is based first of all on the will, made in a British colony by a

testator domiciled in that colony; it is therefore first of all a case of construction of a will, and must be decided by the law of that colony—a will affecting land in that colony, and that has been held to be "not triable" in this country: *Pike* v. *Hoare*, 2 Eden 182. To this rule there are only three exceptions: (1) Where there was a contract between the plaintiff and defendant with reference to the land; (2) where there was a trust or equity binding on the conscience of the defendant; or (3) where there was fraud on the part of the defendant. This case does not come within any of these exceptions: *Norris* v. *Chambres*, 9 W. R. 259, 29 Beav. 296. In substance this case is one of ejectment, and the court has no jurisdiction to try such an action over foreign land except under the three exceptions.

They also quoted Dicey's Conflict of Laws, p. 214, and *In re Hawthorn*, 32 W. R. 147, 23 Ch. D. 743.

*Warmington, K.C.*, replied.

JOYCE, J.—I have reason to believe that the law of the Gold Coast Colony is the same as that of this country, but I do not know whether or not any ordinance has been passed applying the Land Transfer Act to that colony. At all events, I am prepared to hold that, as to the personalty and the leaseholds which would vest in the executrix, this action is maintainable. There is clearly a trust, and there are equities which must be worked out. There is or may be a difficulty as to the immovable property which legally devolves at once upon the heir-at-law of the testator. From what has been stated in Westlake on International Law (3rd ed., section 173, p. 294), and from other authorities referred to by him, it appears that there have been instances in which the court, having jurisdiction as to the personalty, has exercised a jurisdiction over the realty as well, considering the two as so much mixed up together that it was not possible to separate them. There is another question here, as to whether the real estate is not devised by the will to these two defendants upon trust, and that consideration has been forced upon me by one of the recitals in the agreement. If that is so, then these defendants are subject to the jurisdiction of the court, which can be exercised against them personally, and this court clearly has jurisdiction to determine whether there is a trust or not. In these circumstances I am prepared to make the following order: Declare that the objection to the jurisdiction raised by the defence is not good in law. Order the action to proceed to trial, notwithstanding that objection. This order to be without prejudice to any question in reference to the immovable property (if any) the legal interest in which devolved at the testator's death directly upon the heir-at-law.

Solicitors, *Lewis & Lewis; Foss, Ledsam, & Blount.*

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K. B. Div. (Kennedy, J.) — Oct. 31.

## DE HART v. COMPANIA ANONIMA "SEGUROS" AURORA. (a.)

*Insurance—Marine—Time policy—General average—Contract of affreightment—Foreign statement—Belgian law.*

*A policy of marine insurance contained the following clause: "General average payable according to foreign statement if so made up or York-Antwerp Rules if in accordance with contract of affreightment."*

*Attached to the policy were the Institute Time Clauses, 1900, one of which provides: "General average and salvage charges payable according to foreign statement or per York Antwerp Rules if in accordance with the contract of affreightment."*

*By a charter-party made between the shipowner and the charterer it was agreed that, "In case of average the same to be settled according to York-Antwerp Rules, 1900, excepting that jettison of deck cargo (and freight thereon) for the common safety shall be allowable as general average."*

*The average statement was made up at Antwerp, and included jettisoned deck cargo and freight thereon. The shipowner paid the ship's contribution to general average. Apart from express agreement in the contract of affreightment, the Belgian law would not recognize such jettisoned deck cargo and freight thereon as being the subject of a claim for general average.*

*Held, in an action by the shipowner to recover from the underwriters the amount of his contribution, that the underwriters were liable.*

Action tried in the Commercial Court.

This was an action by shipowners against underwriters on two policies of insurance on the steamship *Henriette H.*

The two policies were dated the 31st of August, 1900, and the 28th of September, 1900, respectively, for twelve months, and both contained the following clause: "General average payable according to foreign statement if so made up or York-Antwerp Rules if in accordance with contract of affreightment."

Attached to the policies were the Institute Time Clauses, 1900, including the following clause: "General average and salvage charges payable according to foreign statement or per York-Antwerp Rules if in accordance with the contract of affreightment."

By a charter-party, dated the 11th of October, 1900, made between the plaintiff as shipowner and Baars, Dunwody, & Co., as charterers, it was agreed that the *Henriette H.* should carry a cargo of wood, and if the master required it a deck-load, from Pensacola to Antwerp.

The charter-party contained the following clause: "In case of average the same to be settled according to York-Antwerp Rules, 1900, excepting that jettison of deck cargo (and freight thereon) for the common safety shall be allowable as general average."

The vessel sailed from Pensacola with a deck-load of timber, which was customary. During the voyage part of the deck-load was jettisoned for the safety of ship and cargo. The vessel reached Antwerp and there delivered the remaining cargo. An average adjustment made at that port included the deck cargo jettisoned and the freight thereon as the subject of general average.

The plaintiff, having paid the ship's contribution to general average, now claimed to be indemnified by the underwriters.

It was admitted that by the Belgian law the jettison of the deck cargo and the freight thereon would not give rise to a claim for general average apart from express provision in the charter-party.

The following cases were cited: *Harris* v. *Scaramanga*, 20 W. R. 777; *Mavro* v. *Ocean Marine Insurance Co.*, 23 W. R. 758; *Hendricks* v. *Australasian Insurance Co.*, 22 W. R. 947; and *The Brigella*, [1893] P. 189, 41 W. R. Dig. 192.

*Carver, K.C.*, and *de Hart*, for the plaintiff.

*J. A. Hamilton, K.C.*, and *J. R. Atkin*, for the defendants.

KENNEDY, J.—In this case the plaintiff claims

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

from the defendants an indemnity against a general average contribution which he has paid. The question depends upon the true construction of certain clauses in the policy.

I think they are susceptible of a natural meaning. The general average statement made up at Antwerp was not contrary to the law of Belgium. The point taken by the defendant company was that the average statement admitted what but for the special agreement made between the parties would not be general average according to Belgian law. The Belgian law, however, recognizes the terms of an express contract between the parties to the contract of affreightment. In my opinion the fair construction is that the underwriters are bound to pay according to the foreign statement, and if the foreign law recognizes with regard to general average the terms of the contract of affreightment then the underwriters are bound by the statement made in accordance with that law. I therefore give judgment for the plaintiff.

Solicitors for plaintiff, *Stibbard, Gibson, & Co.*, for *Gibson, Pybus, & Pybus*, Newcastle-on-Tyne.

Solicitors for defendant, *Waltons, Johnson, Bubb, & Whatton.*

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## IN BANKRUPTCY.

K. B. Div. (Wright, J.) — Dec. 4, 15.

*In re* LAKE.
*Ex parte* CAVENDISH. (*a.*)

*Bankruptcy—Insurance—Life policy—Assignment of life policies by way of mortgage—Notice of assignment—Priority of claims of mortgagees.*

*The bankrupt before his bankruptcy executed a mortgage of life policies in favour of a client whose money he had misappropriated, but never disclosed the fact. He subsequently gave another mortgage on the same policies to a person who gave notice thereof to the insurance companies prior to the bankruptcy. After the bankruptcy the first mortgage was discovered, and the mortgagee at once gave notice of it to the insurance companies.*

*Held, that the second mortgagee was entitled to priority, having been the first to give notice, although the first mortgagee had not been guilty of* laches.

Foster *v.* Cockerell, 9 *Bligh N. S.* 332, *followed.*

Motion by F. Cavendish for a declaration that an equitable mortgage in his favour of certain policies on the life of B. G. Lake, the bankrupt, was entitled to priority over a mortgage of the same policies in favour of one Cox.

In 1898 the bankrupt's firm (Lake & Lake, solicitors) received £15,000, the property of Cavendish, for investment. The firm informed Cavendish by letter that they had invested the money, but in fact it was misappropriated. On the 6th of April, 1899, B. G. Lake executed a mortgage on certain life policies to secure to Cavendish £13,500 of the money misappropriated. Lake did not inform Cavendish of the existence of the mortgage or give notice of it to the insurance companies.

On the 18th of December, 1899, Lake mortgaged the same policies to one Cox, a clerk in his office, as trustee for certain other clients whose moneys had been misappropriated, but did not inform Cox of the prior mortgage.

Shortly before the making of the receiving order, which was dated the 27th of June, 1900, Cox gave notice to the insurance companies of the mortgage in his favour. In December 1900, the mortgage in favour of Cavendish was discovered at the offices of Lake & Lake, and notice thereof was given on his behalf to the insurance companies.

Cavendish now moved for a declaration that his mortgage was entitled to priority.

*Reed, K.C.*, and *Ivor Johnson*, for the motion.—B. G. Lake, the bankrupt, stood in a fiduciary position to Cavendish, having received Cavendish's money for investment. By the mortgage of the 6th of April, 1899, he constituted himself a trustee for Cavendish of the property comprised therein, and could not by a subsequent mortgage give Cox a title prior to that of his *cestui que trust*: see the judgment of Jessel, M.R., in *Mumford* v. *Stohwasser*, 22 W. R. 833, L. R. 18 Eq. 556, which is not overruled upon this point by *Hunt* v. *Luck*, 50 W. R. 291, [1902] 1 Ch. 428. Further, the doctrine of priority of notice depends on *laches*, and Cavendish was not guilty of any negligence, having given notice as soon as he knew of the mortgage: *Dearle* v. *Hall*, 3 Russ. 1; *Loveridge* v. *Cooper*, 3 Russ. 30.

*R. B. D. Acland*, for the respondent Cox.—Lake was not a trustee for Cavendish, consequently the *dictum* of Jessel, M.R., in *Mumford* v. *Stohwasser* does not apply. The principles of priority between equitable mortgagees rests on notice, not on *laches* or diligence. Cox had no notice of any prior mortgage and was the first to give notice to the insurance companies: *Foster* v. *Cockerell*, 9 Bligh N. S. 332.

*Northcote* appeared for the trustee in bankruptcy.

*Reed, K.C.*, replied.

*Cur. adv. vult.*

Dec. 15.—WRIGHT, J.—The question I have to determine is, which of two equitable incumbrancers is entitled to priority. The ordinary rule in cases of equitable assignment is that the first to give notice is the one who obtains priority. Here it was contended that Lake was a trustee for Cavendish, and a *dictum* of Jessel, M.R., in *Mumford* v. *Stohwasser* was relied on. It seems to me, however, that this *dictum* does not apply, because the facts of this case do not raise the same question. Then it was said that the doctrine of priority by notice depends on *laches*, and that Cavendish had not been guilty of any negligence because he gave notice as soon as he knew of the existence of the mortgage. But I think the point is disposed of by the judgment of Lord Lyndhurst in *Foster* v. *Cockerell*, 9 Bligh N. S., at p. 375. He says: "This was a question of priority between two equitable incumbrances—a question whether the subsequent incumbrancer of the equity, having given notice to the trustees of the fund, was entitled to priority over the former incumbrancers. Now that question has been settled, after much deliberate discussion, in the cases of *Dearle* v. *Hall* and *Loveridge* v. *Cooper*. These two cases were argued before Sir Thomas Plumer, as Master of the Rolls, with great learning and attention to the subject. The Master of the Rolls, after considering the question, pronounced a very elaborate judgment, deciding that in cases of this description the party who first gave notice to the trustees was entitled to the priority; and, without adverting to the particular facts of those cases, the principle upon which the decision was founded was this, that if a contrary doctrine were to prevail it would enable a *cestui que trust* to commit a fraud; he might assign his interest first to one and then to a second incumbrancer, and the second incumbrancer would have no opportunity by way of communication with the trustees of ascertaining whether or not there had been a prior assignment of the interest. There was also another principle upon which he

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

decided those cases, which was this, that a party, till he gives notice to the trustees, has not done everything to complete his title. In such cases it is necessary for the parties to do everything in their power. Further than that, he assigns as an additional reason, that, until notice was given to the trustees, they did not in fact become trustees for the assignee. It was upon these distinct grounds that he laid down as a general rule that in the case of an equitable assignment the party giving notice to the trustees, although he was second incumbrancer, was entitled to priority, if the former incumbrancer had given no such notice. The principle of those authorities applies directly to the present case."

I hold, therefore, even although this is an extreme case, that Cavendish is not entitled to priority over the second mortgagee.

*Application dismissed.*

Solicitors for the applicant, *Bompas, Bischoff, & Co.*

Solicitors for the respondent, *Longbourne, Stevens, & Co.*

Solicitors for the trustee in bankruptcy, *Lee & Pembertons.*

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## House of Lords.

From C. A. (England). July 10, 1902.

IBO SYNDICATE (LIMITED) v. WYLER. (a)

*Practice—Appeal—House of Lords—New trial—Entering judgment for the defendant—Appellate Jurisdiction Act*, 1887, *r.* 4.

*Where the House of Lords comes to the conclusion that there is no evidence to go to a jury in an action, they will order judgment to be entered for the defendant, and not send the case for a new trial; and this will be done though there is no cross-appeal on the defendant's part.*

Appeal from an order of the Court of Appeal setting aside a verdict and judgment for the appellants (plaintiffs below) on the ground that the verdict was against the weight of evidence.

The case was one of fact, and is reported upon the question of practice only.

*Lawson Walton, K.C.*, and *Spencer Bower*, for the appellants.

*Sir R. Reid, K.C.*, and *Roskill*, for the respondent.

Their lordships took time to consider their judgment.

The Earl of HALSBURY, L.C.—This is an action for deceit, and there are three things necessary in order to establish the right of the plaintiffs to recover in such an action. There must be deceit, a representation fraudulently made by words or deeds; there must be an acting upon that by the person who complains of the wrong, and there must be damage by his or their having acted upon it. Each of those three elements is necessary in order to establish a right of action. After the most careful perusal of the whole of the evidence in this case, and looking at the arguments on both sides which have been presented to your lordships, I have come very clearly to the opinion that the plaintiffs fail in every one of the elements constituting the right to bring an action. [His lordship went through the evidence, and continued:] Upon the whole case it seems to me to be absolutely impossible to say that either there was any evidence that ought to have been properly submitted to the jury, or that the verdict can stand.

Upon that I come to the only question which seems to me to demand serious consideration—namely, the question of what your lordships ought to do under these circumstances, there being a verdict which is certainly not warranted by the evidence, and in my view no evidence to go to the jury; though in that respect one ought to remember that the law is not now that any scintilla of evidence that might exist is to be submitted to the jury, but only where it is of such a character that the court will send it for a new trial. In this case I am prepared to go to the extent of saying there was none, but even if there was a scintilla of evidence it would be insufficient to establish the propriety of allowing this judgment to stand. But then the question has been argued rather as a question of form, whether, there being no cross-appeal here, your lordships ought to enter judgment for the defendant. It is idle to refer to what the practice in times gone by was. There is no doubt that at one time one was sometimes incumbered with forms in a manner which occasionally, I am afraid, did injustice, and the substance was thereby somewhat lost sight of. But that matter has been the subject of very considerable debate and alteration in the law. In the first place, what I have just referred to—namely, the right of anybody to have matters submitted to the jury if there was a scintilla of evidence—has passed away; it had passed away in practice, I think, already, but the rules made under the Judicature Act have expressly provided for it. Before referring to those rules, I think I may say that the analogy of the law was always what it is now, although, when the case was entangled with questions of fact, and certain questions had to be submitted to the jury, and others had to be left to the judge, there was very often difficulty which was not always surmounted until the recent legislation. But that was always the analogy of the law; it mattered not who demurred first; it mattered not whether or not the particular plea or pleading was bad or good; the moment the court had before it the whole record they would then give judgment, notwithstanding that the person may have succeeded in showing that the plea he demurred to was bad; if upon the whole record, as it then stood before the court, judgment ought to be entered in one particular way, they entered judgment for the person who upon the whole record appeared to be entitled to judgment. Upon that analogy, it being obviously good sense, upon these questions, when they were entangled with fact (and it was sometimes difficult to disentangle what was law and what was fact), I think that the later view to which I have referred, of what ought to be done in such a case as the present, has prevailed. Now, as to the rule itself, it is important to bear in mind the date of the rule. I need not detain your lordships upon this point because we are not acting upon this rule at all beyond saying this, that whatever the form of procedure may be, the court can enter judgment and make such order as the court from which the appeal came ought to have made. That, of course, would have justified the Court of Appeal in entering judgment, even if there were no such cross-appeal in such a case as this; but that rule having been passed in the year 1875, the Appellate Jurisdiction Act was passed in the year 1887, and the rules under that Act are of course the rules of practice under which your lordships are acting. Section 4 of those rules is this: "Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before his Majesty the King in his Court of Parliament, in

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

order that the said court may determine what of right and according to the law and custom of this realm ought to be done in the subject-matter of such appeal." These are wider words even than the order under which the High Court of Justice acts. It appears to me that under these circumstances the order which ought to be made in this case is that judgment should be entered for the defendant, and that the plaintiffs—I use the words "plaintiffs" and "defendant," they have now become respectively the appellants and the respondent—should pay to the defendant the costs both here and below.

Lord MACNAGHTEN.—I am of the same opinion.

Lord LINDLEY.—I am of the same opinion, and I shall add very few words in order to show the view which I have taken of this case. As regards the appeal from the decision of the Appeal Court, I consider that the appeal was absolutely hopeless when once the facts were understood. To suppose that any court could allow the verdict and judgment pronounced at the trial to stand is to suppose that the court had no knowledge whatever of legal principles. A difficulty arose when the House was asked to go further and enter judgment for the defendant. I looked at the reasons given in the Court of Appeal, to see why the Court of Appeal did not go to that length. I could find no reasons given except the short reason which is involved in saying that there must be a new trial. But when we look and see how the evidence stands, it appears to me that this case is one in which unquestionably the Court of Appeal might go and your lordships ought to go the length of saying that upon the evidence as it stands no verdict for the plaintiffs ought to be allowed to stand, which in other words means that judgment ought to be entered for the defendant.

The LORD CHANCELLOR —I ought to say that Lord Brampton entirely concurs in the judgment at which your lordships have arrived.

*Order appealed from varied by ordering judgment to be entered for the defendant instead of ordering a new trial. Plaintiffs to pay to the defendant the costs both here and below.*

Solicitors for the appellants, *Ingle, Holmes, & Sons.*

Solicitors for the respondent, *Ashurst, Morris, Crisp, & Co.*

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From C. A. (Ireland). } Nov. 27.

DUBLIN UNITED TRAMWAYS CO. *v.* FITZGERALD. (*a*)

*Tramway—Liability of company to keep their portion of roadway in proper condition—Sanding slippery road —Tramway Act,* 1870 (33 & 34 *Vict. c.* 78), *s.* 28.

*The Tramway Act,* 1870, *s.* 28, *requires the tramway company to maintain and keep in good condition and repair that portion of the road for which they are responsible, with such materials and in such manner as the road authority should direct. The Tramway Co. (as required) laid its portion of the road with granite blocks, which became worn and consequently dangerous in certain states of the weather. An accident occurred, through the company neglecting to lay down sand on its portion of the road, which would have counteracted the slippery nature of the surface.*

*Held, that the Company was liable.*

Appeal from an order of Court of Appeal in Ireland.

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The respondent was, in March, 1900, driving a horse and cart in Grafton-street, Dublin, on that portion of the roadway on which tramway was laid when he was thrown out and sustained injury, for which he brought this action against the appellant tramway company.

The jury found that the appellants had not been negligent in the construction or maintenance of the pavement, but that they were negligent in not sanding, and a verdict and judgment was entered for the respondent, the damages being £1,000.

This was affirmed, but the findings of the jury as to the construction or maintenance of the roadway were set aside.

Previously the corporation had taken out summonses against the tramway company asking that they should be ordered to sand, owing to the slippery condition, that part of the roadway under their control, and the company was held liable, but a case was stated for the opinion of the court, which upheld the conviction.

The 28th section of the Tramway Act, 1870 (not applicable to Ireland), is incorporated with the special Act of the Dublin United Tramways (Electrical Power) Act, 1897.

Section 28 of the Act of 1870: "The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway. If the promoters abandon their undertaking, or any part of the same, and take up any tramway, or any part of any tramway belonging to them, they shall with all convenient speed, and in all cases within six weeks at the most (unless the road authority otherwise consents in writing), fill in the ground and make good the surface, and to the satisfaction of the road authority restore the portion of the road upon which such tramway was laid to as good a condition as that in which it was before such tramway was laid thereon, and clear away all surplus paving or metalling material or rubbish occasioned by such work; and they shall in the meantime cause the place where the road is opened or broken up to be fenced and watched and to be properly lighted at night. Provided always that, if the promoters fail to comply with the provisions of this section, the road authority, if they think fit, may themselves, at any time after seven days' notice to the promoters, open and break up the road and do the works necessary for the repair and maintenance or restoration of the road to the extent in this section above-mentioned, and the expense incurred by the road authority in so doing shall be repaid to them by the promoters."

Section 37 of the Act of 1897: "The company shall at all times maintain and keep in good condition and repair, and so as not to be a danger or annoyance to the ordinary traffic, the rails of the tramways and the substructure upon which the same rest, and also the paving, wires, posts, tubes, and electrical apparatus of any description whatever, and if the company at any time fail to comply with this provision or with the provisions of sections 25 and 28 of the Tramway Act, 1870, they shall be subject to a penalty not exceeding £5 for every day on which such noncompliance continues, and in the event of any such noncompliance as aforesaid, and

without prejudice to any other remedy, the road authority may, after giving to the company forty-eight hours' notice in writing in that behalf, execute and do all works necessary for such maintenance and repair and for such restoration as aforesaid, or as in the said section 28 of the Tramway Act, 1870, is mentioned, and may recover they costs, charges, and expenses of so doing from the company."

*Balfour Browne, K.C., J. Gordon, K.C.* (of the Irish bar), and *J. Fitzgerald Murphy*, for the appellants.

Serjeant *Dodd, K.C.* (of the Irish bar), *Lawson Walton, K.C.*, and *J. B. Powell* (of the Irish bar), for the respondent.

*Barnett* v. *Borough of Poplar*, 49 W. R. 574. [1901] 2 K. B. 319, and *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 25 W. R. 794, 2 Ex. Div. 441, were referred to.

Earl of HALSBURY, L.C.—I move your lordships that this appeal be dismissed. I am of opinion that the judgment of the Court of Appeal is perfectly right, and I am glad to be fortified in that opinion by the all but unanimous judgment of all the learned judges who have been consulted on this subject, with the single exception of Boyd, J. Although it has taken, not unreasonably, a considerable time to argue, the question turns upon a very few words, which do not, I think, require a very elaborate exposition. The tramway company has been permitted to use a public highway, and it has been permitted that use subject to certain obligations, which practically mean that while they are permitted to use the public highway, they shall take care that the safety and convenience of the public shall be preserved. The obligation is cast upon them of keeping the highway in a safe and fit condition for public traffic. They are not to have a monopoly of the highway. Passengers, horse and foot, are to be allowed to cross these tramways as freely as they did before, except where they may be intercepting or interfering with the use of the tramway as such. As part of the obligation cast upon them by the statute, the tramway company are to take what is stated by description, but really might have been given by actual measurement, and to some extent is so given—part of the roadway—under their immediate superintendence. By "their immediate superintendence" I do not mean that they are to have an independent superintendence; on the contrary, there is a power above them and beyond them under whose authority they are to act. But in the first instance it is their duty to take care of the public convenience in respect of that portion of the highway over which they are permitted to exercise this kind of subordinate dominion. They are under an obligation, therefore, under the words of the statute, both to repair and maintain that portion of the highway which I have indicated. When you look at their obligations you see that they are under the authority and superintendence of what I may describe as their immediate superiors in making the highway, and in the rest of what I have to say I will speak of it as their highway. They are to make the highway fit and proper for the public use as a highway. They are to maintain and repair that portion, and they are to repair and maintain it under the superintendence of the road authority, which has jurisdiction over the whole of the highway. It would appear that under that direction this tramway company have put, as part of their highway, the granite setts which gives rise to the question. One of the obligations which is placed upon them is to repair and maintain that which is described as "pavement" in the statute, and they are under no greater and no less obligation to maintain those setts to the same extent and with the same care as is applicable to the rest of the highway under their superintendence. It does not appear to be denied, but is insisted on by both sides, that owing to its particular character this surface roadway of their part of the highway, which was placed there under the superintendence and by the direction of the road authority, is liable in certain states of the weather to become a danger and a nuisance to the public using the highway. As a matter of fact the jury in this case have found that it had become a nuisance, and that it was dangerous, and both the plaintiff and the defendants join in the statement that in the actual condition of things when this accident occurred it was a dangerous nuisance. It is certainly a somewhat extraordinary proposition to say that although the immediate superintendence of this part of the highway is committed to the defendants, and though they are directed to act under the superintendence of the road authority, it being admitted that on this particular matter they received absolute directions to do the act which would have prevented the accident from happening, still there is no liability because they originally constructed something which, by the hypothesis, in its original construction would not have caused the accident, but have allowed it to get into such a condition that it does cause the accident. To say that under these circumstances there is no liability seems to me to be a somewhat bold contention. I confess that I do not understand the argument which was addressed to your lordships that the obligation to repair, or restore to the same condition in which the thing was, does not include the restoration of the thing to a condition in which it would not be a nuisance; because if that obligation is admitted, and the proper way of doing it is admitted to be by applying sand to the surface, it seems to me to come to this—indeed I think that it was almost admitted in terms—that if the case had been shaped in this way, "that these stones having become slippery partly by reason of the surface having been worn away by traffic, the obligation was cast upon us, the tramway company, of taking them up again and redressing them, we should not deny that we were under that condition of things liable to do it, because it would come under the strictest construction of the words 'repair and maintenance,' and 'repair and maintenance' is a thing which it is admitted that we were bound to do." According to the evidence these setts were dressed when they were originally put there, but, either by reason of the wear of the traffic or by reason of the weather, they are no longer in that condition. It would be a very extraordinary thing to say that the defendants would be liable in that case, but that they are not to be liable when, instead of taking up the stones and redressing them, they did not take the precaution, which the witnesses on both sides admitted to be the ordinary and usual precaution in the case of a highway being slippery, of putting down sand. It seems to me to be absolutely frittering away the obligation which is created by the Act of Parliament to say that they would be liable to do the thing in one way, but not to do it in the other way. What strikes me in that sort of argument is this, that it is confusing the mode in which the obligation is to be performed with the obligation itself. The obligation, as I read the statute, is to keep that portion of the highway in a fit and proper condition for public traffic. How that is to be done is a question of mechanical engineering, and neither the Legislature nor the courts are called upon, as it appears to me, to enter into the question of how it can best be done. All the learned judges, I believe without exception,

seem to agree that the best and most proper mode of doing is it by doing that which the road authority directed the tramway company to do, a direction which they had deliberately disobeyed. It appears to me that the various propositions which have been put before your lordships are answered by the language of the statute itself. I read it in its ordinary and reasonable interpretion. It says: "You, the tramway company, are to be in the first instance the persons taking the care and guardianship of this portion of the public highway; but, although we cast upon you the duty of keeping it in such a condition as not to be a nuisance, we do not make you an independent road authority; you shall act under the direction of the ordinary and usual road authority, and if you do that your obligation is discharged." If there is any other obligation on the part of the road authority itself, we are not concerned to inquire what that is. Here, as it strikes me, no question of a conflict of authority arises, because here the road authority, which has power under this statute to give directions, has directed the tramway company to do the very thing which it is generally agreed ought to be done, and they have refused to do it. Under these circumstances the only question of law which remains is whether the thing which the road authority have ordered the tramway company to do is a thing which can be properly comprehended within the words "repairing and maintaining" the part of the roadway which is under their superintendence. For may own part I cannot entertain any doubt that those words do comprehend it, and I further entertain no doubt that the Legislature intended in giving these special rights to a private company of taking part of the highway for their tramway that they should do that which an ordinary highway authority would be bound to do—namely, take upon themselves in the first instance the obligation of keeping it in a fit and proper condition for public traffic. That they have neglected to do, and the accident was the result. I think, therefore, that they are obviously responsible in damages for the neglect of the duty which the jury have found that they did neglect, and accordingly I move that this appeal be dismissed with costs.

Lord SHAND.—There has been such a general agreement and consensus of opinion on the part of the learned judges in Ireland, with respect to this case, and they are so much in accord with what the Lord Chancellor has just said, that I have very few words to add. It appears to me, notwithstanding the able argument which has been addressed to us on behalf of the tramway company, that, as regards the part of the public road along which the tramway passes, the company have, under the statute, the entire charge and control, and all the duties arising from this portion of the public road, which not only includes the part upon which their rails are laid, but the ground which lies between the tramways and on each side of them for eighteen inches beyond the rails. I need not read the clauses in the statutes, but they make it clear, as I think, that there is a certain portion of the road in that peculiar position. It has been contended on behalf of the tramway company that their obligation is fulfilled if, having made the road and having laid down the setts that are necessary, they keep it in proper repair whatever its condition on the surface may be, and that it lies rather with the municipal authority to see to the condition of the road in that respect when they have so laid it. I am quite unable to agree with the construction which the appellants' counsel desire to place upon the Acts of Parliament. I do not think that the obligation is expressly limited to making and keeping in repair. As the Lord Chancellor has said, the obligation relates to the condition of the road, and is really for the benefit, safety, and protection of the public. I think that, as a condition of the tramway company getting the advantages which they have of making a profit by their line, obligations are laid upon them, and one of those obligations, I take it, is not only to make and repair and maintain the line so far as the laying of stones is concerned, but also to keep the road—that is, the surface—in good order and condition. It is quite clear that slipperiness is at different times, according to the weather, a necessary result of the way in which these setts are laid, and this causes danger to the public unless steps are taken to obviate it. It is true that the Act of Parliament provides that the company shall lay down the same class of material as the municipality have laid down; but though that is provided, and very properly provided, I have no doubt it is also provided that the promoters shall "at all times maintain and keep in good condition and repair with such materials, and in such manner as the road authority shall direct, and to their satisfaction," the part of the road in question. It appears to me that on a proper construction of that provision, which I hold to apply to the surface of the road, if slipperiness occurs upon the road, it is for the persons who have the control and direction of that part of the road to discharge the obligations which the statute has laid upon them, quite apart from the provisions of section 37 of the Act of 1897, which contains the express words "so as not to be a danger or annoyance to the ordinary traffic." Should danger arise in any other way, as by projecting stones, accumulation of rubbish or mud, or the like, so as to create danger or annoyance to the public, the obligation of the company is the same. I hold with FitzGibbon, L.J., and some of the other judges, that, quite apart from that section altogether, under the terms of the previous statutes, the obligation of the company is the same. I am of opinion, therefore, that the judgment is sound, and ought to be affirmed.

Lord DAVEY.—I am of the same opinion. I would first ask myself what is the liability by statute law which the Legislature has imposed upon this tramway company. A great deal of argument, apparently, was expended in the Court of Appeal upon the question under which section they would be liable. I do not think it necessary to state my views upon that question at large, because it is sufficient for me to read the words of section 28 of the Act of 1870. Whether the defendants are also liable under section 37 of the Act of 1897 or not, it is unnecessary for me to say, but at any rate they are liable, in my opinion, because they have imposed upon them by section 28 of the Act of 1870 this obligation: "The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway, and where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other, the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of, and on each side of, any such tramway." That is an obligation which the Legislature has imposed upon the promoters, to keep that portion of the roadway which is mentioned in good condition and repair, with such materials and in such manner as the road authority shall direct. What happened in this case was that the road authority directed the tramway company to pave this

portion of the roadway with what are called "granite setts." I turn to the evidence of the engineer to the corporation in order to understand exactly what is meant by that expression. He tells us that they are granite stones of a particular form, that they are fitted together, and he says: "The stones when put down originally are dressed—that is, the new setts. As soon as this top portion gets worn off by traffic, and the dressing becomes worn off the stones, they become slippery more or less. In certain states of the atmosphere they are an actual danger to horses and carriages passing over them unless they are sanded. Sanding is the simplest way to protect them. To redress the stones would be a serious thing." Therefore we have this state of facts, that this portion of the road was made with this granite material as directed by the corporation, the road authority, and they directed the use of a material which had this peculiarity, or this liability, that when the surface was worn off it became slippery in certain states of the atmosphere, and, so far as I can judge, most frequently, it became a source of danger to horses passing over it. What, then, was the duty of the tramway company when the granite setts had got into this state? They must keep this roadway "in good condition and repair," and if the roadway as originally constructed had by the wearing of the traffic, or by any other cause, been brought into such a state as to become slippery and dangerous to horses passing over it, it is clear that their obligation of keeping it in good condition was not fulfilled. What, then, was their duty? Their duty was to restore it to a good condition. Now, the corporation have taken exactly this view. They have required the tramway company by a notice to meet the difficulty in this way, "either by placing sand daily on such pavement aforesaid, or by any other means rendering safe and usable the said pavement for traffic." And then the engineer to the corporation goes on to say: "And I require you forthwith to acquaint me of some reasonable and proper mode by which you propose to remedy the condition of such pavement." That seems to me to have been a perfectly proper notice. What the corporation required them to do was to restore the tramway to a good condition to their satisfaction, leaving to the tramway company the choice either of using a temporary expedient, such as sanding the road, or, I suppose, if they had any other mode by which they could restore the road to a good condition, they were at liberty to tell the corporation what they proposed to do, and to take that other measure. But what I wish to impress upon your lordships is this, that it is not a mere question of sanding; that is merely a mode in which the defect could be cured; but what did require to be cured was that the pavement, to the extent that I have mentioned, was out of good condition and repair, and needed to be restored to or kept in that good condition either by some temporary expedient such as sanding, or by some more permanent mode of meeting the defect in granite setts after they had become worn. It was owing to their having become worn, and thereby dangerous, that it was necessary to serve the notice. It seems to me, I confess, that under those circumstances what has been called sanding, or, as I prefer to say, meeting in some proper mode the defect in the granite setts which time had exposed, was really supplemental to and in that sense part of the construction of the pavement; it was making the pavement. I assume that the pavement as originally constructed was properly constructed, but this notice required that the pavement, which had been properly constructed in the first instance, should be supplemented by some means for securing that the streets should be in a good condition for the purpose for which streets are needed—namely, the passage of horses. Some argument was addressed to your lordships based upon the findings of the jury. I must confess that I do not think that the questions were very happily framed for the jury; but when they were asked whether the tramway company were negligent as regards the construction and maintenance of the pavement, to which the answer was "No," I must assume that what was meant was in the supply of materials, the stone and so forth from which it was constructed, because otherwise it appears to me that the answer is inconsistent with the next answer; for when they are asked whether the tramway company were negligent in not sanding the roadway they say "Yes." Sanding the roadway is only a means of maintaining it in proper condition and repair; therefore I think that the answers are on the face of them rather inconsistent in themselves. But your lordships will not, of course, be hampered by any imperfection in the way in which the questions were put to the jury. We have to decide the substance of the case, and I entirely agree with the conclusions which have been expressed by the Lord Chancellor. I have only to add that in nothing that I have said have I expressed any opinion, nor do I intend to express any opinion as to the respective duties of the tramway company and the corporation as to what had been called scavenging—that is to say, as to the ordinary duty of cleaning the streets, and duties of that kind. I regard this case as depending entirely upon the liability of the tramway company to keep the pavement which they have laid down in the road in good condition in the manner directed by the corporation.

Lord ROBERTSON.—I accept the doctrine which has been strongly urged upon your lordships by the appellants, and what they have have got to keep in good condition is the structure or fabric of their part of the roadway. But then the surface is part of that structure or fabric, and, as this is a roadway, a very important part. Now, one of the qualities of the setts of which the structure is composed is either that they never possess grittiness, or, as seems to be really the case, with use the surface loses its original roughness, which is an element of safety, and in certain states of the weather is slippery and dangerous. Now, what sand supplies is simply this grittiness which originally was supplied by the roughness of the setts themselves. Accordingly, while it cannot be asserted that in ordinary weather the setts are in bad condition, yet, on the other hand, in certain weather it cannot be asserted that they are in good condition. Therefore if the appellants use materials having this kind of surface, they must from time to time supply by sand to this material what other materials might of themselves in all conditions supply by the roughness of their own surfaces. On this ground I concur in the decision of the courts in Ireland.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Clay & Close*, for *Casey & Clay*, Dublin.

Solicitors for the respondent, *Stibbard, Gibson, & Co.*, for *J. Fitzgerald*, Dublin.

## Court of Appeal.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 12, 13.

BELL v. MARSH. (a.)

*Solicitor and client—Conveyance to client prepared by solicitor—Portion of solicitor's property comprised—Negligence—Estoppel.*

*A person who relies on an estoppel by negligence must show that he was led into a belief on which he acted to his detriment.*

*A solicitor was ordered by his client to investigate the title to and prepare a conveyance of property adjoining his (the solicitor's) property. In the conveyance a small portion of the solicitor's property was comprised, but the client did not believe, nor was he led by the solicitor to believe, that he was buying the small portion in question. The client subsequently brought an action claiming the land.*

*Held, that the solicitor was not estopped from setting up the truth.*

This was an appeal from a decision of Buckley, J.

The facts were as follows:

Madeira Hall and Madeira Cliff were two adjoining properties at Ventnor, Isle of Wight.

Madeira Cliff belonged to Mr. Urry, a solicitor, and he had in 1880 built a greenhouse, which, to the extent of one-third of its length, encroached upon the Madeira Hall property, though he was not aware of the enroachment. To this small portion of encroached land he subsequently acquired a prescriptive title.

In 1893 Madeira Hall was put up for sale by auction, and in the particulars was included the small piece of ground on which Mr. Urry had erected a portion of his greenhouse. It was purchased about two weeks after the date of the auction by private treaty, but subject to the same particulars and conditions as at the auction.

The purchaser was the plaintiff, Dr. Bell, and he asked Mr. Urry to act for him as solicitor in completing the purchase. Mr. Urry accordingly investigated the title and prepared the conveyance.

The conveyance was dated the 26th of January, 1894, and the parcels, which were taken from previous conveyances of the same property, through inadvertence, comprised the small portion of rocky ground in question. If Mr. Urry had at the time of preparing the conveyance tested the measurements of the property as they appeared in the description of the parcels and the plan contained in the title-deeds, he would have discovered his mistake. However, he and his client, Dr. Bell, had, before the completion of the purchase, walked over the property, and Dr. Bell was never given to believe, and in fact did not believe, that he was buying the little bit of ground with its greenhouse.

Early in 1898 the plaintiff discovered that the piece of ground in question was included in his conveyance, but he let the matter rest and never spoke to Mr. Urry about it.

Mr. Urry, who had been ailing, died in September, 1899.

In October, 1900, his personal representatives, the defendants in this action, offered Madeira Cliff for sale. Dr. Bell, discovering from the plan annexed to the particulars that the property to be sold comprised this piece of ground, objected, and no sale was effected.

Subsequently he brought this action, claiming a declaration that the defendants, as representatives of Mr. Urry, were not entitled to set up as against the plaintiff any right in or title to the encroached land, and that the defendants might be ordered to convey to the plaintiff any estate, right, title, interest, or claim which they might have to that land, and to deliver possession thereof to the plaintiff.

Buckley, J., held that the defendants, as representatives of Mr. Urry, were estopped by breach of duty from setting up their title. Mr. Urry, as the plaintiffs' solicitor, had been under a duty to see that the plaintiff had got a good title to the whole of the property which he had agreed to purchase. He had represented to the plaintiff that he had got this title, and the plaintiff had thereupon paid his purchase-money.

The defendants appealed.

*Astbury, K.C.*, and *K. G. Metcalf*, for the appellants.—Estoppel is a common law doctrine: *Bloomenthal* v. *Ford*, 45 W. R. 449, [1897] A. C. 156. In estoppel you must have a representation by words or conduct, known to the person making it, and the person to whom it is made must believe it and act upon it: *Pickard* v. *Sears*, 6 A. & E. 469; *Freeman* v. *Cooke*, 2 Exch. 654. In estoppel arising from negligence, the negligence must be the proximate cause of the loss suffered by the person who relies on the estoppel, and the representation must have been made to the knowledge of the person making it. Mr. Urry did not know he was telling Bell that Bell's property included the site of his greenhouse. Mr. Urry may be liable for negligence, but the representation was not intended, for you cannot intend a thing of which you have no knowledge: *Carr* v. *London and North-Western Railway Co.*, 23 W. R. 747, L. R. 10 C. P. 307; *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82. The mere fact that a man breaks his duty is not enough to create an estoppel. The plaintiff was not misled. Neither party knew that the little bit in dispute was in the contract. Their express knowledge and belief overrides any representation which might be implied from Mr. Urry's conduct. If Mr. Urry was guilty of negligence, Dr. Bell had the ordinary remedy. In estoppel there must be a clear and unambiguous representation of an existing fact: *Jordan* v. *Money*, 5 H. L. Cas. 185.

*Terrell, K.C.*, and *J. T. Prior*, for respondents.—If a solicitor is instructed to investigate and prepare title-deeds, when he hands over those deeds he impliedly says: "Here are the title-deeds of the property which you contracted to buy." If circumstances impose upon a solicitor the duty of knowing facts, he is estopped by breach of duty from subsequently taking advantage of those facts: *In re Ward*, 31 Beav. 1, 11 W. R. Ch. Dig. 100. Suppose a solicitor has a mortgage on property which he has forgotten and that property is sold to his client free from incumbrances, the solicitor by his conduct represents to his client that he has done his duty and that the conveyance is the result. He is precluded from afterwards saying that his representation was untrue: *Freeman* v. *Cooke*. Under the contract Dr. Bell did agree to buy the whole piece of land as set forth in the particulars. His position was completely changed after he had parted with the purchase-money. Mr. Urry was resident himself at the property, and it was clearly his duty to have found out the proper boundary. The neglect of such a very simple thing must recoil on his own head.

COLLINS, M.R.—This is in substance an action of ejectment which has taken an equitable colouring.

(a.) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

The question for decision is whether the defendants are estopped from setting up their title to the land claimed by the plaintiff.

In 1894 the plaintiff acquired certain land in the Isle of Wight, known as Madeira Hall. The defendants are the executors of Mr. Urry, the solicitor who acted for the plaintiff in the purchase of the land. Both before and after the conveyance Mr. Urry was himself the occupant of adjoining property, Madeira Cliff, which property embraced rocky ground on which Urry had from 1880 placed cucumber frames and a greenhouse. Two or three days before purchasing the property the plaintiff went over the ground with Mr. Urry. He was aware that Mr. Urry was in possession of the greenhouse. He had not any idea that the property he was buying embraced any portion of the greenhouse. All the documents respecting the title were sent to and approved of by Mr. Urry. The boundary line in the conveyance embraced a portion of Mr. Urry's greenhouse. Mr. Urry might by measurement have ascertained that the boundary embraced the greenhouse. He had himself been in possession of the greenhouse for a period much longer than the statutory period. The plaintiff says in his evidence that he did not consider he was buying any portion of the greenhouse. For four years after the conveyance had been completed it never occurred to him to claim that any part of the greenhouse was his. Then certain circumstances put him upon inquiry, and for a year before Mr. Urry's death he became aware that the conveyance did embrace the greenhouse. Mr. Urry, it is true, was in delicate health for six months before his death, yet the plaintiff said nothing about the matter for a whole year and a-half.

The question simply is this: It being known to Mr. Bell at the time of the purchase that Mr. Urry was in the possessson of the greenhouse, are Urry and his executors estopped from setting up the truth? It is said that Mr. Urry's conduct brings him under the law of estoppel. Now, estoppel is part of the law of evidence. Do the conditions create an estoppel. Dr. Bell admits that he was under no impression that he was acquiring any part of the greenhouse. In order to establish estoppel he must show that he was led to change his position by representations made for that purpose by Mr. Urry. If he cannot do that he cannot succeed. The representations in estoppel may be made by conduct—for example, negligence. When you test the links in the chain, are they all sound? It seems to me that the estoppel breaks down in the most crucial place. If the plaintiff relies on negligence, he has got to show that the negligence was the proximate cause of his acting in the manner he did. The law is summed up in the judgments of Wilde, B., and Blackburn, J., in *Swan* v. *North British Australasian Co.*, 10 W. R. 841, 7 H. & N. 603, 11 W. R. 862, 2 H. & C. 175, at p. 182. What evidence is there that the plaintiff was led into a belief on which he acted to his detriment? He bought the property without intending to acquire the greenhouses. The representation alleged is that the property embraced the whole of the greenhouse. How can he aver that at one and the same time he was led to act on the belief that he was getting it? That is in itself a complete answer to the whole case. But I am not satisfied that even in the earlier parts the plaintiff has made out his case. He says that the solicitor ought to have found out that part of the greenhouse passed by conveyance to the plaintiff. Now test that by the passage from Blackburn, J. The negligence was not the proximate cause; it had nothing to do with the action of the plaintiff in buying. I do not feel sure that Buckley, J., fully appreciated the importance of this—viz., that a person seeking to set up an estoppel by conduct must show that he was induced to change his position on the faith of that conduct. The plaintiff did not so change his position. For these reasons I am of opinion that the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. It is rather important to see what this case is not. It is not a case of fraud, nor is it a case where the defendants are trying to establish a right because of a defect in the conveyance to the plaintiff. It is a case of a very different character. The plaintiff comes forward and says that the defendants are estopped from setting forth the truth of their title. What is the truth estopped? In fact and in truth at the date of the conveyance to the plaintiff Mr. Urry was in possession of and claimed a title to, the greenhouse in dispute. Now, did, Mr. Urry lead the plaintiff to believe that he was not in possession of or had no title to this greenhouse? I doubt very much whether any such representation can be inferred. But, further, the plaintiff must show that he acted on such representation. To this there can be only one answer. The plaintiff did not believe that Urry was not the owner of the greenhouse, nor was he induced to act to his detriment at all. This answers the whole case. It is no use for the plaintiff to say generally and vaguely, "I did not know what I contracted to buy, but my solicitor by his conduct made it clear what I contracted to buy." It would have been sad indeed if the plaintiff had been able to succeed in this action. It is an action which ought never to have been brought.

COZENS-HARDY, L.J.—I am of the same opinion. Assume that the plaintiff did contract to buy this particular piece of ground. Yet, if he had been told that it was not included, would he have refused to complete? The answer, according to the evidence, is clearly "No." There did not exist what is an essential in a case of estoppel—a misrepresentation of fact relied upon by the other side.

*Appeal allowed.*

Solicitors, *Herbert B. Bell; Peacock & Goddard*, for *Urry & Woods*, Ventnor, Isle of Wight.

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 10.

ATTORNEY-GENERAL v. LORD MONTAGU. (*a*.)

*Inland revenue—Estate duty—Settled property—Mortgage by tenant for life and remainderman—Indemnity to tenant for life—Value of property passing on death of tenant for life—Equity of redemption—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-section* 1 (h); *s.* 7.

*An estate was settled by will upon a tenant for life with remainder to a second tenant for life, with remainder in fee. The first tenant for life and the remaindermen mortgaged the estate in fee as security for an advance to the remaindermen, who alone covenanted with the mortgagee to repay the advance and interest thereon. By an indenture of even date the remaindermen covenanted to indemnify the first tenant for life against any liability or loss and against any claims or proceedings in respect of the mortgage debt, and they conveyed an annuity to trustees as security for the performance of the covenant. The first tenant for life was in fact kept indemnified against any claim upon her or her estate. On the death*

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*in* 1895 *of the first tenant for life the Crown claimed estate duty under section* 1 *of the Finance Act*, 1894, *upon the principal value of the estate, without deducting the amount of the mortgage debt, as property passing on the death of the tenant for life, on the ground that the tenant for life, by reason of the indemnity, had been beneficially interested in the estate to its full value.*

*Held, that estate duty was only payable on the principal value of the estate after deducting the mortgage debt.*

*Judgment of* Phillimore, J. (50 *W. R.* 270, [1902] 1 *K. B.* 429), *reversed.*

Appeal from the judgment of Phillimore, J., upon an information by the Attorney-General claiming estate duty under the Finance Act, 1894 (reported in 50 W. R. 270, [1902] 1 K. B. 429).

By the will of the Duke of Buccleuch and Queensberry the testator appointed the Ditton estate to the use of his wife, Charlotte Anne, Duchess of Buccleuch and Queensberry, for her life, and after her death to the use of the testator's second son, the defendant, for his life, and after his death to the use of the first, second, third, and all and every other the son and sons of the defendant successively in tail male, with remainders over.

The duke died on the 16th of April, 1884.

By an indenture dated the 28th of May, 1888, and made between the dowager duchess of the first part, the defendant of the second part, the eldest son (who had attained the age of twenty-one years) of the defendant of the third part, and certain trustees of the fourth part, and enrolled as a disentailing assurance, the defendant and his eldest son, with the consent of the dowager duchess as protector of the settlement, conveyed the Ditton estate to the trustees in fee simple, subject to the life estate of the dowager duchess, but freed from the life estate of the defendant under the will of the duke, to such uses and in such manner as the defendant and his eldest son should from time to time by deed jointly appoint, and in default of and subject to any such appointment to the use of the defendant for his life, with remainder to such uses as the said eldest son, after the death of the defendant, should from time to time by deed or will appoint, and in default of and subject to any such appointment to the use of the said eldest son for his life, with remainder to the use of his first and other sons successively in tail male, with remainders over.

By an indenture dated the 29th of May, 1888, and made between the dowager duchess of the first part, the defendant of the second part, the said eldest son of the third part, and certain mortgagees of the fourth part, in consideration of £27,000 lent to the defendant and the said eldest son, at the request of the dowager duchess, by the mortgagees, the defendant and his eldest son jointly and severally covenanted with the mortgagees to repay them the said sum with interest thereon, and the dowager duchess, as tenant for life in possession, granted, and the defendant and his eldest son, in exercise of the joint power of appointment given to them over the fee simple in remainder expectant on the death of the dowager duchess by the deed of the 28th of May, 1888, appointed, the Ditton estate unto and to the use of the mortgagees in fee simple, subject to a proviso for redemption.

By another indenture dated the 29th of May, 1888, and made between the defendant of the first part, his eldest son of the second part, the dowager duchess of the third part, and certain trustees of the fourth part (which recited that the dowager duchess agreed, at the request of the defendant and his eldest son, to concur in the above-mentioned mortgage upon the express condition that she should be indemnified in respect thereof in manner thereinafter appearing), the defendant and his eldest son jointly and severally covenanted with the dowager duchess to keep her indemnified against the mortgage debt of £27,000 and interest, and against all actions, suits, proceedings, claims, and demands which might be brought or made by any person or persons against her or the Ditton estate during her life by way of enforcing the mortgage security, or for or in respect of the sum of £27,000 and interest thereby secured; and the defendant and his eldest son conveyed to the trustees an annuity and rent-charge of £1,500, payable out of the Clitheroe estate upon trust thereout during the life of the dowager duchess to keep down the interest on the mortgage debt of £27,000, to the intent that the life interest of the dowager duchess in the Ditton estate might be wholly exonerated therefrom, and to pay her all sums which she might from time to time be compelled to pay by reason of the mortgage security or in respect of the money secured thereby, and also to repay and make good to her all rents and profits of the Ditton estate which, but for the mortgage security, would have been paid or payable to her, and to pay her compensation in respect of any messuage, lands, or hereditaments forming part of the Ditton estate of which she might be deprived of the possession by reason of the mortgage security, and generally at all times thereafter to save harmless and keep indemnified the dowager duchess from and against the mortgage debt and the interest thereon, and from and against all actions, suits, proceedings, claims, and demands in respect thereof.

The dowager duchess died on the 28th of March, 1895.

The mortgage of the 29th of May, 1888, was created wholly for the benefit of the defendant and his eldest son, or one of them, and the dowager duchess and her estate were in fact kept wholly indemnified by them, or one of them, against the mortgage and all claims for interest or otherwise in respect thereof. The information stated that the defendant as tenant for life in possession of the Ditton estate was bound to deliver an account and to pay estate duty under the Finance Act, 1894, on the principal value thereof, but that, in delivering such account, he claimed to deduct the mortgage for £27,000 from the capital value of the estate.

The Crown claimed that upon the death of the dowager duchess estate duty became payable under the Finance Act, 1894, upon the principal value of the Ditton estate as property which passed on her death within the meaning of that Act without deduction of the mortgage debt of £27,000.

Phillimore, J., held that by reason of the deed of indemnity the dowager duchess must be deemed to have been beneficially interested in the Ditton estate to its full value, and that it was this full interest which passed on her death. He accordingly gave judgment for the Crown.

The defendant appealed.

*Danckwerts, K.C.*, and *Austen Cartmell*, for the defendant.

*Sir Robert Finlay, A.G.*, *Sir Edward Carson, S.G.*, and *Vaughan Hawkins*, for the Crown.

The following cases were referred to: *Earl Cowley* v. *Inland Revenue Commissioners*, 47 W. R. 525, [1899] A. C. 198; *Attorney-General* v. *Beech*, 47 W. R. 257, [1899] A. C. 53; *Attorney-General* v. *De Preville*. 48 W. R. 193, [1900] 1 Q. B. 223; and *Tennant* v. *Smith*, [1892] A. C. 150, at p. 154, 40 W. R. Dig. 216.

VAUGHAN WILLIAMS, L.J.—In my opinion we cannot affirm the judgment of Phillimore, J.. in this case. I do not propose to go through the facts at

length, but I may state them shortly so as to make the reasons for my judgment clear. By the will of the Duke of Buccleuch the duchess had a life interest in the Ditton estate, and subject to her life interest the estate was to go to the second son of the duke for life with remainder to that son's first and other sons in tail male successively. The second son of the duke and his eldest son, when of age, being desirous of raising a sum of money, secured the co-operation of the duchess in joining in a mortgage of the Ditton estate to the lenders, and it is not disputed that the legal effect of that mortgage was that the fee simple in the estate was conveyed to the lenders as their security, and there was nothing left in the duchess under the will of the duke except a life estate in the equity of redemption. It is not disputed that on the death of the duchess the interest which thereupon passed—by "passed" I mean which thereupon arose upon her death in the persons claiming in remainder—was simply this equity of redemption. The question arises as to what estate duty then became payable. As I understand it, it is not denied that the case falls within section 1 of the Finance Act, 1894.

In those circumstances it is said that the duty ought to be paid as if the life estate of the duchess had continued as it was under the will of the duke, because by a deed of even date with the mortgage Lord Montagu and his son gave an indemnity to the duchess, and that we ought for the purposes of the Finance Act, 1894, to hold that the Crown is entitled to the same duty as if the mortgage had never been made. I cannot agree that the giving of the indemnity has this effect. It is said that we ought to look at the reality and substance of the transaction. I agree; but we are not, because we are to look at the reality and substance, to deal with it as if it were something which it is not. We are not to deal with it as if there was some section in extension of sections 1 and 2 of the Act which would enable us to deem property to pass, other than what is therein specified, which in truth and in fact has not passed, or which would enable us to deal with matters as coming within the Act because it might be said that they come within the spirit and intention of the Act. There is no part of the Act which enables us to do anything of the sort. We have merely to deal with the words of the Act, and it seems to me that we have simply to ask ourselves the question whether anything passed on the death of the duchess except the estate subject to the mortgage. With regard to this I think that if one reads the opinion of Lord Davey in *Lord Cowley* v. *Inland Revenue Commissioners*, [1899] A. C. at p. 219, it really seems as if he was dealing prophetically with the very case now before us. He says: "Since the decision in *Attorney-General* v. *Beech*, it cannot be denied that, if tenant for life and remainder-man in fee combine to sell settled property, it is thereby taken out of the settlement, and does not pass, and is not to be deemed to pass, on the death of the life tenant. And I think the result must be the same if, instead of selling, they combine to create a mortgage in fee upon the settled property. *Pro tanto* the property is taken out of the settlement, and what passes on the death of the tenant for life is the equity of redemption only, and the benefit accruing or arising in that event is in that equity alone." It seems to me that those words cover this very case.

An argument has been addressed to us on behalf of the Crown with reference to section 7, sub-sections 1 and 7, of the Act. I am not sure that I followed the drift of that argument. I am not quite sure whether it was intended to say that by reason of what was found there we ought to give a very wide meaning to section 1, or whether we ought to amplify section 2. I myself prefer to say as Lord Davey says, and as I think Lord Macnaghten also says, that we need not trouble ourselves with section 7 at all. The truth is, that when once one has arrived at the conclusion that all that could pass, or did pass, on the death of the duchess was the equity of redemption, one need not trouble oneself further with any arguments based on section 7. In my judgment the decision of Phillimore, J., ought to be reversed, and judgment given in favour of the appellant.

STIRLING, L.J.—I am of the same opinion. We are dealing here with an information by the Crown asking for a declaration that upon the death of the duchess estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the Ditton estate devised by the will of the duke, as property which passed on her death within the meaning of the Act, without deduction of the mortgage debt of £27,000, created by an indenture of mortgage of the 29th of May, 1888; and Phillimore, J., has made a declaration in accordance with the prayer. We are not concerned to inquire whether there may not be a right to estate duty in some other aspect of the transaction which gave rise to the present question. All we have to consider is whether the duty became payable on this estate as property which on the death of the duchess passed within the meaning of the Act without deduction of the mortgage for £27,000.

Now section 1 of the Finance Act, 1894, provides that there shall "be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty called estate duty." The first question to be considered is what is the meaning of "property which passes on the death of" the person referred to. That had to be considered by the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners;* and Lord Macnaghten deals with it in this way [1899] A. C., at p. 212: "What the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased, which if it be a limited interest can never pass. With an interest that ceases on death the Act is not directly concerned, except in the one case where without any passing of property a benefit accrues or arises by reason of the cesser of a determinable interest such as a charge that expires." Therefore we have to look and see, with reference to the death, what property it was that passed, not what was the interest of the deceased person.

The question in this case is whether or no the Ditton estate passed subject to the mortgage or not. At the date of the mortgage on the 29th of May, 1888, the property stood limited under the will of the duke, first to the duchess for her life, with remainder to her son, the defendant, for his life, with remainder to his eldest son originally in tail, but practically at that date in fee because a disentailing deed had been executed by father and son by which they were given a joint power of appointment over the estate by the exercise of which they could pass the fee. Therefore practically it comes to the same thing as if the duchess and Lord Montagu had been successively tenants for life with remainder to the eldest son in fee. Now father and son were desirous of raising a sum of £27,000, and they applied to the duchess to aid him in that purpose. One way in which that £27,000 might have been raised would have been by selling a specific portion of the property. If that course had been pursued and a certain specific part of the property had been sold with the concurrence of all, and the purchase-money handed over to the father and son, or to all three, there would have been an end,

so far as the settlement was concerned, of the property which was sold. I do not think it could have been contended that after that transaction the property sold was any longer comprised in the settlement. The sole property which would have remained in this settlement would have been the unsold portion, and on that alone estate duty would have fallen. In the present case that was not done, but the duchess, Lord Montagu, and his eldest son executed a mortgage in fee by which the estate was conveyed to mortgagees to secure the sum of £27,000. That sum was paid to the father and son, and they covenanted for repayment of it. The duchess did not make herself liable in any way to the mortgagees for the repayment of the £27,000 and interest, although she conveyed her legal estate; and father and son, by a deed of even date, entered into covenants by which she was to be indemnified in respect of the mortgage, and further conveyed property to trustees by way of security for the performance of the covenant of indemnity. But whatever the arrangements were between these three persons, they combined together to execute a legal mortgage to the mortgagees for £27,000, and the question we have to consider is what is the effect of that on the property which passed within the meaning of section 1 of the Act. That is answered for us in very clear terms in the words of Lord Davey which have been already read, and which it is unnecessary for me to read again. It is the same thing as if the tenant for life and the remainderman in fee had combined together to sell a portion of the property and take it completely out of the settlement. So I read the decision of *Lord Cowley's case*, which cannot be neglected in the present case; and it seems to me that, so reading that decision, we can come to no other conclusion than that the property which remained in the settlement was in this case simply the equity of redemption and nothing more, and that consequently the mortgage for £27,000 must be deducted from the principal value of the estate.

I have very little say with regard to the other points which have been urged upon us. As regards section 2 of the Act, it does not seem to me to apply for the same reasons as are given in *Lord Cowley's case*; and as regards section 7, sub-section 1, which was very much relied on, I can only say, as in that case, that, whatever it may apply to, it does not seem to me to apply to the present case, because there is no deduction and no sums are charged upon or payable out of the property which remains in settlement—namely, the equity of redemption.

For these reasons I think that the appeal ought to be allowed, and I respectfully differ from Phillimore, J., as I think for the reasons I have given that he did not give proper effect to the three cases of *Earl Cowley* v. *Inland Revenue Commissioners*, *Attorney-General* v. *Beech*, and *Attorney-General* v. *De Preville*.

MATHEW, L.J.—I am of the same opinion. The short question here is whether the estate passed on the death of the duchess subject to the mortgage, or whether it passed not so subject. It is said that it did not pass subject to the mortgage because of the contract of indemnity. There seems to me to be nothing in the Act to justify that contention. There is nothing in the language of the Act to bear it out. An argument was based on section 7 with the view of inducing us to look at the spirit of the Act, and to deal with the matter upon that footing. When we examine section 1 it appears to me to be clear. The position of things was that after the mortgage was entered into there remained the equity of redemption, and what passed on the death of the duchess was that equity of redemption. Section 1 provides that there shall be "levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty called estate duty." What passed in this case seems to me to be clearly the equity of redemption and nothing more, and that disposes of the case. The appeal must consequently be allowed.

*Appeal allowed.*

Solicitors for the defendant, *Nicholl, Manisty, & Co.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

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From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L JJ.) } Dec. 11, 12, 20.

STAGG v. MEDWAY (UPPER) NAVIGATION CO. (a.)

*Company—Borrowing powers—Company incorporated by statute—Power to mortgage surplus lands—Security for existing debt—Transfer of mortgage*—Ultra vires.

*A company incorporated by special Act, though possessing no express powers of borrowing except on the security of its undertaking, has power to charge its surplus lands for the purpose of further securing a valid debt already incurred.*

Gardner v. London, Chatham, and Dover Railway Co., 15 *W. R.* 325, *L. R.* 2 *Ch. App.* 201, *and* Ex parte Grissell, 15 *W. R.* 324, *L. R.* 2 *Ch. App.* 385, *discussed and applied.*

*Decision of* Swinfen Eady, J. (50 *W. R.* 446), *affirmed.*

This was an appeal from a decision of Swinfen Eady, J. (reported 50 W. R. 446), in an action to restrain the defendant company from mortgaging its surplus lands.

By the Medway (Upper) Navigation Acts, 1664 and 1739, the Company of Proprietors of the Navigation of the River Medway were incorporated for the purposes of improving the navigation of the river.

These Acts did not give the company any power to borrow on mortgage, but in 1892 the Medway (Upper) Navigation Act, 1892 (55 & 56 Vict. c. lxxxvii.), was passed re-incorporating the company and changing its name to the Medway (Upper) Navigation Co.

The Act contained a recital that the company had borrowed on mortgage of their lands, tolls, rates, and duties a sum of £6,000, which was still due and owing, and that it was expedient that they should be empowered to pay off these moneys notwithstanding any question as to the legality thereof.

Section 13 accordingly provided as follows: "Notwithstanding any question as to the legality of the power of the company to borrow" the moneys in question, "and which moneys have been expended upon the undertaking, the company shall be at liberty to repay the amounts" secured as in the section mentioned, "and for the purpose of paying off such mortgage the company may borrow on mortgage of their undertaking any sum not exceeding £6,000, provided that the amount to be borrowed under the general borrowing powers conferred by this Act shall be reduced by the amount borrowed under this section."

Section 15 empowered the company to borrow on mortgage of the undertaking any sum not exceeding in the whole £10,000. Section 18, sub-section 1, empowered it to retain and let or cultivate or use

(a.) Reported by H. W. LAW, Esq., Barrister-at-Law.

lands which were or would eventually be required, in the opinion of the company, for the purposes of the undertaking, and by sub-section 2 to sell land not so required. Sub-section 3 provided that moneys received in respect of lands were to be applied, if attributable to income, as income, and if attributable to capital, in repayment of moneys borrowed or for any other purpose for which capital was properly applicable, and meanwhile to be invested in trustee securities or in any other manner authorized by the company at a general meeting.

By section 16 the company might create debenture stock, but the interest on all debenture stock and all mortgages was to rank *pari passu* irrespective of the dates of the securities, and have priority over all principal moneys secured by the mortgages.

No express power of borrowing except on the security of the undertaking was conferred by the Act.

On the 18th of February, 1893, the company, in pursuance of the above provisions, paid off the old mortgage and mortgaged the undertaking afresh to William Levett, who had now called in £2,000 of the debt, and had therefore been given notice by the company that the whole would be paid off. For this purpose the company was making arrangements to transfer the mortgage; but the proposed transferees stipulated that the surplus lands and the proceeds of sale of them must be included in the security.

The plaintiff Stagg, who was a director and shareholder, thereupon brought this action to restrain the company from carrying out the arrangement on the ground that it was *ultra vires* to mortgage the surplus lands.

Swinfen Eady, J., held that the transaction was valid, on the ground that the company were making no fresh loan, but arranging terms with regard to an antecedent debt, and that if the surplus lands were liable to be taken by a judgment creditor, the company could anticipate that event by making them a security for the debt.

The plaintiff appealed.

*Rowden, K.C.*, and *Leeke*, for the appellant.—The company cannot charge its surplus lands for the purpose of securing or further securing a debt. There is no authority for the proposition that a company incorporated by special Act can do so. *Gardner* v. *London, Chatham, and Dover Railway*, 15 W. R. 325, L. R. 2 Ch. App. 201 (see also *Ex parte Grissell*, 15 W. R. 324, L. R. 2 Ch. App. 385), decided that a mortgagee of the undertaking took nothing by way of rents or proceeds of sale of surplus land; and the railway company was in a much better position for giving a charge than the company here. If *Gardner* v. *London, Chatham, and Dover Railway* could be treated as an authority for the respondent, it was a decision only on the particular facts of that case, which was very different from this case. If this is a good charge the company can raise money indirectly by transferring charges. *Blackmore* v. *Yates*, 15 W. R. 750, L. R. 2 Ex. 225, the principle of which Swinfen Eady, J., declared applicable, was a very special case.

They also cited *Lady Wenlock* v. *River Dee Navigation Co.*, 10 App. Cas. 354, 33 W. R. Dig. 28; section 127 of the Land Clauses Act, 1845; and various sections of the company's special Act of 1892.

*Theobald, K.C.*, and *Dunham*, for the company.—In *Gardner* v. *London, Chatham, and Dover Railway* the question was whether a charge included surplus lands. The creditor here could obtain a judgment and take the lands in execution, and it is extraordinary if the company cannot anticipate this by giving a charge. *Blackmore* v. *Yates* is directly in our favour. [COZENS-HARDY, L.J.—Has that case ever been followed?] It has very often been cited. This transaction is not borrowing, but merely a transfer of a debt as a condition of which transfer the transferee requires further security. The Act of 1892 was intended to give this company increased powers, not to restrict it. In a case falling under the Lands Clauses Acts, which do not apply to this company at all, it may be that a mortgage of surplus lands is prohibited by implication, since there is an express direction for sale; but in the present case there is only a power, and there is nothing in the special Act to prevent the company from applying these lands, which are part of its capital, for the payment of its debts.

They also cited *In re Ogilvie*, 20 W. R. 226, L. R. 7 Ch. App. 174, and *Pickering* v. *Ilfracombe Railway Co.*, 16 W. R. 458, L. R. 3 C. P. 235.

*Rowden*, in reply.

*Cur. adv. vult.*

Dec. 20.—The following judgments were delivered:

VAUGHAN WILLIAMS, L.J.—I think that the judgment of Swinfen Eady, J., was quite right and ought to be affirmed. His judgment is based upon principles recognized, as he points out, both in *Gardner* v. *London, Chatham, and Dover Railway Co., Ex parte Grissell*, and in *Blackmore* v. *Yates*. This, as Swinfen Eady, J., points out, is not a case of borrowing, or one in which the company contemplates borrowing. There was an existing debt, the validity of which is recognized by the Act of 1892. The company, acting under the powers of section 13 of the Act, borrowed £6,000 of Mr. Levett on a mortgage of the undertaking. This mortgage debt is now due, and the company has found certain persons who will take a transfer of Mr. Levett's mortgage, but require as a further security a charge on the surplus lands of the company. The sole question therefore is, can the company give this charge to secure this valid existing debt? I think it can, and that to do so is not *ultra vires*. The observation of Lord Cairns (then Cairns, L.J.) in *Gardner* v. *London, Chatham, and Dover Railway Co.*, L. R. 2 Ch. App., at p. 219, seems plainly to apply. He says: "It cannot in my opinion be doubted but that the company, owing a sum to their contractors for works done, might have paid this sum out of those surplus sale moneys (the claim of debenture-holders being out of the way); and if so they might equally, as I think, have given the contractors a charge upon the sale moneys for the amount." It is true that this observation deals only with proceeds of the sale of surplus lands, and not with surplus lands themselves; but the security given was a charge upon the surplus lands, and the rents and proceeds of the sale of such lands, and the principle involved in the observation does not seem to be affected by being applied to the proceeds. I do not gather that Lord Cairns meant to exclude surplus lands, at all events in any case where such lands were extendible by elegit, and could thus be compulsorily applied to the satisfaction of the creditor's debt. This principle is recognized in *Blackmore* v. *Yates*, where a railway company conveyed to a creditor (before the Act for the protection of rolling stock) their rolling stock as security. I do not think that one ought to read the observation of Martin B., declining to determine what the shareholders or the Attorney-General might do to prevent the charge being given, as really affecting the principle. It is a remark made *ex abundanti cautela*. In *In re Calne Railway Co.*, L. R. 9 Eq. 658, 18 W. R. Ch. Dig. 116, and in *In re Ogilvie* the right of a judgment creditor of a railway company to obtain an order for a conveyance in the former case, and an order for sale in the latter, was recognized. It is true that the transferees of this mortgage debt are not judgment creditors, but they could as transferees obtain judgment, and

the company may give them by arrangement that which they could obtain by judgment. This being so, it is only necessary to ascertain whether there is anything in the Act of 1892 precluding this company from thus dealing with its surplus lands. I think not. Section 16, which was pressed upon us, deals only with priorities. Section 18 (2) does not seem to me to preclude a mortgage to secure an existing debt. It may be that there will be nothing upon which the mortgage can attach until the company has declared that in its opinion particular land will not be required for the purposes of the undertaking; but this does not make the mortgage *ultra vires*. And I see nothing in section 18 (3) to prevent the company applying moneys received in respect of the sale of surplus lands in payment of debts.

STIRLING, L.J., after stating the facts, said that the transferee was in the same position as the original mortgagee with regard to the debt, and that the case ought to be considered exactly as if the original mortgagee were applying for payment and being offered additional security, it being an arrangement between the company and its creditor for the payment of a valid debt. His lordship then continued: Now, the company is a statutory corporation, and therefore it has only such powers as the Legislature has conferred on it, whether expressly or by necessary implication. The Legislature, by section 13 of the Act of 1892, has conferred on the company a power of borrowing, but in my view of the facts the borrowing powers of the company are not in question in this case. The company has a power to contract debts, both by borrowing and otherwise, for the purposes for which it is incorporated, and is under an obligation to pay them when they become due. Of necessity it must have power to make proper arrangements for this payment when they become due, and in my judgment that includes a power of giving security to the creditor in a case where it is not in a position to make immediate payment. I think this power is clearly recognized both in *Pickering* v. *Ilfracombe Railway Co.* and in *The Imperial Mercantile Credit Association's case* in *Gardner* v. *London, Chatham, and Dover Railway*, L. R. 2 Ch. App., at p. 219, both of which, especially the second, are cases of very high authority. Now, what is proposed in the present case is to give the transferee an equitable mortgage on all the surplus lands of the company and all proceeds of sale thereof or arising therefrom. Various objections were raised to the giving of this charge. In the first place, it was said that the company would thereby infringe section 16 of the special Act, which puts the holders of mortgages and of debenture stock on the same footing. But *Gardner* v. *London, Chatham, and Dover Railway* shews that the surplus lands of a company of this kind do not form part of its undertaking, and therefore lie outside the mortgages of the undertaking authorized by section 13. That, therefore, does not stand in the way of this charge. But what was really relied on was section 18, the first sub-section of which empowers the company to retain and let or cultivate lands required for the purposes of the undertaking. These are lands of a different class from those comprised in the charge; but the second sub-section, empowering the company to sell lands not required for the purposes of the undertaking, does deal with the lands proposed to be charged, and the argument is, that inasmuch as the company has an express power to sell those lands, it is by implication deprived of a power of charging them. Now probably that is to some extent well founded. I should say, for example, that if the company were borrowing it could not create a charge on those lands, because all it has power to give a security upon by section 13 is the undertaking. But the *Imperial Mercantile Credit Association's case*, which I have already mentioned, is an express authority for the proposition that the company may create a charge on the proceeds of sale of its surplus lands for the purpose of securing a debt due and payable to the company. In the present case there are no rights of pre-emption hampering the exercise of the power of sale conferred upon the company, and that power may be exercised by the company for its own benefit as and when it thinks fit, and most certainly may be exercised for the purpose of paying its just debts which are payable. Under these circumstances I can see no reason why the company should not be able, for the purpose of securing the payment of a debt which it is not ready to pay at the moment, to give a charge upon the land themselves as well as on the proceeds of sale. I should just like to add this, that I have dealt with this case on the footing that this is a *bonâ fide* transaction between the company and the transferee of an existing mortgage. If it were made out that this power was being used merely as a cloak for adding to the borrowing powers of the company, very different considerations would apply, and a very different conclusion might be arrived at. But as it is I think the appeal ought to be dismissed.

COZENS-HARDY, L.J. — This appeal raises the question whether it is competent to the defendant company to give a charge for an admitted debt upon the surplus lands of the company and the proceeds of sale of such lands. The transaction is not one of borrowing. It will be convenient to consider this question in the first instance as though the company were a railway company governed by sections 127-131 of the Land Clauses Consolidation Act, 1845, and afterwards to consider the language of the special Act governing the company. It was expressly decided by the Court of Appeal in 1867 in *Gardner* v. *London, Chatham, and Dover Railway Co.*, that such a charge would be good as against the surplus sale moneys. [His lordship here read the words of Lord Cairns, quoted above by Vaughan Williams, L.J., and also the succeeding sentence in Lord Cairns' judgment.] It was not necessary in that case to go any further. The company there would doubtless have been involved in trouble and expense in dealing with a great number of small strips of land if the concurrence of the contractors, whose debt was £135,000, had been necessary to the completion of every transaction. The contractors were content with the charge given by the Lords Justices upon the sale moneys. I cannot, however, read that judgment as a decision that the surplus land could not be charged, though the proceeds of sale might be charged, nor can I see any ground for such a distinction. It has repeatedly been held that a judgment creditor to whom land has been delivered in execution may obtain an order for sale of surplus lands, although under ordinary circumstances the court would in the first instance only direct inquiry as to what lands are superfluous and whether there are any incumbrances: see *Gardner* v. *London Chatham, and Dover Railway Co., Ex parte Grissell*. It has never been held that the obligations imposed upon the company to sell the superfluous land within a certain period, or under some circumstances to give a right of pre-emption to the adjoining owner, were obligations of such a nature as to be inconsistent with a sale. The judgment of James, V.C., in *In re Calne Railway Co.* is a clear authority on this point. In that case the judgment creditor obtained an immediate order for sale under 27 & 28 Vict. c. 112 to the adjoining owner, who had a right of pre-emption, and the court

ordered the company to join in the conveyance. The Vice-Chancellor pointed out that under 1 & 2 Vict. c. 110. s. 3. the judgment creditor had the same remedies as if the company had by writing agreed to charge the land with the judgment debt. Neither a mortgage given expressly nor a mortgage created by virtue of the Judgments Acts over superfluous lands in any way interferes with the company's undertaking. If the company could charge or sell an old engine not required for the purposes of the railway, as I think it could, there seems no reason why the same principle should not apply to surplus lands. The mortgagee will, of course, take such interest only as the company has in the land, subject to all rights of pre-emption and other rights which might be available against the company.

It remains to consider whether there is anything in the special Act of 1892 to distinguish the position of the company here from that of an ordinary railway company. Section 18 is the only section which can seriously be relied on. There are three points of distinction—(1) No time is limited within which superfluous lands must be sold; (2) no right of pre-emption is given to adjoining owners; (3) the opinion of the company and not the verdict of the judge or the judgment of a court decides whether land is superfluous. I cannot see that these points of distinction are really material. The charge does not profess to extend beyond lands which in the opinion of the company are superfluous lands, and the proceeds of sale thereof, nor can I find anything in the directions for application of the purchase-money if the company sells, inconsistent with the proposed transaction. For these reasons I think Swinfen Eady, J.'s, judgment is correct, and that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors, *Routh, Stacey, & Castle; Tarry, Sherlock, & King.*

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From P. D. & Ad. Div. (Collins, M.R., and Mathew, L.J.) — Dec. 1.

"THE DUC D'AUMALE." (a.)

*Admiralty—Practice—Writ—Service out of the jurisdiction — Collision outside territorial waters — Action against owners of English tug and foreign tow—Proper party—Action properly brought—Ord.* 11, *r.* 1 (g).

*A collision occurred outside British territorial waters between an English steamship and a French sailing ship which was in tow of an English tug. The owners of the French ship commenced an action against the owners of the English steamer in the French court. The owners of the English steamer then commenced an action* in personam *in the Admiralty Division against the owners of the French ship and the owners of the tug, and, having served the writ on the owners of the tug, obtained leave to issue a concurrent writ and serve notice thereof on the owners of the French ship out of the jurisdiction. The owners of the French ship, after obtaining judgment by default in the French action and compelling the owners of the English steamer to give security in the nature of bail in order to avoid the arrest of their vessel, took out a summons asking that the order giving leave to serve notice of the writ out of the jurisdiction might be discharged.*

*Held, that the order ought not to be discharged, for the action was properly brought against the owners of the tug as well as against the owners of the tow, and the owners of the tow were proper parties to the action; and the order was not the less rightly made because the cause of action arose out of the jurisdiction.*

*Decision of Barnes, J.,* ante, *p.* 271, *affirmed.*

Appeal from the refusal of Barnes, J., to discharge an order giving leave to the plaintiffs to issue a concurrent writ and serve notice thereof out of the jurisdiction (reported *ante*, p. 271).

On the 22nd of June, 1902, a collision occurred in the English Channel, outside British territorial waters, between the steamship *Camrose*, belonging to the plaintiffs, the Marychurch Steamship Co., and the French sailing ship *Duc d'Aumale*, belonging to La Compagnie Maritime Française. At the time of the collision *The Duc d'Aumale* was in tow of the English tug *Challenge*, but there was no collision between *The Camrose* and *The Challenge*. After the collision *The Duc d'Aumale* was towed to Dunkirk for repairs and *The Camrose* proceeded to Antwerp.

On the 8th of July the owners of *The Duc d'Aumale* commenced an action against the owners of *The Camrose* in the French court at Nantes. The owners of *The Camrose* wished to have the question between the parties tried in the English courts, but the French company declined to consent to that jurisdiction.

On the 11th of July the owners of *The Camrose* commenced the present action by issuing a writ *in personam* against the owners of the tug *Challenge* and the owners of *The Duc d'Aumale*, claiming compensation against the defendants "as owners respectively of the steam-tug *Challenge* and the barque or vessel *Duc d'Aumale* for damage occasioned by a collision which took place in the month of June, 1902, between the plaintiffs' steamship *Camrose* and the barque *Duc d'Aumale* whilst in tow, or having been in tow, of the tug *Challenge*."

This writ was duly served on the owners of *The Challenge*, and on the 22nd of July the President of the Admiralty Division, Sir Francis Jeune, on the application of the plaintiffs, made an order giving leave to the plaintiffs to issue a concurrent writ and to serve notice thereof upon the defendants, La Compagnie Maritime Française, in France. The application was supported by an affidavit on behalf of the plaintiffs that the owners of *The Duc d'Aumale* were necessary or proper parties to the action brought against them and the owners of *The Challenge*, "inasmuch as the plaintiffs allege that the said collision was caused or contributed to by neglect or default in the navigation of *The Duc d'Aumale* and *The Challenge*." The order, however, did not limit a time for appearance.

On the 2nd of August the French company entered a conditional appearance under protest to the writ with notice of which they had been served.

On the 8th of August the President set aside his former order as being defective, and made a fresh order giving the plaintiffs leave to issue a concurrent writ and to serve notice of it on the French company in France, and fixing the time for appearance as within twelve days from the service of the notice of the writ.

On the 14th of August the French company were served with notice of the fresh writ.

On the 20th of August, the owners of *The Camrose* not having entered an appearance to the French action, judgment by default was obtained against them in the court at Nantes, and the French company, taking advantage of a convention between France and Belgium for the enforcement of French judgments in Belgium, threatened to arrest *The Camrose* in the port of Antwerp. In order to avoid her arrest the owners of *The Camrose* were compelled to give

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

security in the nature of bail. On the 25th of August the French company entered a conditional appearance to the second writ under protest, and on the 23rd of October they took out a summons asking that the order giving leave to issue the writ and serve notice thereof out of the jurisdiction might be discharged and the service set aside.

By ord. 11, r. 1, of the Rules of the Supreme Court, "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (*g*) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

Barnes, J., refused to discharge the President's order, being of opinion that the action was properly brought against the owners of the tug as well as against the owners of the tow, and that the owners of the tow were proper parties to the action; but he gave leave to appeal.

The owners of *The Duc d'Aumale* appealed.

*Scrutton, K.C.*, and *Lewis Noad*, for the appellants.—This case is not within the rule. The rule only applies where the plaintiff has a *bonâ fide* cause of action against the person served within the jurisdiction. If the owners of the tug and the owners of the tow had both been within the jurisdiction, the owners of the tug would not have been made defendants, and the plaintiffs ought not to be allowed to bring the foreign owners of the tow within the jurisdiction of the court by the mere device of adding the owners of the tug as defendants: *Witted* v. *Galbraith*, 41 W. R. 395, [1893] 1 Q. B. 577; see also *Williams* v. *Cartwright*, 43 W. R. 145, [1895] 1 Q. B. 142. Further, the collision in respect of which the action is brought occurred out of the jurisdiction, and in such a case an order cannot be made under the rule for service out of the jurisdiction on foreign defendants. It was held under the rules of 1875 that in such a case an order could not be made: *Harris* v. *Owners of Franconia*, L. R. 2 C. P. D. 173, 25 W. R. Dig. 209.

*Pickford, K.C.*, and *Balloch*, for the respondents, the owners of *The Camrose*, were not called upon.

COLLINS, M.R.—In my opinion this case comes clearly within the rule. The words are "any person out of the jurisdiction" who "is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." The criterion is not whether the cause of action arose within the jurisdiction, but whether the other person has been duly served within the jurisdiction. On the question whether the owners of the tug were properly made defendants I entirely agree with Barnes, J.

MATHEW, L.J., concurred.

*Appeal dismissed.*

Solicitors for the appellants, *William A. Crump & Son.*

Solicitors for the respondents, *Thomas Cooper & Co.*

## High Court of Justice.

Chan. Div.
Farwell, J. } Jan. 15.

TODD v. NORTH-EASTERN RAILWAY CO. (*a*.)

*Practice — Costs — Taxation — Chancery Division — Apportionment—R. S. C.*, 1883, *ord.* 65, *r.* 2.

*Plaintiffs in an action claimed an injunction against defendants restraining them from interrupting an access to the plaintiffs' premises, and they also claimed damages for trespass. Defendants paid £60 into court in lieu of damages for the trespass. Plaintiffs failed on the first issue, and accepted the sum of £60 paid into court as satisfaction of the second issue. The court dismissed the first part of the action without costs, but the defendants were ordered to pay the costs of the second part of the action. The taxing-master allowed the plaintiffs all the general costs of the action, so far as related to the issue upon which the plaintiffs were successful. The defendants objected that the order of the court involved an apportionment of the general costs of the action, and that if it had been intended that the plaintiffs were to recover the whole of the general costs the order would have directed the defendants to pay the plaintiffs "their costs of this action except so far as such costs have been increased by the issue upon which the plaintiffs have been unsuccessful." The taxing-master, in reply, referred to the addition to ord.* 65, *r.* 2, *in R. S. C.*, 1902, *and stated that this rule gave effect to the established practice of the King's Bench Division.*

*Held, that the effect of the addition to ord.* 65, *r.* 2, *was to give the judge power to make an apportionment of the costs in the action. The practice in the Chancery Division had not been altered, and remained as it was laid down in* Jenkins *v.* Jackson, 39 *W. R.* 242, [1891] 1 *Ch.* 89.

This was a summons taken out by the defendants to vary the taxing-master's certificate in the above action.

The plaintiffs in the action claimed an injunction to restrain the defendants from altering the level of a road so as to intercept an access to the plaintiff's premises, and also damages against defendants for entering upon the plaintiff's premises and pulling down part of a wall.

The plaintiffs failed to obtain the injunction, but the defendants, having paid £60 into court in lieu of damages claimed by plaintiff, this sum was accepted as satisfaction.

The court made the following order: "This court doth order that the £60 paid into court by the defendants in satisfaction of the cause of action stated in paragraph 8 of the statement of claim be paid out to the plaintiffs as directed in the schedule hereto, and it is ordered that the defendants, the North-Eastern Railway Co., do pay to the plaintiffs their costs of this action so far as relates to the said claim stated in paragraph 8 aforesaid, such costs to be taxed by the taxing-master. And it is ordered that the rest of the plaintiffs' action do stand dismissed out of this court without costs."

Paragraph 8 referred to the claim against the defendants for trespass.

The taxing-master allowed the plaintiffs all the general costs of the action so far as related to the issue upon which the plaintiffs were successful. To this the defendants objected that there were two issues in the action, in respect of one of which the

(*a*.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

defendants paid £60 into court with their defence, which sum was accepted, and in respect of the other of which issues the action was dismissed. The order directed the defendants to pay to the plaintiffs their costs of this action so far as relates to the said claim stated in paragraph 8 of the statement of claim. The defendants submitted that in accordance with the settled practice of the Chancery Division an order in the above form involved an apportionment of the general costs of the action. If it had been intended that the plaintiffs were to recover the whole of the general costs, the order would have directed the defendants to pay to the plaintiffs "their costs of this action except so far as such costs have been increased" by the issue upon which the plaintiffs were unsuccessful.

In support of their contention the defendants referred to the following authorities, in which the distinction between the different forms of order was clearly stated: The Annual Practice for 1903, vol. 1, p. 925; Pridmore's Guide to Costs (10th ed.), p. 55; Seton's Judgments and Orders (6th ed.), vol. 1, pp. 248 and 264; and *Jenkins* v. *Jackson*, 39 W. R. 242, [1891] 1 Ch. 89. R. S. C., ord. 65, r. 2, as altered in 1902, had made no change in the practice as stated in *Jenkins* v. *Jackson*.

The taxing-master answered these objections: "I have come to the conclusion that the intention of the learned judge was that the plaintiffs should have their full costs of the proceedings they took to prosecute the claim stated in paragraph 8 of the statement of claim on which they were successful. The order gives the plaintiff their costs of this action so far as relates to this particular claim, and the remainder of their action is dismissed without costs. The defendants get no costs of the other issue (on which they succeeded), so that there is no set off, as was the case in *Jenkins* v. *Jackson*. I think, therefore, that under the actual wording of the order the plaintiffs are entitled to their costs as if their action had been limited to the claim on which they succeeded. If I am right, no question of the apportionment of the general costs of the action arises. All charges relating to the claim on which the plaintiffs failed have been excluded in the taxation. But on the subject of the effect of the addition to ord. 65, r. 2, made by the Rules of the Supreme Court, January, 1902, I may point out that the addition was expressly made for the purpose of giving effect to the established practice in the King's Bench Division as laid down in *Sparrow* v. *Hill*, 29 W. R. 490, 7 Q. B. D. 362, and *Jones* v. *Curling*, 32 W. R. 651, 13 Q. B. D. 262, and to alter the Chancery practice stated in *Jenkins* v. *Jackson*, the case referred to in the objections. It was strongly urged by Bowen, L.J., in that case that there should be one and the same practice in both Divisions, and the new rule was passed with the intention of giving a party who had succeeded on one out of two or more of his claims the general costs of the action, and to do away with the necessity for the taxing-master apportioning such general costs —in other words, to make the Chancery practice conform to that which has long been the practice in the King's Bench Division—I have disallowed the objection."

The addition to ord. 65, r. 2, referred to above is as follows: "And an order giving a party costs, except so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, but the court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the court or judge shall determine."

*Mark Romer*, for the defendant, referred to the case of *Jenkins* v. *Jackson*.

*Frank Dodd*, for plaintiff.

FARWELL, J.—In my opinion the taxing-master is wrong in the construction he has put on the addition to ord. 65, r. 2. The practice in the Chancery Division is well known, and is stated in *Jenkins* v. *Jackson*, and that has remained the practice down to the present time, unless the addendum to ord. 65, r. 2, has altered it. I am unable to find anything in that rule which has altered the practice. It is said that the words "the court or judge . . . may . . . direct taxation of the whole costs and payment of such proportion thereof as the court or judge shall determine" have affected the practice of the court. In my opinion, the object of this addition is plain. It was doubted whether a judge had power to avoid the expense and trouble of an apportionment of each item of costs by the taxing-master. This addition was put in to remove that doubt. It is better that the judge should make an apportionment of the costs when the matter is fresh in his mind, and that liberty be allowed him to give fractional shares in the costs, as was done by Kekewich, J., in *In re Pollard*, (1902) W. N. 49, and by myself in *Bourne* v. *Swan & Edgar*, *ante*, p. 213, [1903] 1 Ch. 211. The taxing-master has put a wrong construction on the rule, and the matter must go back to him.

Solicitor for the defendants, *A. Kaye Butterworth*.

Solicitor for the plaintiffs, *Nash, Field, & Co.*, for *W. M. Pybus & Son*, Newcastle-on-Tyne.

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Chan. Div. } Feb. 13.
Buckley, J. }

*In re* HARROGATE ESTATES (LIMITED). (*a*.)

*Company— Debenture— Registration — Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

*The registration under sub-section* 4 *of section* 14 *of the Companies Act*, 1900, *of the particulars therein mentioned protects the whole of the series of debentures in respect of which such registration is effected, at whatever time such debentures are issued, provided they be not issued more than twenty-one days before such registration.*

*The meaning of section* 14 *of the Companies Act*, 1900, *discussed.*

On the 18th of November, 1901, resolutions were passed creating a series of 150 debentures of £100 each; each debenture itself contained a charge.

On the 13th of December a trust deed was executed for securing the issue, which also contained a charge.

On the 31st of December the trust deed and ninety-nine debentures actually issued up to that date were sent in for registration.

The particulars sent in were (as was held by Buckley, J.) sufficient to comply with section 14, sub-section 4, of the Companies Act, 1900, save that the date of the resolution was wrongly given as the 13th of December.

Further debentures subsequently issued were subsequently carried in for registration, and on the 1st of January, 1903, forty debentures were sent in for registration, of which ten had been issued to the

(*a*.) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

subscribers within the preceding twenty-one days, but more than twenty-one days had elapsed since the issue of the remaining 30.

The registrar refused to register the thirty debentures last mentioned.

This was a motion under section 15 of the Companies Act, 1900, asking for (i.) an extension of the time for registering these thirty debentures (if necessary), and (ii.) the rectification of the mistake above-mentioned as to the date of the resolution.

*Maugham*, for the applicants.

*Fulton Carr*, for the trustees of the debenture trust deed.

BUCKLEY, J., made an order rectifying the mistake as to the date of the resolution, and in dealing with the application for extending the time for registration, said: The frequency of applications for an extension of time for registering securities under section 15 of the Companies Act, 1900, makes it desirable, in my opinion, to express my view of the true construction of section 14 of that Act. The relevant events are commonly as follows—(1) The company passes a resolution and thereby resolves to issue debentures or to execute a trust deed securing debentures; there is no charge created, only an intention expressed to thereafter give a charge. (2) Either (*a*) debentures are issued—that is to say, money is paid to the company and an instrument under the company's seal is handed to the person making the payment; or (*b*) a trust deed is executed for securing a series of debentures, and a charge is thereby expressed to be given to the trustees to secure sums to be thereafter advanced upon debentures, and debentures are subsequently issued to persons who make a money payment and thereupon become entitled to a charge. (3) Some instrument or particulars are sent in for registration.

The question is whether when such instrument and particulars are so sent in the twenty-one days in section 14, sub-section 1, have run.

Sub-sections 1, 2, and 3 deal with a case in which a charge is created in favour of a person, either (i.) named in the debenture or (ii.) who can be named because he is the bearer of the debenture, who becomes entitled to the charge. The twenty-one days runs from the date at which a person so becomes entitled; sub-section 1 speaks of the creation of a charge and of a "security thereby conferred"; sub-section 3 speaks of "charges created" and registration of "the names of the . . . persons entitled to the charge"; sub-section 2 deals with property abroad in respect of which "further proceedings may be necessary to make . . . a charge valid and effectual according to the law of the country in which such property is situate," and makes registration of "a deed purporting to specifically charge such property" sufficient. The twenty-one days mentioned in sub-section 1 run, not from the resolution, but from the date at which the charge was created in favour of a person entitled to its benefit.

Sub-section 4 contains a proviso allowing a different course to be pursued; where a series of debentures is created (whether accompanied by a covering deed or not) the Act allows the registration, not of the charge, but of the resolution creating the series and (if there be one) of the covering deed, which does not necessarily "create" but may only "define" the security. At the date of registration that deed may secure, not advances actually made, but advances to be made if anyone takes up the debentures; registration duly made under sub-section 4 will protect debentures subsequently issued, notwithstanding that the charge contained in such debentures or given by the covering deed has not arisen at the date of registration, and will not arise until the issue of the debentures. No period of twenty-one days from the date of the resolution or covering deed is mentioned in sub-section 4; this is still governed by sub-section 1, and the registrar ought to register under sub-section 4 at any time, irrespective of the date of the resolution or of the covering deed. Such registration will protect all debentures subsequently issued and all debentures issued not more than twenty-one days before registration, but will not protect debentures issued at an earlier date. In sub-section 4 the words "debentures containing any charge" are equivalent to "debentures having the benefit of a charge." The case in which a charge is contained in the covering deed only, and not repeated or extended by the debentures, is within this sub-section.

Sub-section 5 relates to cases where registration has been made under sub-section 4, and provides that the registrar may be required to "register the date and amount of any particular issue," but this is not essential to the validity of the debentures.

Sub-section 6 relates to a certificate which the registrar, of course, cannot give until the registration has been effected. It nevertheless provides for a copy of the certificate being endorsed on every debenture the payment of which is secured by the charge. This is consistent with the interpretation above given of sub-section 4.

As regards the certificate itself, it assumes a different form according as the registration is made under sub-sections 1, 2, and 3 or sub-section 4; if under sub-sections 1, 2, and 3, it will be a certificate of the registration of the particular mortgage or charge registered; if under sub-section 4, the registrar ought to certify that the particulars required by that sub-section have been registered, inserting the relevant particulars for each case. If that registration is made under sub-section 4 it is unnecessary that each particular debenture should be registered within the twenty-one days mentioned in sub-section 1. In this case no further registration was required if the registration under sub-section 4 has been properly made, as will be the case if the mistake as to the date of the resolution is corrected.

I do not propose to make any order extending the time for registration as in my opinion no such order is required. I think the parties are at liberty to carry in before the registrar under sub-section 5 a memorandum in such form as he thinks right giving the particulars under sub-section 5 and identifying these debentures as part of those already protected by the original registration under sub-section 4.

Solicitors, *Metcalfe, Birkett, & Rowlatt; Goldring & Philips.*

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Chan. Div. Joyce, J. } Jan. 28.

*In re* UNDERWOOD.
*In re* BOWLES.
U. *v.* W. (*a*.)

*Practice—Writ* ne exeat regno—*Non-compliance by trustee with order to pay money into court—Evidence of actual receipt—Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *s.* 4 (3).

*The circumstances under which the court will allow a writ* ne exeat regno *to issue must be such as would*

(*a*.) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

*justify the issue of a writ of attachment, and in addition the evidence as to the intention of the defendant to leave the country must be direct and unequivocal.*

This action had been commenced for the administration of the estates of the two above-named deceased persons, and for the appointment of a new trustee of the will of M. A. Underwood, and for accounts and inquiries.

The usual decree having been pronounced, the master by his certificate found that there remained due from the defendant W., first, a sum of £133 odd in respect of rents and profits of the real estate of J. H. Bowles, deceased, and received by him as trustee thereof; secondly, a sum of £153 odd in respect of personal estate received by him as the executor of M. A. Underwood; thirdly, a sum of £122 odd in respect of the rents and profits of the real estate of M. A. Underwood and received by him as trustee of her will; and lastly, a sum of £288 odd received by him during the lifetime of M. A. Underwood, and had and received to her use. The evidence upon which the master so found consisted of the accounts submitted by W.

By the order, dated the 16th of December, 1902, made on further consideration of the action, the defendant W. was ordered on or before the 20th of December, 1902, or subsequently within four days after service of the order on him, to lodge in court to the credit of the action the four sums so certified to be due. A copy of the order was duly served upon him on the 20th of January, 1903, together with the paymaster's directions as to lodgment. This order remained uncomplied with, and it being understood that W. intended to sail for Canada on the 29th of January for a wedding tour of indefinite duration, notice of motion was served to restrain his departure.

The only evidence of intention was an affidavit of information and belief by a solicitor deposed to "from information given to me by several persons who are intimately acquainted with the defendant, and who have obtained their knowledge either directly or indirectly from the defendant himself, but who decline to depose to these facts or to allow me to use their names as informants."

*J. G. Wood*, for the motion.—The evidence of intention to leave the country is sufficient although indirect: *Collinson* v. ——, 18 Ves. 353. As regards evidence of "actual receipt" by the defendant, the case of *In re Fewster, Herdman* v. *Fewster*, [1901] 1 Ch. 447, 49 W. R. Dig. 180, is against me, but that was a case of attachment and not of *ne exeat*.

He also referred to *Colverson* v. *Bloomfield*, 33 W. R. 889, 29 Ch. D. 341.

JOYCE, J.—This is an application of a most unusual kind, and I should certainly never allow a writ *ne exeat regno* to issue unless I were positive I was right in doing so. In the present case I am not satisfied with the nature of the evidence furnished of the defendant's intention to leave England, and further than that, I am by no means certain that this money has ever been "in his possession or under his control" within the meaning of the exception in section 4 (3) of the Debtors Act, 1869. There is no strict evidence to show that the defendant ever actually received this money, and the same considerations apply as in the case of *In re Fewster*, which was a case I decided myself. I shall decline to go behind that decision, and and as upon this evidence under other circumstances a writ of attachment would not be granted, so no case is here shown for the issue of a writ *ne exeat regno*. The writ cannot go.

*Writ refused.*

Solicitors, *Nussey & Fellowes.*

Later in the same day the application was renewed before the Court of Appeal (Collins, M.R., and Romer and Cozens Hardy, L.JJ.)

*J. G. Wood*, for the motion.

THE COURT refused the application upon grounds similar to those upon which Joyce, J., based the above decision.

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K. B. Div. (Wright, J.) — Jan. 16.

BLORE v. GIULINI AND ANOTHER. (a.)

*Landlord and tenant—Lease—Power given to lessee to determine lease on notice — Lessor's remedies for antecedent breaches of covenant to repair not reserved—Liability of lessee.*

*By an indenture of lease for fourteen years it was provided that the lessees might, upon giving six months' previous notice in writing, determine the lease at the end of the first seven years, and that in such case the "indenture and every clause, matter, and thing" therein contained should upon the expiration of the notice "cease and determine and be void." The lease did not contain any proviso that the exercise by the lessees of their power to determine should be subject to the lessor's rights and remedies for existing breaches by the lessees of the covenants. The lessees duly determined the lease at the end of the seven years and left the premises out of repair.*

*Held, that the lessor was entitled to sue the lessees upon the covenant to repair contained in the lease, on their determining the lease under their above power, notwithstanding that no such right was expressly reserved.*

Point of law raised on the pleadings.

In this case the action was brought by a lessor against lessees to recover damages for breach of covenant to repair.

From the pleadings it appeared that the plaintiff granted to the defendants a lease of a dwelling-house, 36, Brompton-square, for the term of fourteen years, from the 25th of March, 1895.

The lease contained the usual covenant by the lessees to repair and deliver up the premises in good repair, and it also contained a proviso giving to the lessees power to determine the lease at the end of the first seven years on giving six calendar months' previous notice in writing, and in such case it was provided that "this present indenture and every clause, matter, and thing therein contained, shall, upon the expiration of the said notice, cease and determine and be void, anything hereinbefore contained to the contrary notwithstanding."

There was no provision in the deed that the exercise by the lessees of the power to determine the lease should be subject to the lessor's rights and remedies for existing breaches by the lessees of the covenant to repair.

The defendants terminated the lease at the end of the first seven years by giving six months' notice, and they gave up the premises without having done any repairs.

On the plaintiff bringing his action for breach of the covenant to repair, the defendants by their defence pleaded that upon the determination of the lease they were exonerated and discharged from all liability under the covenants.

The question of law raised by the defence was ordered to be tried first.

*W. Stewart*, for the plaintiff.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

*Frankau*, for the defendants.—Upon the expiration of the notice determining the lease the covenants became void, and therefore the covenant to repair could not be sued upon. It is usual in leases when power is given to the lessee to determine the lease at the end of seven or fourteen years to provide that such determination shall be subject to the rights and remedies of the lessor for or in respect of any rent in arrear or any breach of any of the lessee's covenants: see Prideaux's Precedents in Conveyancing (17th ed.), p. 66, and Key & Elphinstone's Precedents in Conveyancing (7th ed.), p. 714. No such proviso was inserted in the present lease. Upon the expiration of the notice it was provided that everything in the indenture should become void, and no provision was inserted preserving the rights of the lessor in respect of any antecedent breach of any covenant or condition contained in the deed. The omission to do so gives the defendant in this case a good defence to the action. *Hartshorne* v. *Watson*, 4 Bing. N. C. 178, is distinguishable from this case. There the covenants were not affected by the re-entry, and it was held that an action of covenant lay for rent accruing before a re-entry for a forfeiture notwithstanding that the lessor under such re-entry was to have the premises again "as if the indenture had never been made."

WRIGHT, J.—In my opinion the point raised by the defence cannot be supported. I do not suppose for a moment that the parties to this deed ever intended that the liability of the lessees to pay damages for breaches already committed by them of the covenant to repair should be put an end to merely by the exercise by the lessees of the power given them to determine the lease at the end of seven years. To hold so would be contrary to common sense. *Hartshorne* v. *Watson* sufficiently decides this point. In that case Tindal, C.J., said: "It would be a singular construction to hold that to an action for rent on an instrument under seal, the lessee or assignee may plead, not payment, but that the lessor entered for non-payment; in other words, may deprive the lessor of his rent because he declines to submit to any further loss. The argument would apply equally to covenant for repairs, or other services to be rendered by the lessee, and is so unreasonable that it cannot be upheld." There must be judgment for the plaintiff.

*Judgment for plaintiff.*

Solicitors for the plaintiff, *Child & Child.*

Solicitor for the defendants, *A. J. Adams.*

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## Court of Appeal.

From K. B. Div.
Earl of Halsbury, L.C., Lord Alverstone, L.C.J., and Sir F. Jeune, P. — Feb. 19.

BOZSON *v.* THE URBAN DISTRICT COUNCIL OF ALTRINCHAM. (*a.*)

*Practice—Appeal—Order whether final or interlocutory—Order to try preliminary question of liability—Action dismissed—Appeal to Court of Appeal—Rules of the Supreme Court, ord. 58, rr. 3 and 15.*

*In an action for breach of contract the judge at chambers made the following order: "It is ordered that the action be transferred to the non-jury list. Questions of liability and breach of contract only to be tried. Rest of case (if any) to go to the official referee."*

*At the trial the judge made an order dismissing the action on the ground that there was no binding contract, and judgment was entered for the defendants. From this order the plaintiff appealed.*

*Held, that the appeal must be treated as an appeal from a final order, and not as from an interlocutory order.*

Salaman *v.* Warner, 39 *W. R.* 547, [1891] 1 *Q. B.* 734, *not followed.*

Shubrook *v.* Tufnell, 30 *W. R.* 740, 9 *Q. B. D.* 621, *preferred.*

This was an appeal by the plaintiff from an order made by Wills, J.

The action was brought by the plaintiff, a contractor, against the defendants for damages for breach of contract.

On the 29th of January, 1902, the following order was made by the judge in chambers: "It is ordered that the action be transferred to the non-jury list. Questions of liability and breach of contract only to be tried. Rest of case (if any) to go to the official referee."

On the 6th of March, 1902, the case came before Wills, J., at Manchester, when the learned judge made an order dismissing the action on the ground that there was no binding contract, and upon that order judgment was subsequently entered for the defendants.

From this order the plaintiff, on the 3rd of May, 1902, gave notice of appeal.

[On the case being called on counsel for the defendants raised a preliminary objection.]

*Pickford, K.C.* (*Langdon* with him), for the defendants.—This appeal is from an interlocutory order, and is therefore out of time, as notice should have been given within fourteen days from the date of the order. This case is covered by *Salaman* v. *Warner*, 39 W. R. 547, [1891] 1 Q. B. 734. In that case a point of law had been raised on the pleadings and the judge at chambers ordered that the point should be set down for argument and disposed of before the trial, and the Divisional Court, after argument, ordered that the action should be dismissed. Thereupon the plaintiff gave a four days' notice of appeal as from an interlocutory order, and the Court of Appeal, on a preliminary objection being raised that the notice of appeal should have been a fourteen days' notice, the order being a final order, held that the order was not a final order within ord. 58, r. 3. Lord Esher, M.R., in the course of his judgment, in speaking of the order, said the question whether the order, for the purpose of giving notice of appeal under the rules, was final or not must depend on what would be the result of the decision of the Divisional Court in that case, assuming it to be given in favour of either of the parties. "If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory." That exactly meets the present case. If the decision in the present case had been in favour of the plaintiff it would not have finally disposed of the matter in dispute, because the case would then have had to go to the official referee. The order made by the learned judge is therefore an interlocutory one. The principle laid down in *Salaman* v. *Warner* is affirmed in the case of *In re Herbert Reeves*, 50 W. R. 252, [1902] 1 Ch. 29. There is, however, the earlier case of *Shubrook* v. *Tufnell*, 30 W. R. 740,

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

9 Q. B. D. 621, to which the attention of the court ought to be drawn, for undoubtedly it is difficult to reconcile it with *Salaman* v. *Warner*, in which case it does not appear to have been referred to. In *Shubrook* v. *Tufnell* an arbitrator, under an order of reference, stated a case for the opinion of the court, which provided that, if the opinion of the court should be one way, the case was to be referred back to the arbitrator; if the other way, judgment was to be entered for the defendant. The Divisional Court decided in favour of the plaintiffs and referred the case back to the arbitrator. On appeal the Court of Appeal (Jessel, M.R., and Lindley, L.J.) held that the order was a final one. *Salaman* v. *Warner*, however, has always been followed.

*Montague Lush, K.C.* (*M. Macnaghten* with him), for the plaintiff, was not called on.

The Earl of HALSBURY, L.C.—I prefer to follow the earlier case of *Shubrook* v. *Tufnell*. I think that this is an appeal from a final order, and that the notice of appeal was therefore given in time.

Lord ALVERSTONE, L.C.J. — I agree. In my opinion the real test whether an order should be considered final or interlocutory is this—if the order, as made, finally determines the rights of the parties, it ought to be treated as final for all purposes; if, on the other hand, further proceedings are necessitated, the order ought to be treated as interlocutory.

Sir FRANCIS JEUNE, P.—I am of the same opinion.

The appeal was then heard on the merits and dismissed.

*Objection overruled; appeal dismissed.*

Solicitor for the plaintiff, *G. J. Fowler*, for *Grundy, Lamb, & Grundy*, Manchester.

Solicitors for the defendants, *Robbins, Billing, & Co.*, for *Nicholls, Harris, & Lindsell*, Manchester.

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From Chan. Div. (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.) } Nov. 6, 7, 10, 24; Feb. 3.

BENNETT *v.* STONE. (*a.*)

*Vendor and purchaser—Conditions of sale—Wilful default — Form of conveyance — Honest mistake—Interest—Vendor in possession—Account of rents and profits not on the footing of wilful default—Occupation rent—Losses incurred by vendor in carrying on business.*

*A contract provided that interest should be paid on the purchase-money if the completion were delayed from any cause other than the wilful default of the vendors. The vendors insisting on the insertion of a particular clause in the conveyance, the purchaser brought an action and obtained judgment for specific performance.*

*Held, by* Stirling *and* Cozens-Hardy, L.JJ. (Vaughan Williams, L.J., dissentiente) *that the purchaser was liable to pay interest on the purchase-money.*

*By* Stirling, L.J.—*The persistence of the vendors in having the clause inserted, though arising out of an honest mistake on their part, amounted to wilful default within the contract, but the real cause of the delay in completion having been the inability of the purchaser to find the purchase-money, he was not thereby relieved from his liability for interest.*

*By* Cozens-Hardy, L.J.—*The vendors had not been guilty of wilful default within the meaning of the contract.*

*By* Vaughan Williams, L.J.—*The vendors had been guilty of wilful default within the meaning of the contract, and had thereby become disentitled to any interest.*

*Decision of* Buckley, J. (50 *W. R.* 118, [1902] 1 *Ch.* 226), *affirmed.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This was an appeal from a decision of Buckley, J. (reported 50 W. R. 118, [1902] 1 Ch. 226).

By an agreement dated the 26th of September, 1898, the defendants agreed to sell to the plaintiff the Stoneleigh estate, near Epsom, for £75,000, of which £1,000 was to be paid immediately as a deposit, and the balance on the 2nd of January, 1899.

Article 2 of the agreement provided that on the purchaser paying his purchase-money on the date aforesaid, he should, as from the 25th of December, 1898, be let in possession or into receipt of the rents and profits, and up to that day all rents, rates, taxes, and outgoings should (if necessary) be apportioned, and if from any cause whatever other than the wilful default of the vendors the completion of the purchase was delayed beyond the 2nd of January, 1899, and the agreement should not be cancelled and the deposit forfeited by the vendors under the last clause thereof, the purchase-money should bear interest at the rate of 5 per cent. per annum to the day of actual payment thereof.

The deposit was paid, but the purchase was not completed on the 2nd of January, 1899, and in fact the purchase was not yet completed, nor the balance of the purchase-money paid.

The draft conveyance furnished by the purchaser to the vendors contained the following words to enure to him the benefit of certain covenants which had been entered into by William Cunliffe with the defendants: "Together with the full benefit of the covenants on the part of the said William Cunliffe with the said Edward Mulready Stone and Frederick William Stone contained in the said indenture of the 29th day of August, 1898." The defendants substituted for these words the following: "But with the benefit of the covenants on the part of the said William Cunliffe with the said Edward Mulready Stone and Frederick William Stone contained in the said indenture of the 29th day of August, 1898 (so far as the said Edward Mulready Stone and Frederick William Stone are now in law or in equity entitled to assign the benefit of such covenants) without thereby warranting that such covenants are now enforceable by the assigns of the said Edward Mulready Stone and Frederick William Stone."

The plaintiff objected to the clause as altered, and on the 22nd of June, 1899, commenced an action for specific performance.

On the 2nd of February, 1900, Buckley, J., holding that the defendants were wrong in insisting on this addition, pronounced judgment for specific performance, and ordered that interest, if any, be computed at the rate of 5 per cent. on the £74,000, or at such lower rate as the same might be reducible to under the contract, from the 2nd of January, 1899; the judgment also ordered an account of the rents and profits of the said hereditaments received by the defendants or by any other person or persons by the order or for the use of the defendants since the 2nd of January, 1899.

By his certificate, dated the 13th of June, 1901, the master found that the amount of the interest due from the plaintiff to the defendants was £8,661 12s. 6d., and that the defendants had received on account of the rents and profits of the hereditaments £776 18s., and that they had paid, or were entitled to be allowed on account thereof, £1,797 6s. 10d. It appeared that the tenant of about two-thirds of the land had given

up possession on the 29th of September, 1899, and that the defendants, instead of letting his farm, had entered into possession themselves, and, for the purpose of working it had purchased quantities of farming stock and utensils; the sums paid for these, as well as £469 11s. 9d. paid to the outgoing tenant in respect of his tenant rights, were included in the £1,797 6s. 10d.

The plaintiff took out a summons to vary the certificate (1) by disallowing the amount allowed for interest; (2) by disallowing such of the expenses comprised in the £1,797 6s. 10d. (including the £469 11s. 9d.) as were incurred by the defendants in consequence of their farming the land themselves; (3) by charging the defendants with an occupation rent in respect of the land they did not let.

Buckley, J., was of opinion that there had been no such wilful default on the part of the vendors as to disentitle them to interest; and he further held that the real cause of delay was the inability of the purchaser to procure the purchase-money. On both these grounds he held that the first point raised by the summons failed. On the other two points he refused to disallow to the defendants the £469 11s. 9d. and to charge them with any occupation rent, but he thought that they could not be allowed the losses incurred in carrying on the farming business.

The plaintiff appealed.

*H. Terrell, K.C.*, and *Sheldon*, for the appellant.

*Astbury, K.C.*, and *Dunham*, for the respondents.

*H. Terrell, K.C.*, replied.

The arguments used were similar to those reported in the court below.

*Cur. adv. vult.*

VAUGHAN WILLIAMS, L.J.—In this case the vendors refused to execute a conveyance except in a form which they were not entitled to insist upon. The purchaser thereupon brought an action for specific performance and got judgment in that action with costs.

The first question which arises in this case is whether such conduct amounts to wilful default by the vendors so as to exempt the purchaser from payment of interest.

This is a question of contract. It is in no sense a question of judicial discretion. If the conduct of the vendor amounts to "wilful default" the contract exempts the purchaser from the interest during the period of delay caused thereby, and the court has, in my judgment, no jurisdiction to deprive the purchaser of that exemption.

In this case the vendor insisted, under threat of cancelling the contract and forfeiting the deposit, upon the purchaser with twelve days of the 12th of June, 1899, approving a form of conveyance which it was ultimately held he had no right to insist upon.

The purchaser on the 22nd of June issued his writ in an action for specific performance. He succeeded in the action, and got judgment on the 2nd of February, 1900. Buckley, J., is of opinion that this conduct by the vendor does not amount to "wilful default." I cannot agree. I think that the conduct of the vendor did amount to wilful default—did amount, that is, to a conscious abstention by the vendor from doing that which reasonably he ought to have done. I think that the judgments of Romer, J., and the Court of Appeal in *In re Woods and Lewis's Contract*, 46 W. R. 643, [1898] 2 Ch. 211, go a long way to consolidate the results of the authorities into one consistent whole. The judgment of Bowen, L.J., in *In re Young and Harston's Contract*, 34 W. R. 84, 31 Ch. D. 168, is the basis of the judgment both of Romer, J., and of the Court of Appeal. The outcome of this case, to my mind, is this—that it leaves untouched the proposition of Bowen, L.J., that "wilful" implies nothing blamable, but merely that the person of whose action and default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will, and also leaves untouched the words of Lindley, M.R., in *In re Hetling and Merton's Contract*, 42 W. R. 19, [1893] 3 Ch. 269: "Whatever may be the popular meaning of wilful default, whatever the expression may mean in dealing with other matters, it is now settled that moral delinquency, intentional delay, wilful obstruction on the part of a vendor may all be absent and yet there may be wilful default on his part disentitling him to interest under such a contract as that before us." But while the judgments *In re Woods and Lewis's Contract* affirm the statement of law just cited from the judgments of Bowen, L.J., and Lindley, M.R., these judgments also expressly affirm the *dictum* of Bowen, L.J., defining "default" thus: "Default is a purely relative term, just like negligence. It means nothing more and nothing less than not doing what is reasonable under the circumstances—not doing something which you ought to do—having regard to the relations which you occupy towards the other persons interested in the transaction." Honesty of intention, therefore, will clearly not prevent the act of the vendor from being "wilful," but mere failure to perform will not constitute "default"; there must be, to constitute default, neglect of a duty, neglect to do something which the vendor ought to have done having regard to his duty to the purchaser. This view brings the observation of Turner L.J., in *Williams* v. *Glenton*, 14 W. R. 294, L. R. 1 Ch. App. 200, into line, and shows that the proposition established by that case—that mere difficulties of title, although involving a certain degree of default on the part of the vendor, are not sufficient to exempt the purchaser from the payment of interest under the ordinary interest clause—is not an exception grafted by judicial decision on the words of the contract, but is merely an instance in which the courts have uniformly found that the vendor has not failed in doing what is reasonable under the circumstances. It is pointed out by Knight-Bruce, L.J., in *Sherwin* v. *Shakspear*, 2 W. R. 668, 5 De G. M. & G. 517, that, considering the nature of the titles to land according to our institutions and the present course of practice, it could not in general reasonably be expected that at the time appointed for the delivery of the abstract an abstract should be delivered at once clear of all difficulty, of all doubt, or even of all objection. Knight-Bruce, L.J., goes on to point out that the ordinary clauses in a contract for the sale of land show that the parties thereto must have contemplated the possibility of a title imperfect at first or an abstract originally incomplete. This confirms, to my mind, the view that the failure to make title is only an instance in which generally the failure will not involve neglect to do that which the vendor ought reasonably to have done. The conclusions which I have here stated are to a large extent inferences from the terse judgment of Collins, M.R., in *In re Woods and Lewis's Contract*. I should add I do not think Lord Lindley qualifies Bowen, L.J.'s, observations by anything he says in *The Mayor of London and Tubbs' Contract*, [1894] 2 Ch. 524. Applying these conclusions to the present case, in my judgment it was wilful on the part of the vendor to strike out the clause relating to Cunliffe's covenant, but in so doing he did not do anything involving a failure in his reasonable duty as vendor—so far there is no wilful default. But, in my judgment, to add to this erasure the threat, if it was not accepted

to cancel the contract and forfeit the deposit, was a neglect by the vendor to conduct the sale to its completion in the manner in which he ought to have done. This justified, as the result shows, the purchaser in bringing his action for specific performance, and in my judgment the vendor cannot claim interest during the time occupied in bringing the action to a conclusion—that is, from the 22nd of June, 1899, to the 2nd of February, 1900.

To allow him to do so would be to allow the vendor to take advantage of his own wrong. If this were not so, no prudent purchaser would fight the vendor, however unreasonable his claim. The vendor would have a good investment, whatever the result of the action or inquiry. I think it would be lamentable that the liability for interest and the right to it should depend upon the form of the order which the plaintiff accepted. A great portion of the time occupied by the inquiry was occupied by a claim which the learned judge himself has since decided that the vendor could not support.

Here again to give the vendor interest would be to enable him to take advantage of his own wrong.

The conditions in this case are concurrent. The vendor must be willing to convey, and the purchaser to pay the price. But in such a case the vendor who seeks to recover interest must show that he is ready and willing to perform the concurrent conditions so far as it lies on him.

It is said by Buckley, J., that the action ought never to have been brought. The fact that the plaintiff obtained judgment with costs seems the answer to this. Assuming that it was a matter of very little importance to either side whether the conveyance contained this clause, this shows how unjustifiable it was for the vendor to insist upon it with a threat of cancellation and forfeiture.

As to the time occupied by the inquiries ordered, I think that the learned judge ought to have decided the question as to interest by his order. Be this how it may, in my judgment the vendor cannot have interest for the time occupied by him in making claims he could not support.

I have only to add that I cannot agree that it has been shown in this case that the inability of the purchaser to find the purchase-money was, as Buckley, J., puts it in his judgment on the motion to vary the certificate, the *causa causans* of delay. On the contrary, it seems to me that the proper answer to this is given in Buckley, J.'s, own judgment in the action for specific performance. In that action the vendor pleaded that the plaintiff purchaser was not ready and willing because he was unable to pay the balance of the purchase-money. Buckley, J., gives judgment in favour of the purchaser for specific performance, and when Mr. Astbury at the conclusion of the judgment says, "They have had eighteen months and have not been able to find the purchase-money," the learned judge answers, "Because the conveyance was not in a fit form."

If I had to draw an inference of fact myself in this case, I should infer that the purchaser had an extremely good bargain, leaving an ample margin for raising the money. What occurred in the negotiations at the end of the case before us confirms this view.

STIRLING, L.J.—In this case Buckley, J., has held that the plaintiff, the purchaser, is liable to pay interest on the unpaid balance of his purchase-money for two reasons—first, because the defendants, the vendors, have not been guilty of "wilful default" within the meaning of the contract; secondly, because the real cause of the delay in the completion of the purchase is the default of the purchaser. On the appeal both grounds of decision have been controverted and have been fully argued; and it is necessary to consider both. First, has the vendor been guilty of wilful default?

According to the rule laid down in the Court of Appeal in *In re Young and Harston's Contract*, a vendor commits a default if he fails to do something which he ought reasonably to do, regard being had to the terms of the contract which he has entered into with the purchaser; and he is guilty of wilful default if he so fails when he is a free agent and knows what he is doing and intends to do what he does. It follows that the vendor may be guilty of wilful default, although he may not have any intention of breaking his contract, and this appears to be clearly recognized in the judgment of the Court of Appeal delivered by Lindley, L.J., in *In re Hetling and Merton's Contract*. It was subsequently held by the majority of the Court of Appeal in *In re Mayor of London and Tubbs' Contract* that the rule laid down in *In re Young and Harston's Contract* does not apply in cases of "honest mistake or oversight"; and Buckley, J., has held that the present case falls within that category. To ascertain whether this be so the decisions in *In re Hetling and Merton's Contract*, and *In re Mayor of London and Tubbs' Contract* must be carefully examined.

In *In re Hetling and Merton's Contract* two trustees of a voluntary settlement entered into a contract for sale of a piece of land which was subject to a mortgage in favour of Petch and Hetling, the latter being a vendor. The purchaser required that Petch should concur. Petch, who was a solicitor, had gone abroad, having given to his partner a power of attorney, authorizing him to execute deeds and transfer any property held by him as trustee or mortgagee. The vendors knew and relied on his power of attorney but the purchaser declined to complete without a conveyance from Petch himself, and this the vendors after some delay procured. It appears that the purchaser had his money ready on the day fixed for completion, and kept it ready without receiving any interest on it. The court held that the purchaser's objection was well founded; and further, that the delay in completion was attributable to the wilful default of the vendors, and that they were not entitled to any interest on the purchase-money. So far as appears, the vendors there fell into an honest mistake as to the efficacy of the power of attorney on which they relied.

In *In re Mayor of London and Tubbs' Contract* the contract for sale contained a statement as to the title of the vendors, which upon investigation by the purchaser proved to be inaccurate as to a portion of the property. The vendors, upon a requisition being made by the purchaser, admitted the inaccuracy, and and on the day after that fixed for completion delivered a further abstract of title of this part of the property. It appeared that the vendors had a good title and the purchaser ultimately accepted it after a delay of about three months. The question then arose as to whether the vendors were entitled to interest during this period; and it was held by the majority of the court (Lindley and Lopes, L.JJ.) that they had not been guilty of wilful default, and were consequently entitled to interest.

Lindley, L.J., put the matter thus: "Unfortunately the title was not examined or not examined with proper care before the conditions of sale were framed. This was unquestionably a default, but in my opinion it was not 'wilful.' I do not propose to examine this word with scientific accuracy; it is sufficient to observe that to make up one's mind not to verify a statement is 'wilful,' but that simply not to think about verifying it is not." It appears, in my opinion,

from the rest of the judgment that the general rule laid down in *In re Young and Harston's Contract* was not intended to be departed from. Further, I do not think that it was intended to lay down that every case of honest mistake lies without that rule; so to hold would seem to me to be inconsistent with the decision in *In re Helling and Merton's Contract.*

I attach great weight to the observations made by Lindley, L.J., in *In re Mayor of London and Tubbs' Contract* on the meaning of the word "wilful"; they appear to me to indicate with sufficient clearness for ordinary purposes how the line is to be drawn in this class of cases. It is important also to observe that there the vendors in answer to the purchaser's requisitions admitted their mistake and proceeded to rectify it. The decision, therefore. only covers the case of a mistake honestly made at first and not persisted in when called to the vendor's attention; it is a different matter where a vendor has in the first instance been led through honest mistake or inadvertence into some act or omission which amounts to a default, but persists in it when it is called to his attention. In that state of things it seems to me that a default originally attributable to mistake or inadvertence may become wilful.

It was argued before us, as it was in the court below, that the decision in *In re Mayor of London and Tubbs' Contract* only applies where a vendor makes a mistake as to title. I agree with Buckley, J., in thinking that this distinction is not well founded. It seems to me that the rule must be the same whether the mistake of the vendor relates to title or evidence of title or conveyance. I wish, however, to point out that not every failure on the part of a vendor to fulfil his contract is a "default"; in each case the circumstances must be looked at; and if it turns out that the vendor using reasonable care has failed to observe some matter which gives rise to a proper requisition on the part of the purchaser, but proceeds with reasonable diligence to comply with the requisition, he will not be guilty of a default: *In re Woods and Lewis's Contract.*

In my opinion the circumstances may be such that the vendor will not commit a default unless and until the court has determined that his contract puts him under an obligation to comply with the purchaser's requisition.

In the present case the default complained of is the refusal of the vendor to execute a conveyance to the purchaser in the form required by the purchaser.

From the judgment delivered by Buckley, J, at the trial of the action, it appears that the purchaser claimed to be entitled under the purchase contract to the benefit of covenants entered into by one Cunliffe with the vendors by an indenture dated the 29th of August, 1898; and in the draft conveyance as ultimately tendered by him there were inserted for the purpose of passing this benefit these words: "Together with the full benefit of the covenants on the part of the said W. Cunliffe with the said E. M. Stone and F. W. Stone contained in the said indenture of the 29th day of August, 1898."

The vendors agreed that the purchaser was to have the benefit of the covenants, and left the words just quoted standing in the draft as finally approved on their behalf, but added these words—"so far as the said E. M. Stone and F. W. Stone are now at law or in equity entitled to the benefit of such covenants without thereby warranting that such covenants are now enforceable by the assigns of the said E. M. Stone and F. W. Stone." The purchaser objected to these words, and the vendors, on the 21st of June, 1899, refused to execute a conveyance without them, and persisted in such refusal. Whether they were right in so doing was the only question between them and the purchaser when the action was brought and was tried.

The learned judge decided that the vendors were bound to execute a conveyance without the addition on which they insisted. This decision has not been appealed from, and in my judgment it was perfectly right. Then arises the question, did the vendors act reasonably in refusing to comply with the purchaser's requirements as to the form of conveyance? In my opinion they did not act reasonably. The learned judge said that the parties were fighting about nothing, meaning, as I understand, merely about a matter of form. The conveyance is prepared by the purchaser, and it was a matter of great importance to him that it should be clearly expressed upon the point as to which the question arose; while in this respect the form was a matter of no importance to the vendors. The vendors therefore, in my opinion, committed a default, they did so deliberately, and consequently were guilty of wilful default during part at least of the time subsequent to the 21st of June, 1899. Secondly, was the delay in the completion of the purchase attributable to the default of the purchaser? It is admitted that the purchaser was unable to complete the purchase out of his own moneys; there is no evidence that he ever found anyone to advance the unpaid balance. Buckley, J., was of opinion that the real cause of the delay was that the purchaser was not provided with the money to complete his purchase, and I am unable to differ from this conclusion.

Now the contract provides that the purchaser shall pay interest "if from any cause whatever other than wilful default on the part of the vendors the completion of the purchase is delayed." Here the real cause of delay was not the wilful default of the vendor; and it appears to me that the purchaser, insisting as he does on specific performance of the contract, cannot be relieved from payment of interest. To hold otherwise would in my opinion be inconsistent with the decision of the Court of Appeal in *In re Mayor of London and Tubbs' Contract*, where the same point arose, and all the learned judges agreed that even if the vendors were guilty of wilful default, the purchaser was liable for interest.

I think, therefore, that on this last ground the appeal fails and must be dismissed.

COZENS-HARDY, L.J. — This appeal raises an important question as to the effect of the common form clause providing for payment by the purchaser of interest on purchase-money from the day named for completion except in the case of wilful default on the part of the vendor. The facts are happily such as have not often to be considered by the court. [His lordship stated the facts, and continued:] As to the occupation rent, for the reasons assigned by Buckley, J. I think the plaintiff's contention is hopeless.

But as to the claim for interest there is more difficulty. It was not seriously argued before us that the plaintiff is not liable to pay interest for some period. And in my point of view I think the plaintiff must pay interest from the 2nd of January, 1899, to the 22nd of June, 1899, when he first approved a conveyance in what the court held to be a proper form.

The subsequent period may conveniently be divided into two parts: (*a*) From the writ to the judgment; (*b*) from the judgment to the present time. The position of vendor and purchaser under a contract which is silent as to possession and as to interest does not now admit of doubt. From the time when the purchaser could prudently take possession—that is to say, from the time when a good title is first shown—the parties, in the view of a court of equity, change characters. The purchaser becomes the owner of

the land and entitled to the rents and profits and bound to discharge outgoings, and the vendor becomes entitled to the purchase-money with interest until actual payment; and in respect of this right the vendor has a lien upon the land for his unpaid purchase-money which the courts will enforce. Whether the interest is greater or less than the rents and profits is wholly immaterial.

There may, however, be conduct on the part of the vendor or the purchaser which suffices to relieve the purchaser, wholly or in part, from the liability to pay interest. A familiar example is where the purchaser, complaining of delay, informs the vendor that the purchase-money is lying idle on deposit at a bank, and that he will object to pay anything beyond the bank interest. As it is often difficult to ascertain precisely when this change would take place, it has long been usual to insert express stipulations fixing a date for completion without reference to the question whether a good title has been shown, from which date, on the one hand, the purchaser is to be entitled to the rents and profits, and, on the other hand, the vendor is to be entitled to interest. Such a stipulation recognizes that in dealings with land in England it is the rule, and not the exception, that actual completion does not take place on the day named. There are two forms, the first of which says that "if from any cause whatever" the purchase is not completed on the day named the purchaser shall pay interest at the agreed rate, and the second of which adds the words "other than the wilful default of the vendor." The courts have so construed the first of these forms as to prevent a vendor from taking advantage of his own wrong: see *Williams* v. *Glenton*; *In re Woods and Lewis's Contract*, 46 W. R. 643, [1898] 2 Ch. 211, *per* Lindley, M.R., at p. 213.

The second of these forms may be somewhat more extended in its operation in favour of the purchaser, but I do not think the difference is great. If both vendor and purchaser are to blame, the exception of wilful default of the vendor has no operation, and, indeed, the court will always struggle to prevent the purchaser from receiving the rents and profits without any correlative liability to pay interest on his purchase-money: see *Birch* v. *Joy*, 3 H. L. Cas. 565. It is, moreover, well settled that the second form does not apply even though the purchaser is in no way to blame if the delay is due to any inability on the part of the vendor to make out a title in due time, or to what has been called by Lord Lindley "an honest mistake" on his part. There are at least three classes of objection or difficulty which may arise in completing a purchase. There are, first, objections to the vendor's title; second, objections as to the evidence or proof of title; and third, objections as to the form of conveyance. The distinction between a question of title and a question of conveyance is very refined. The court, either on a summons under the Vendor and Purchaser Act, or in an action for specific performance, deals with objections of each of these three classes, and as a rule visits the unsuccessful litigant with the costs of the litigation. I am not, however, aware that any such distinction has ever been drawn as that a vendor wrongfully refusing to comply with an objection to title should be decreed not guilty of a wilful default but would be held guilty of a wilful default if the objection were one as to conveyance and not as to title. In either case the vendor may act with perfect honesty and under skilled advice, and I can see no reason why, having regard to the difficulties incident to the law of real property and the practice of conveyancing, any such distinction should be drawn. Reference has been made to cases in which the title has been accepted, the forms of conveyance settled, and the conveyance engrossed, but the vendor has not been ready to execute the conveyance, and in such a case the courts have held that it was wilful default on his part. In those cases all difficulties alike of title and of conveyance had been got rid of, and it was naturally held that the vendor claiming interest would be taking advantage of his own wrong, or be guilty of wilful default.

Applying these observations to the facts of the present case I cannot regard the view taken by the vendors acting under the advice of counsel as to the proper form of the conveyance to be other than an honest though mistaken view. They were made to pay the costs of the action as they would have been made to pay the costs of a summons under the Vendor and Purchaser Act addressed solely to the point whether the conveyance was in proper form. But I cannot hold that there was within the meaning of the rule any such wilful default as to exempt the purchaser from his liability to pay interest. This covers the period up to judgment.

With respect to the period since the judgment I think there is much less difficulty. It is impossible to say that the delay was due solely to the vendors. The plaintiff denied his liability to pay any interest and took the judgment in a form which enabled him to raise this point. He also contended that the defendants ought to be charged with an occupation rent. These two contentions he raised in the proceedings before the master, and upon his summons to vary the master's certificate, and he has again raised them in the notice of appeal to this court. Under these circumstances I think the plaintiff is liable to pay interest not merely for the period before action, but also for the whole period from the writ until the actual completion shall take place. I am aware that the rents and profits are small and the interest is large, but in my view the rights of the parties cannot depend upon this. Buckley, J., based his judgment partly on the ground that the delay was not attributable to the alleged wilful default on the part of the vendors, but to the plaintiff's inability to procure the purchase-money. I do not dissent from this view, but I prefer to base my judgment on the ground that there was no wilful default on the part of the vendor. The result is, that in my opinion Buckley, J.'s, order against the plaintiff on the summons to vary was correct, and that this appeal ought to be dismissed with costs.

Solicitors, *Swepstone & Stone; Henry White.*

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From Registrar in Bankruptcy. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Jan. 30.

*In re* CHARLES BRIGHT.
*Ex parte* CHARLES BRIGHT. (*a.*)

*Bankruptcy — Jurisdiction — Foreigner "ordinarily resident"—Hotel—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-section* 1 (d).

*A foreigner who, for purposes of litigation, has stayed in England at hotels during nine months of the year immediately preceding the date of the presentation of a bankruptcy petition, has "ordinarily resided" within the meaning of the Bankruptcy Act,* 1883, *s.* 6, *sub-section* 1 (d).

This was an appeal from a receiving order made by Mr. Registrar Giffard.

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

The question for decision was whether the debtor had ordinarily resided in England within the meaning of the Bankruptcy Act, 1883, s. 6, sub-section 1 (*d*), which enacts as follows: "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

The facts were as follows:

Mr. Bright, an American subject with an American domicil, came over to England in January, 1900, for the purpose of litigation. He stayed in England until the 7th of August, 1900, on which date he returned to America. He came back to England on the 11th of November, again for litigation purposes, and remained until May, 1901. Whilst in Europe he stopped at various London hotels and also paid several short visits to the continent, chiefly to Paris, where he had a flat. For three months—viz., May to July, 1900, he had, without paying anything, occupied the room of a friend at the Hotel Cecil.

In May, 1901, a bankruptcy petition was presented against him, and a receiving order was made on the 30th of July, 1901.

This was affirmed by the Court of Appeal in November, 1901, but in November, 1902, the court ordered the petition to be re-heard on the ground that there had been a misunderstanding as to the facts.

The registrar re-affirmed his decision and came to the conclusion on the evidence that the debtor had resided in England for 242 days during the year in question—viz., May, 1900, to May, 1901.

The debtor appealed.

*Gore-Browne, K.C.*, and *Newton Crane*, for the debtor.—Mr. Bright never stayed anywhere except at hotels, and hotels are something quite different from lodgings. The mere staying at an hotel is not sufficient: *In re Hecquard*, 38 W. R. 148, 24 Q. B. D. 71; *In re Norris*, 5 Morr. 111. The leaning of the courts is against treating a foreigner as having ordinarily resided: *In re Cunningham*, 33 W. R. 22, 13 Q. B. D. 418. A residence for litigation purposes is not ordinary residence. Mr. Bright was on many occasions on the continent, and he only came over here when he was obliged. The character of the residence must be looked at as well as the quantity of the residence.

*C. A. Russell, K.C., Muir Mackenzie*, and *Disturnal*, for the petitioning creditors, were not called upon.

*Van Neck*, for other persons interested.

COLLINS, M.R.—In this case there is no controversy about the domicil of the debtor. The question is whether he has ordinarily resided or had a place of business in England within a year of the presentation of the petition. It was decided by this court in November, 1901, on the statement of the facts then before them, that the debtor had so resided. The matter, however, was subsequently sent back to the registrar on the ground that there had been some material misunderstanding, the court, in allowing the rehearing, acting *ex maiori cautela*. The learned registrar has again held that the debtor had "ordinarily resided" and had "a place of business" in accordance with the section. In dealing with the decision of the registrar, unless we can see that he has applied some wrong principle of law, we ought not to interfere with his decision on a question of fact. The facts show that for only three months during the year in question was the debtor continuously absent from London. During the rest of the time he was in London for a definite purpose, and, though he made occasional visits to the continent, yet London was his central place of dwelling. It has been argued that in point of law the debtor cannot have "resided," because his place of dwelling was not a lodging-house but simply one or more hotels, and that, unless it is shown that he paid for his rooms, whether he occupied them or not, he cannot be said to have resided in them. It is important to bear in mind that the "residence" of the section is not residence at large, but residence within a particular year. A long sojourn is not a *sine qua non*. The residence may be a temporary residence for a particular purpose. There must, of course, be some duration—for instance, two or three days would not be sufficient. The purpose for which the debtor was here is one of the elements to be taken into consideration. If he was here for a particular purpose which could not be conveniently disposed of without his presence, and was here for a substantial time, then it becomes a question of fact whether he was ordinarily resident or not. In my opinion there is abundant evidence to support the learned registrar's conclusion.

ROMER, L.J.—I am of opinion that the learned registrar has come to a correct decision on a point of fact.

COZENS-HARDY, L.J.—I agree.

*Appeal dismissed.*

Solicitor, *J. D. B. Lewis; Church, Rendell, & Co.; Blair & W. B. Girling.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Jan. 28.

ZIMBLER *v.* ABRAHAMS. (*a*.)

*Landlord and tenant—Contract of letting—Document not under seal—Weekly rent—Contract not to give notice to quit—Lease for life—Agreement for lease—Specific performance—Ejectment.*

*By a document not under seal it was expressed that the plaintiff had let a house to the defendant at a weekly rent, and that the plaintiff agreed not to raise the rent so long as the defendant lived in the house and paid rent regularly, and that the plaintiff would not give the defendant notice to quit, and that, if at any time the defendant wished to move out, the plaintiff promised to return to him the sum of money he had paid on taking possession.*

*In an action of ejectment brought after the defendant had refused to quit, in pursuance of a week's notice to quit,*

*Held, that the interest intended to be created by the document was a lease to the defendant for his life subject to certain conditions; that though it would be void as such a lease for want of a seal, it might be used as an agreement for such a lease; and that such an agreement was capable of specific performance; and that, therefore, the defendant, electing to ask for specific performance, was entitled to judgment.*

Appeal from the judgment of Darling, J., on the trial of an action without a jury.

The action was brought by a landlord against a tenant to recover possession of a house.

Prior to the month of October, 1896, the defendant held the premises of the plaintiff as a weekly tenant.

On the 5th of October, 1896, the parties having

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

agreed to an alteration in the weekly rent, a document in the following terms, and not under seal, was signed by the plaintiff's agent and delivered to the defendant:

"I, the undersigned, S. Beron, of 13, Samuel-street, Commercial-road, E., have let to Mr. Abrahams the house situated at 24, Morgan-street, Commercial-road, E., at a weekly rental of 23s., and I agree not to raise Mr. Abrahams any rent as long as he lives in the house and pays rent regular. I shall not give him notice to quit. Any time Mr. Abrahams wishes to move out, I promise to return to him the £6 he has paid me on taking possession of the house.—S. BERON."

On the 30th of September, 1901, a week's notice to quit was given on behalf of the plaintiff to the defendant.

The defendant refused to go out of possession on the expiration of the notice, but remained in the house and proposed to continue payment of the weekly rent. His contention was that the plaintiff was bound by his agreement that he would not give him notice to quit.

The plaintiff refused to receive further rent and brought this action for recovery of possession. He alleged that the defendant held the premises on a weekly tenancy, and his case was that the condition as to not giving notice to quit was repugnant to the nature of a weekly tenancy, and was, therefore, not binding. Further, the plaintiff contended that, if the document, on the construction of it, amounted to a demise for the life of the defendant, it was as a lease for life void for not being under seal.

Darling, J., gave judgment for the defendant.

The plaintiff appealed.

*Tindal Atkinson, K.C.*, and *Holloway*, for the plaintiff.

*Foà*, for the defendant.

The following cases were cited in argument: *Browne* v. *Warner*, 14 Ves. 156, 409; *Cheshire Lines Committee* v. *Lewis*, 50 L. J. Q. B. 121, 29 W. R. Dig. 111; *In re King's Leasehold Estates*, L. R. 16 Eq. 521, 22 W. R. Dig. 129; *Parker* v. *Taswell*, 6 W. R. 608, 2 De G. & J. 559; *Wood* v. *Beard* 2 Ex. D. 30, 25 W. R. Dig. 134; *Mardell* v. *Curtis*, [1899], W. N., p. 93.

VAUGHAN WILLIAMS, L.J.—I think that the judgment of Darling, J., should be affirmed, but that the terms of it should be somewhat varied. Where there is an attempt to create an interest in land which for some reason or other fails, and in the same document in which that interest in land is attempted to be created there is an agreement by the grantor that he will not during the life of the grantee take any steps to enforce his, the grantor's, rights to resume possession of the land, then, in my opinion, unless the agreement creates in the grantee either a leasehold estate, or something beyond a leasehold estate, like a life estate, such agreement cannot be enforced. It may be as clear as possible that the grantor and the grantee did not intend that any action should be brought by the grantor to recover possession of the land during the life of the grantee. Still, however plain that may be, in my judgment, unless the agreement is such as to create in some way or other an effective interest in land in the grantee, the grantor has a right to bring his action to recover possession, and the right of the grantee, if any, under the agreement, is not a right to defeat an action by the grantor in the nature of ejectment, but a right to recover damages for breach of contract.

The whole question, therefore, in this case is whether, in effect, the document with which we have to deal either creates an immediate interest in land in the grantee or gives the grantee a right to call upon the grantor to execute such a document as shall convey to the grantee an interest consonant with the agreement and defeating the grantor's right to bring an action to recover possession of the land. It seems to me to be plain that this document does not create an immediate interest in land at law as between the plaintiff and the defendant. It does not vest in the defendant any interest in land whatsoever. That is so by reason, among other things, of the statute 8 & 9 Vict. c. 106, which requires any conveyance of an interest in land (subject to certain exceptions) to be under seal. But it is contended that, though this document is not under seal, and therefore ought not to be construed as a present demise, yet it may be construed as an agreement to demise of which a court of equity would grant specific performance; that, though the effect of the statute may be such as to render it impossible to rely on the document as an effective lease for the want of a seal, yet the grantee may treat it as being an agreement for a lease and as giving him the right to come to a court of equity and ask for an order for specific performance of it. And it is said that that is equally so, whether the document appears on the face of it to be a mere agreement to grant a lease, or whether it appears on the face of it to be a present demise but fails to comply with the requirements of the statute by not being under seal. For the first part of the proposition reference is made to the decision of Lord Eldon in *Browne* v. *Warner*, and for the second part reliance is laid on the judgment of Lord Chelmsford in the case of *Parker* v. *Taswell*. The latter judgment contained the following passage: "But the instrument now in question could not amount to a lease, because it was not signed by an agent lawfully authorized by writing, nor was it signed in the name of the principal, so as to render it a lease binding upon the lessor. Assuming, however, that it had been signed in the name of the lessor, and would, therefore, have amounted to a lease, as containing words of present demise, yet there is nothing in the Act to prevent its being used as an agreement, though void as a lease because not under seal."

I suppose, therefore, that I must take it that, unless there is something in this document rendering it impossible for judgment to be given for specific performance, the grantee is entitled to specific performance, if it either appears to be, within the rule laid down by Lord Eldon, a mere agreement to grant a lease, or if it appears to be in terms a present demise, but void as such under the Act of 8 & 9 Vict. for not being under seal. That seems to be the effect of the authorities. And if the defendant is entitled to specific performance there is an end to this action. If he ever had a right to have a lease executed he cannot be ejected. unless in accordance with any of the terms of the agreement, as by a notice to quit, any interest which he may have acquired has come to an end. Then what interest was intended to be created by this document? I find a difficulty in construing it as an agreement to create a tenancy from week to week. If not, what is it? It seems to me to be an agreement for a lease for the rest of the defendant's life, subject to two conditions—(1) that that the lessor may turn him out of possession if he does not pay his rent regularly; and (2) that the defendant may determine his own life estate by deciding to move out and, presumably, giving notice of his intention to do so.

Speaking for myself I should have doubted whether a court of equity would grant specific performance of a contract of that sort; for the moment after specific performance has been ordered it will be open to the

lessee to determine his life estate and make the lease futile. The authorities, however, are in favour of the view that this is an agreement of which specific performance might be ordered.

But I do not think that our judgment ought to end there. This is an action for recovery of possession of land; and it seems to me that the plaintiff is entitled to recover unless the defendant within a specified time elects to take specific performance of the agreement and pays the arrears of rent now due. If the defendant within the time limited puts himself in a position to get specific performance by paying the arrears of rent, the appeal will be dismissed.

STIRLING, L.J.—I am of the same opinion. If the words of this instrument are sufficient to make it a demise, it is, as such, bad at law for not being under seal. But the judgment of Lord Chelmsford in *Parker* v. *Taswell* shows that that does not conclude the case. Although the instrument is void as a lease because it is not under seal, it may be used as an agreement for a lease. The question arises whether it is an agreement which is capable of specific performance. As regards that question, a doubt was expressed by Brett, L.J., in *Cheshire Lines Committee* v. *Lewis*. But in the case of *Mardell* v. *Curtis*, which was similar to the present case, Cozens-Hardy, J., granted specific performance. I see no reason to dissent from that decision, and I think that this agreement is capable of specific performance. I agree that the defendant, electing to ask for specific performance, is entitled to judgment, on condition that he pays the arrears of rent within the time limited.

MATHEW, L.J., concurred.

*Judgment varied.*

Solicitors for the plaintiff, *Brighten & Lemon.*

Solicitors for the defendant, *G. Van Damm & Co.*

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## High Court of Justice.

Chan. Div. Byrne, J. } Nov. 6, 26; Jan. 26.

*In re* RYLAND.
ROPER *v.* RYLAND. (*a.*)

*Will—Charity—Terminable interest of real estate—Tenant for life—Consent—Mortmain—Vesting—Official Trustee of Charity Lands—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5, 6.

*A testator, by his will and codicil, gave his real and personal estate to trustees on trust for sale, but directed that no part of his freeholds and leaseholds should be sold during the life of his widow without her consent; and, subject to certain legacies and annuities, he gave one-fourth of the income, rents, and profits of his estate to his widow, and the remaining three parts of said income to certain charities; and he directed that after his widow's decease the whole of the said residuary estate should go to the said charities. The widow was alive, and had not consented to a sale, and more than a year had elapsed since testator's death.*

*Held, that the will gave two interests to the charities:* (1) *a reversionary interest, expectant upon the widow's decease, in the proceeds of sale of land, and this was not land within the meaning of the Mortmain and Charitable Uses Act*, 1891; (2) *a terminable interest in the income of land, which the trustees were expressly forbidden to sell during the lifetime of the widow without her consent in writing, and this was land, which, not having been sold within the year, had vested in the Official Trustee of Charity Lands.*

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Summons.

This was a summons for the construction of the will of William Ryland, late of Rye Lodge, Sheffield, deceased, to determine, *inter alia*, whether under the provisions of the Mortmain and Charitable Uses Act, 1891, the legal estate in a portion of testator's real estate comprised in the said will, and not yet sold, vested in the Official Trustee of Charity Lands. Herbert J. Roper, one of the executors and trustees of the will, was plaintiff, and Clara Ryland, testator's widow, and the other acting trustee and executrix under the will, certain charities, and the Official Trustee of Charity Lands were defendants.

The facts of the case were as follow:

By his will, bearing date the 13th of July, 1900, the testator gave his real and personal estate to his trustees therein named upon trust to carry out the following instructions. And after bequeathing certain legacies and annuities to his wife and others, and making a bequest of certain drawings as therein mentioned, testator directed all his pictures to be sold as therein mentioned and any pictures not sold to be disposed of as therein provided, and continued: "My trustees shall invest the net moneys realized from the sale of my pictures in any societies authorized by law for the investment of trust funds, or in the purchase of freehold ground-rents in England, or of debentures or debenture stock of any railway the works whereof shall be situate in Great Britain or which shall for the time being be paying dividends on its ordinary stock, or on the mortgage debenture bonds or mortgage debenture stock of any limited company in England which shall for ten years preceding the investment have paid dividends of not less than an average of 5 per cent. per annum on its ordinary shares, but not in any other mode of investment, and may from time to time vary or transfer such stock for others hereby authorized, in their discretion; and the income to be applied during the lifetime of my wife as follows: after satisfying the above-mentioned annuities for the time being payable, one-fourth to my said wife during her life and the remainder equally between and amongst the National Lifeboat Institution, the Port of Hull Society and Sailors' Orphan Home (Orphanage Branch), the Royal Masonic Institution for Boys and Royal Masonic Institution for Girls; and after the death of my wife the said purchase-moneys shall sink into and form part of my residuary estate. My trustees shall convert into money the residue of my estate at their discretion, but I direct that my trustees shall sell no part of my freeholds or leaseholds during the lifetime of my said wife without her consent in writing, and my executors and trustees are authorized to retain any of my investments in their present form without incurring any responsibility for any loss to be occasioned by such retention." And testator directed that the residue of his estate should be divided as follows: Two-fifths to the National Lifeboat Institution, two-fifths to the Port of Hull Society and Sailors' Orphan Home, one-tenth to the Royal Masonic Institution for Boys, one-tenth to the Royal Masonic Institution for Girls, in accordance with the directions thereby given.

On the 4th of October, 1900, testator added a codicil to his will whereby he declared his intention as follows: (1) That the annuities by his said will given should be payable out of his general estate, and not exclusively out of the moneys realized from the

sale of his pictures. (2) That the directions as to the mode of investment of moneys realized from the sale of his pictures should apply also to his general estate as and when the same should be realized. (3) That the income of his general estate, after satisfying the annuities for the time being payable, should be applied in the manner in his will described with reference to the income arising from the moneys realized from the sale of his pictures.

The testator died on the 11th of October, 1900, and his will was, on the 28th of December, 1900, proved by two of his executors, the third having renounced probate, at the Wakefield District Registry. A year had thus elapsed since the testator's death, and all the real estate comprised in the will had not been sold.

The official trustee claimed that the legal estate had vested in him.

*G. Cave*, for the plaintiff.

*Levett, K.C.*, and *Nicholas*, for the widow.

*Vaughan Hawkins*, for the official trustee.—So long as there is a prohibition on sale there is no equitable conversion. *In re Sidebottom*, 50 W. R. 641, [1902] 2 Ch. 389, has no application to this case, and section 5 of the Mortmain and Charitable Uses Act, 1891, must apply: *Attorney-General* v. *Dodd*, 42 W. R. 524, [1894] 2 Q. B. 150; Lewin on Trusts (7th ed.), pp. 739, 810, 811.

*W. M. Cann*, *M. Romer*, and *Peterson*, for the charities.

*In re Wilkinson*, [1902] 1 Ch. 841, 50 W. R. Dig. 22, was also referred to.

*Cur. adv. vult.*

BYRNE, J. (after stating the facts).—The first question is whether or not, a year having elapsed since the date of the death of the testator and the time for sale not having been extended under section 5 of the Mortmain and Charitable Uses Act, 1891, the interests given by the testator to charities have vested in the Official Trustee of Charity Lands under the same Act. It will be observed that there is a trust for sale applicable to the whole of the land which must be exercised upon the death of the widow, but the exercise of which during her lifetime without her consent in writing is expressly prohibited.

It is settled by the decision of the Court of Appeal in the case of *In re Sidebottom*, that the proceeds of the sale of land subject to an immediate trust for sale are not land within the meaning of the Act of 1891, and that the provisions of sections 5 and 6 have consequently no application. In such a case the charity takes the interest in the proceeds given to it without any obligation to apply for an extension of time should the trustees neglect or be unable to sell within a year from the death of the testator, although this does not justify the trustees in indefinitely postponing the sale. Where the interest given is reversionary, if it is only an interest in proceeds of sale subject to a trust of sale to take effect immediately upon prior life or other estates in the land itself, I think such an interest is also not land within the meaning of the Act of 1891, and that the provisions of section 5 and 6 do not apply. It appears to me that upon the true construction of the will and codicil in this case there are in fact two interests given to the charities—the one a reversionary interest which is not land within the meaning of the Act, and as to which there is no necessity under this Act for an extension of time and no question of vesting in the Official Trustee of Charity Lands, and the other an immediate terminable interest in the income of land which the trustees are expressly forbidden to sell during the lifetime of the widow without her consent in writing. No such consent has been given, and at the expiration of a year from the testator's death the land from which the income arises remained, and it still remains, unconverted. I consider that the interest in the income given to the charities is land within the meaning of the Act, and that consequently, such interest not having been sold within the year, and no application under the Act for an extension of time having been made within the period, it has by force of the Act vested in the Official Trustee of Charity Lands. It appears to me that the words of section 6 are clear and precise, and that there can be no reasonable ground for saying that the court can avoid the vesting by an order extending the time on a subsequent application. There is a class of cases to which I was referred, showing that when there is a trust for conversion with the consent of a certain person, the introduction of the words "with the consent" was not sufficient to prevent conversion, there being an absolute trust for conversion. But it appears to me that I have a different case to deal with here, because, as I have said, there is an express negation of power to sell, except with consent in writing.

Then there is one other point I may mention, although it is not now before me for decision, I am not prepared to say that in the hands of the official trustee of the charities there is not power in them, in the Charity Commissioners, or in the court, as the case may be, to enlarge the time notwithstanding the fact that the year has elapsed. I do not decide that because it is not before me. [His lordship declared that the interest of the charities during the life of the widow in the income of the real estate had vested in the official trustee.]

Solicitors, *Williamson, Hill, & Co.*, for *Storey, Williams, & Storey*, Halifax; *Waterhouse & Co.*; *Parker, Garrett, Holman, & Howden*; *Rowcliffes, Rawle, & Co.*, for *Cooper & Sons*, Manchester.

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Chan. Div. Buckley, J. — Feb. 4, 5.

*In re* ROMAIN. (*a.*)

*Solicitor—Remuneration—Conveyancing—Purchase and re-sale — Scale fees — Negotiation — Commission to agent — "Completing" conveyance — General order under Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *Schedule I., Part I., r.* 11.

*In order to earn the scale fee for negotiating a purchase or a sale, a solicitor must arrange it—that is to say, must substantially do all the negotiations connected therewith, and not merely be one of a group of persons who negotiate; he must also show that no commission has been paid to another agent in respect of the negotiation.*

In re Withall, 39 *W. R.* 529, [1891] 3 *Ch.* 8, *followed.*

*In order to earn the scale fee for completing a purchase or sale, he must do all the work specified in the schedule, so far as the contract requires it to be done. Where there is a purchase and a re-sale of the whole of the purchased property, and the conveyance is from the vendor to the ultimate purchaser, the solicitor is not entitled to such a scale fee.*

In re Read, 42 *W. R.* 601, [1894] 3 *Ch.* 238, *distinguished*

In re Baillie & Co., 15 *Times L. R.* 277, *followed.*

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

Adjourned summons.

This was an application on the part of a client to review the decision of the taxing-master, refusing to disallow certain items in a solicitors' bill for work done in connection with the purchase and re-sale of some house property.

On the 19th of February, 1902, Finkelstein and Diamant introduced the house property in question to the notice of the applicant, one Barnett Levy, with a view to its purchase and re-sale by him at a profit; on the same day they received a commission note from him, under which they were to receive £75 if the sale to him went through. He thereupon put himself into communication with a firm of estate agents, who were acting for the vendor, and who offered to submit his offer of £3,000 to the vendor.

On the 24th of February the estate agents informed Levy that there was a better offer for the property. On that day Levy, on the advice of Finkelstein and Diamant, consulted the solicitor.

On the 4th of March, Levy, in the presence of the solicitor, himself bid £50 more than another offer of £3,300, and the result was the purchase.

In the meantime, on the 26th of February, the commission note of the 19th of February had been replaced by another arrangement between the parties. Levy paid £10 in respect of the £75 to Diamant, and gave him another commission note for £45, payable if the re-sale to Davis should be carried through. Levy at the same time promised Finkelstein another commission note (which he ultimately gave him on the 6th of March, after the re-sale had been made) for £35 if the sale to Davis went through.

The re-sale to Davis was arranged on the 5th of March in the solicitor's office in the presence of Finkelstein and Diamant. Diamant, in an uncontradicted passage in his affidavit, swore that at the interview he opened the matter by "discussing the price with Davis, Levy having told me before the meeting that he would not take less than £3,700, which sum Davis eventually agreed to pay."

The conveyance, when prepared, was one from the original vendor to Davis, Levy being made a party. The applicant said that all that the solicitor had done in connection with it was to receive the abstract from the original vendor, copy it, and forward it to Davis's solicitors, to receive the requisitions from Davis's solicitors, copy them, and forward them to the original vendor, and that a similar process took place in regard to the observations and further requisitions. The solicitor said he had done more.

The items to which the applicant objected were—two scale fees for negotiating the purchase and re-sale respectively, and two scale fees, one for investigating the title and preparing and completing the conveyance to Levy, and one for deducing the title and perusing and completing the conveyance to Davis.

The master disallowed the objections, and the present summons was taken out. The applicant did not dispute that the solicitor was entitled to some remuneration.

*P. S. Stokes* and *C. J. Mathew*, for the applicant.—The solicitor is not entitled to the scale fee for negotiating the purchase and re-sale, by reason of rule 11 of the rules under the Solicitors' Remuneration Act, 1883. He has not shown that he arranged the sale, and the price, and terms and conditions; neither has he shown that "no commission was paid by the client to an agent" in respect thereof: *In re Withall*, 39 W. R. 529, [1891] 3 Ch. 8; *Drielsma* v. *Manifold*, 42 W. R., 578, [1894] 3 Ch. 100. In the present case it is clear that Finkelstein and Diamant took the main part in arranging the sale and were paid for so doing. *In re MacGowan*, 39 W. R. 227, [1891] 1 Ch. 105, is not against us, because it was there held that the work in respect of which a commission was paid was something which did not come within the expression "negotiating a sale of property." As to the charge for completion, before the solicitor can charge the scale fee he must show that he has done all the services mentioned in the schedule: *In re Lacy & Son*, 32 W. R. 233, 25 Ch. D. 301. This case was said to have been distinguished in *In re Read*, 42 W. R. 601, [1894] 3 Ch. 238. But in *In re Read* there had been a purchase and a sub-sale of part of the property included in the original purchase, and the solicitor had done work in connection with both the purchase and the sub-sale. That was pointed out by the Court of Appeal in *In re Baillie & Co.*, 15 Times L. R. 277, where, as in the present case, there was a conveyance from the original vendor to the ultimate purchaser, and it was held that the solicitor was not entitled to charge two scale fees.

*H. S. A. Henriques*, for the respondent.—As to the negotiation fee, the solicitor did in fact negotiate both the sale and the re-sale. Finkelstein and Diamant took no part in arranging the contract. All that they did was to introduce the purchaser; that is no part of the negotiation of the sale: *In re Withall*. Consequently the fact that they received a commission in respect of it is immaterial. The master decided this part of the case on the authority of *In re MacGowan*, and I submit that he is right. On the second point, the case falls within the principle of *In re Read*. *In re Baillie & Co.* is distinguishable; the ground on which it was decided was that the contract in respect of which the scale fee was charged was never really carried out.

BUCKLEY, J.—In this case I am unable to agree with the conclusion at which the taxing-master has arrived. If the matter involved a question of detail, of which he has very much greater experience than I, I should have more hesitation in differing from him than I have, but the question I have to determine is really one of principle arising from the construction of these rules and the decisions upon them. Now, if it were necessary to decide the point, I should, upon the affidavits, have very great doubt whether the solicitor in this case was employed to negotiate at all. But it is not necessary to determine that question, because, even if he was appointed to negotiate, I think the scale fee is not applicable for other reasons. [His lordship then stated the facts as to the negotiations, and continued:] The result of all this, as it seems to me, is this, that even if the solicitor did take some part in the negotiation, he did not take the entire part in it. Now, on that statement of the facts, I turn to rule 11, on which the question arises: "The scale for negotiating shall apply in cases where the solicitor of the vendor or purchaser arranges the sale or purchase, and the price, and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other agent." Now, as Bowen, L.J., pointed out in *In re MacGowan*, there are two things to be satisfied—first, affirmatively, the solicitor must arrange the things mentioned; and further, negatively, no commission must be paid by the client to an auctioneer, or estate or other agent. I think the solicitor fails, in the first instance, upon the first part of that; I think he did not arrange the sale or purchase. As to what arranging means, I have the authority of the Court of Appeal in *In re MacGowan*, and again in *In re Withall*, for saying that that means that the solicitor must entirely conduct the negotiation. Those particular words are used by North, J., in *In re Withall*, [1891] 3 Ch. at p. 12, and his judg-

ment is affirmed by the Court of Appeal. I do not understand that to mean that if the vendor introduces an intending buyer to the solicitor, and says to the latter, "Please negotiate," that the solicitor does not entirely conduct the sale. If those were the facts, a solicitor may entirely conduct the sale. But I think the words do mean that the solicitor is not to be one of a body of persons who negotiate; he must be the person who does the whole of the negotiation—that is to say, substantially the whole of the negotiation. Now, assuming, on the point as to which I say I am not satisfied, that the solicitor was employed to negotiate at all, then I think certainly he did not do the whole of the negotiation. He did not find the purchaser when the property was purchased, he did not find the purchaser when it was re-sold, and did not settle the negotiation in the matter of either one or the other.

Then the next point is this, that even if the affirmative words of rule 11 are satisfied, the negative words are not—"no commission is paid by the client to an auctioneer, or estate or other agent." In respect of both the purchase and the re-sale it seems to me that a commission was paid by the client to Finkelstein and Diamant. I think, therefore, that the solicitor is not entitled to the scale fee for negotiating either the purchase or the re-sale.

Then the next question is this, did he investigate the title and prepare and complete the conveyance when Levy purchased, and did he deduce the title and peruse and complete the conveyance when Levy sold. The facts are that, inasmuch as Levy had re-sold to Davis, the solicitor in fact did nothing at all but receive the abstract from the solicitors to Levy, hand it on to the buyer from Levy, and act in the same way with the requisitions when they came in. He did nothing at all. The conveyance when prepared was a conveyance from Levy's vendor to Levy's purchaser. Levy was made a party to it for the purpose of introducing the sub-purchaser, the proper person to whom the vendor could convey. I am not at all saying that the solicitor is not entitled to some payment for those things. He had to see that it was a proper conveyance for his client to concur in; but did he investigate the title and prepare and complete the conveyance in the one case, and peruse and complete the conveyance in the other? He did not. It was held in the Court of Appeal in *In re Lacy & Son* that in order to earn the scale fee the solicitor must do all those things so far as the contract requires them to be done; he must investigate the title, prepare the conveyance, and complete the conveyance, or, if it be a sale, he must peruse the conveyance and complete the conveyance. Did he do any one of those things? It appears to me he did not. It is said that in *In re Read* Kekewich, J., held that there might be a scale fee in circumstances which in some respects are similar to this. The essential difference, it appears to me, is this, that in the case before Kekewich, J., the sub-sale was a sub-sale, not of the whole, but of part of the property included in the head sale. Therefore there was a conveyance in respect of the original purchase, and there was another conveyance in respect of the sub-sale. It may very well be, under those circumstances, that some scale fee may be payable, and it may be that the scale fee in respect of the whole original purchase-money may be payable. As to that I say nothing at all; but it appears to me that *In re Read* has no application to a case where the sub-sale is a sale of the whole of the property included in the original sale, and where, therefore, the solicitor of the intermediate purchaser has nothing to do with completing the sale to his client, as distinguished from a sub-sale by his client. *In re Lacy & Son* was in the Court of Appeal, and was observed upon in *In re Baillie & Son*, where the Court of Appeal pointed out that *In re Read* had reference to such a state of facts.

It appears to me, then, that the solicitor must, in order to earn the scale fee, do all the things in that definition—he must investigate or deduce the title and prepare or peruse the conveyance, as the case may be, and he must procure the completion of the conveyance. This he has not done. I must, therefore, send the matter back to the taxing-master to deal with on the footing of this rule, as I understand the client does not at all dispute that the solicitor is entitled to be paid a proper fee.

Solicitors, *J. S. Blankensee; D. A. Romain.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — Oct. 28.

HAYLES (*Appellant*) *v.* SANDOWN URBAN DISTRICT COUNCIL (*Respondents*). (a.)

*Local government—Street—Private street works—Final apportionment of expenses amongst frontagers—Right of frontager to object to apportionment—When to be made—Private Street Works Act,* 1892 (55 & 56 *Vict.* c. 57), s. 12.

*The respondents, an urban authority, acting in pursuance of section* 6 *of the Private Street Works Act,* 1892, *which Act had been adopted by them, employed a contractor to execute levelling, paving, channelling, metalling, and other works in a certain road which was a street within the meaning of the Public Health Act,* 1875. *Specifications, plans, and an estimate were duly made and deposited. The work was carried out, and on a final report by their surveyor that it had been satisfactorily completed the respondents paid to the contractor the contract price. The surveyor to the respondents then duly made a final apportionment of the expenses, and served notices of such apportionment upon the owners of premises affected thereby, in accordance with section* 12 *of the above Private Street Works Act. By sub-section* 1 *of that section it is provided that such final apportionment shall be conclusive for all purposes, and the sums thereby apportioned shall be recoverable in manner provided by the Act. Sub-section* 2 *of section* 12 *provides that within one month after notice of such final apportionment has been served, the owner of any premises charged with any expenses under such apportionment may object thereto upon the grounds, or any of them* (inter alia), *that the apportionment has not been made in accordance with the section, and that there has been an unreasonable departure from the specifications, plans, and sections.*

*The appellant, one of the frontagers affected by the notice of the final apportionment, objected thereto after one month had expired. The respondents took summary proceedings against the appellant to obtain payment of the sum apportioned upon him, and at the hearing before the justices the appellant objected that the works had not been completed within the meaning of section* 12, *because they had not been carried out in compliance with the specification, and that, therefore, the surveyor had no power to make a final apportionment of the expenses. He further desired to call evidence in support of his contention that the works had not been properly completed, but the justices refused to allow him to do so and ordered him to pay the sum claimed, on the ground that the final apportionment*

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

*not having been objected to in manner provided by the Act was conclusive against him, and they therefore could not entertain the objections.*

*Held, that the decision of the justices was right.*

This was a case stated under the Summary Jurisdiction Acts by justices for the county of Southampton.

At a petty sessions held at Newport, Isle of Wight, on the 12th of October, 1901, a complaint preferred by the clerk to the respondents, the Sandown Urban District Council, against George Hayles, the appellant, for that he owed to the respondents the sum of £38 7s. 1d., according to an apportionment made on the 15th ot April, 1901, under section 12, sub-section 1, of the Private Street Works Act, 1892, of expenses incurred in sewering, channelling, &c., a street called Wilton-road, Lake, was heard and determined, when the justices ordered the appellant to pay to the respondents the aforesaid sum with costs.

At the hearing of the complaint the following facts were admitted or proved.

The respondents had adopted the Private Street Works Act, 1892. Wilton-road was a street within the meaning of the Public Health Act, 1875, and the appellant was the owner of premises abutting on it.

The respondents, acting under section 6 of the Private Street Works Act, being dissatisfied with the state and condition of the said street, resolved that the same should be sewered, kerbed, channelled, levelled, ballasted, metalled, and made good.

The notices, specifications, plans, sections, estimate and provisional apportionments required by section 6 were made, approved, and deposited, and copies thereof were duly served on the owners of the premises liable to be charged.

The works were executed under an agreement dated the 1st of May, 1900, made between the contractor of the one part and the respondents of the other part. The agreement provided, *inter alia*, that the respondents should pay to the contractor for the execution by him of the said works the sum of £279, or such greater or less sum or sums as according to the terms of the specification and general conditions therein referred to or contained should become payable by the respondents to the contractor, and would pay the same according to the terms of the said general conditions.

The cost of such works was arrived at by the respondents having caused a specification, plans, and estimate thereof to be prepared by their surveyor and deposited at the office of such surveyor, and having invited tenders for the works according to the specification and plans and according to the general conditions of the contract, and by their acceptance of the tender of the contractor at the sum aforesaid.

The respondents paid for the works the sum of £296 2s. 4d., made up as follows: Contract price, £279; extras, £3 0s. 4d.; surveyor's charges, £14 2s.

The respondents were satisfied with the works on the report of their surveyor and production of certificates given by him from time to time to the contractor, or during the progress of such works and of his final report and certificate on the completion of such works.

The surveyor inspected the works whilst they were in progress as often as he thought necessary, and when they were finally completed he, by personal inspection, satisfied himself that they had been completed in accordance with the terms of the contract, and he accordingly gave his certificate to the contractor for the payment to him of the balance due to him as provided by the contract, and reported the due completion of the works to his satisfaction to the works committee of the respondents, who thereupon reported to the respondents, who on production of the certificate of the surveyor directed payment of the balance so certified to be due to the contractor, and such final payment was made accordingly.

The amount sought to be recovered was apportioned against the appellant and notice thereof was on the 19th of April, 1901, duly served on him in the manner provided by the Act

The appellant failed to give notice to the respondents within the time prescribed of his intention to object to the final apportionment on any of the grounds set forth in section 12, sub-section 2, of the Act, nor did he raise any objection to such final apportionment until the 22nd of July, 1901, when he by his solicitor addressed the following letter to the respondents:

"I hereby give you notice that I consider the apportionment of the expenses of making up Wilton-road, Lake, made by your surveyor, invalid. Such apportionment should only be made when the work is complete, and from evidence obtained at the inspection made on the 24th of June last it is manifest that the road has not been formed and levelled, nor has it been ballasted with six inches of hard Ventnor rubble or white chalk, nor metalled with six inches best yellow gravel, nor have the footways been ballasted four inches thick, nor metalled with three inches fine St. George's Down gravel. Also the channelling and curbing does not comply with the specifications submitted and forming the basis of notice to frontagers. Mr. Hayles will therefore contest your right to recover payment from him, the Act requiring that the works shall be complete before the surveyor proceeds to make up his apportionment. It will be contended that it is equally necessary that the work should be complete in thickness as that it should be complete in width and length."

In reply the respondents wrote stating that the apportionment was final and had become binding and conclusive, no objection having been made thereto within the terms mentioned in the Public Street Works Act, 1892, under which the road was made, and therefore the matter could not be re-opened.

At the hearing of the complaint it was argued on behalf of the appellant that the works mentioned in the original estimate, specification, plans, and sections had only been partially completed and carried out; that actual completion was a condition precedent to the final apportionment; that as the works had not been wholly completed the final apportionment of the respondents' surveyor was null and void; and therefore it was unnecessary for the appellant to give notice of objection within the time and in the manner prescribed by section 12, sub-section 2, of the Act.

On the part of the respondents it was contended that as the appellant had failed to give written notice of his intention to object to the final apportionment on one or more of the grounds mentioned in the above sub-section within one month of the service of the notice of the same on him, such final apportionment was conclusive for all purposes, and the appellant was bound by the Act to abide by the apportionment.

The appellant desired to cross-examine the respondent's surveyor, and to call evidence in support of his contention that the original works had been only partially executed, but was not permitted to do so, the justices being of opinion that the final apportionment, not having been objected to in manner provided by the Act, was conclusive against the appellant; and they thereupon made the order now appealed from.

The questions now raised for the opinion of the court were: (1) Whether the justices were right in declining to allow the appellant to cross-examine and

produce evidence in support of his contention; (2) whether having regard to the nature of the appellant's contention it was necessary for him to give notice of objection in the manner and within the time required by the Act; and (3) whether the final apportionment was made in accordance with the said Act.

By section 12 of the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), it is provided as follows:

"(1) When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the original or amended provisional apportionment (as the case may be), and such final apportioment shall be conclusive for all purposes; and notice of such final apportionment shall be served upon the owners of the premises affected thereby; and the sums apportioned thereby shall be recoverable in manner provided by this Act. . . ."

"(2) Within one month after such notice the owner of any premises charged with any expenses under such apportionment may, by a written notice to the urban authority, object to such final apportionment on the following grounds, or any of them:

"(a) That the actual expenses have without sufficient reason exceeded the estimated expenses by more than fifteen per cent.

"(b) That the final apportionment has not been made in accordance with this section.

"(c) That there has been an unreasonable departure from the specification, plans, and sections."

*Montagu Lush, K.C.* (*C. B. Marriott* with him), for the appellant.—The decision of the justices was wrong. By section 12 of the Private Street Works Act, 1892, it is a condition precedent to the surveyor making a final apportionment of the expenses on the frontagers that the works be completed, and the appellant was entitled to adduce evidence before the magistrates to show that the works were not completed, and that, in consequence, the final apportionment was bad. The fact of the surveyor certifying that the work is done does not prove that the work has been done, and if the work is not done the apportionment is a nullity. In the case of *Cook* v. *The Ipswich Local Board of Health*, 19 W. R. 1079, L. R. 6 Q. B. 451, which was decided under the Public Health Act, 1848 (11 & 12 Vict. c. 63), an owner of property refused to pay the contribution apportioned to him, on the ground that he disputed the fairness and accuracy of the apportionment, and it was there held that the justices were not empowered under section 64 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), to inquire into the actual expenditure, or as to the deposit of plans, their duty being simply ministerial, but the reason for that decision was that the remedy of the aggrieved party was by memorial to the Secretary of State under section 120 of the Public Health Act, 1848. There is no such remedy given by the Private Street Works Act, 1892.

*Macmorran K.C.* (*C. Fleetwood Pritchard* with him), for the respondents, was not called upon.

Lord ALVERSTONE, L.C.J.—I am of opinion that this appeal fails, and that our judgment must be for the respondents. It is true that at the time *Cook* v. *Ipswich Local Board of Health* was decided it was the law that in proceedings to recover a sum due under an apportionment of paving expenses, made under section 69 of the Public Health Act, 1848, no question could be raised before the justices as to the validity of the apportionment on the ground that plans had not been deposited, or that the amount certified to have been expended was not correct; and it was pointed out in that case that under the above Act the remedy of the aggrieved party was by appeal to the Secretary of State. The Public Health Act, 1875, contains similar provisions to that Act, and provides an appeal to the Local Government Board. Then comes the Private Street Works Act, 1892, which gives the ratepayers valuable assistance and enables frontagers who are sought to be made liable under the Act to contribute towards the expenses of private street works very valuable rights which they had not before possessed. In the case of private street works under that Act it is provided that the surveyor shall prepare a specification, with plans and sections and an estimate of the probable expenses of the works and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith, and these are, on approval by the urban authority, to be deposited for open inspection for the period of one month from the date of publication.

By section 7 any owner of any premises liable to be charged with any of the expenses may, during that month, by written notice served on the urban authority, object to their proposals on any of the several grounds specified in that section; and section 8 provides for the hearing and determination of such objections by a court of summary jurisdiction. Further, by section 12 they are given power of raising special points of objection after the works have been completed. [His lordship here read section 12.] If any of the grounds of objection in that section be made good, the court may amend or quash the apportionment. The appellant, however, in this case, has not availed himself of the remedy provided by section 12. Counsel on his behalf have contended that he could not avail himself of this remedy because the question he desired to raise cannot be brought within that section. It was further contended on his behalf that the final apportionment could not validly be made until the completion of the works, and that, therefore, if they had not been completed, he had a right to raise the question of the validity of the final apportionment on the hearing of the proceedings taken against him.

Speaking for myself I think it cannot be said that the appellant could not have raised the complaints, contained in the letter written on his behalf by his solicitor, under section 12. I think he could have raised them all, and that he had a remedy in respect of them.

Further, however, the facts as found in the case show that far from the works not having been completed, they had been completed to the entire satisfaction of the respondents. [His lordship here read the material parts of the finding as set out in the case.] Therefore, assuming that the matters which the appellant complained of were not such as could have been brought within section 12, the suggestion must be that the surveyor to the urban authority had been guilty of negligence or some improper conduct. There is nothing, however, in the Act showing that the owner of any premises liable to be charged an apportionment of the expenses of executing private street works has the right to raise the question of negligence or improper conduct of the surveyor as a defence to summary proceedings taken against him by the urban authority to recover the sum apportioned on him.

The Act does not give the frontager any new remedy, and I do not think that it can be said that, under the circumstances such as exist in this case, a frontager may dispute a final apportionment which the Act expressly declares shall be conclusive for all purposes. For these reasons I think the decision of the justices was right.

WILLS, J.—I agree.

CHANNELL, J.—I am also of the same opinion. I will only add a few words. I think it probable that the appellant had a remedy under section 12 if he had raised his objections in accordance with the provisions of that section. But assuming that he had no remedy under that section, I think he would have had no remedy at all, and I do not think it an unreasonable conclusion in one sense that he should have none. If the cost of the works executed in this case had not been chargeable to the frontagers, but to the ratepayers generally, and if the surveyor had been guilty of negligence or misconduct, the ratepayers clearly could not have disputed the rate out of which the costs were paid. I think the appellant is in no better position than an ordinary ratepayer against whom proceedings have been taken in a court of summary jurisdiction in order to recover payment of a rate made in respect of works executed at the cost of the ratepayers.

*Appeal dismissed.*

Solicitors for appellant, *Needham, Tyer, & Barrow*, for *John Marsh*, Shanklin, Isle of Wight.

Solicitors for respondents, *Wood, Bigg, & Co.*, for *W. H. Wooldridge*, Sandown, Isle of Wight.

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## Privy Council.

(*From the Supreme Court of Victoria.*)

July 9, 1902.

PAYNE *v.* THE KING.
THE KING *v.* PAYNE. (*a.*)

*Victoria, Law of—Administration Act*, 1890, *s.* 115—*Conveyance, assignment, . . . or transfer with intent to evade payment of duty—Mortgage debt—Land mortgaged situated in different state to testator's domicil.*

*That part of section* 115 *of the Administration and Probate Act of Victoria*, 1890, *relating to conveyances, assignments, gifts, deliveries, or transfers "with intent to evade the payment of duty" is applicable to colourable transactions only. Therefore where a testator, a father, had* bonâ fide *transferred mortgages to his son to accustom him to the management of business and the responsibilities of property, and to make him independent,*

*Held, that the property transferred was not liable to duty.*

*Part of testator's property consisted of a mortgage on land situated in New South Wales, though both he and his mortgagee were resident and domiciled in Victoria, the debt being a specialty debt in New South Wales and a simple contract debt in Victoria.*

*Held, that the debt was an asset in Victoria, and therefore recoverable under a Victorian probate.*

Appeal and cross-appeal from the Supreme Court of Victoria.

The facts are given at length in the judgment of their lordships.

*E. F. Mitchell* and *J. Herbert Williams*, for appellants in the appeal and respondents in the cross-appeal.

*Haldane, K.C.*, and *Rowlatt*, for the Crown.

The judgment of their lordships (Lords MACNAGHTEN, DAVEY, ROBERTSON, LINDLEY, Sir FORD NORTH, and Sir ARTHUR WILSON) was delivered by

Lord MACNAGHTEN.—The appellants, who are also respondents in the cross-appeal, are the executors of the will of the late Thomas Budds Payne, a gentleman of great wealth, who died on the 27th of August, 1897, domiciled in Victoria at the time of his death.

The proceedings out of which the appeal and cross-appeal arose were commenced by a petition of right, whereby the executors sought to recover back probate duty paid in respect of three several sums of £45,000, £75,000, and £63,000 and the interest accrued on those sums respectively at the time of the testator's death. The three principal sums were secured by three statutory mortgages of land in New South Wales, which are referred to in the proceedings as Kiddle's mortgage, McVean's mortgage, and McCulloch's mortgage. The sum of £45,000 secured by Kiddle's mortgage and the greater part of the sum of £75,000 secured by McVean's mortgage were made over by the testator in the year 1896 without consideration to his eldest son, the appellant John Frederick William Payne, and both mortgages were taken in his name.

The first question is, were these transfers made "with intent to evade the payment of duty" within the meaning of section 115 of the Administration and Probate Act of Victoria, 1890. The answer must depend on the true construction of that enactment and on the proper inference to be drawn from the evidence as to the real nature of the transaction between father and son.

The question in controversy with regard to McCulloch's mortgage is whether or not the principal sum secured thereby with the interest accrued at the date of the testator's death was an asset in Victoria so as to render it liable to duty there. This question would also have to be considered in reference to Kiddle's mortgage and McVean's mortgage in the event of it being held in accordance with a contention put forward on behalf of the respondent that the transfers of the two sums secured thereby were merely colourable.

The case came on to be heard before Madden, C.J. He decided the first question in favour of the executors, the second in favour of the Crown. On appeal the position was reversed. The full court determined the first question in favour of the Crown and the second in favour of the executors.

Section 115 of the Act of 1890 contains the following enactment:

"If any person has made or shall hereafter make any conveyance or assignment, gift, delivery, or transfer of any estate, real or personal, or of any money or securities of money with intent to evade the payment of duty under this part of this Act, in case such person should die the property contained in any such conveyance or assignment or the subject-matter of any such gift, delivery, or transfer shall, upon the death of such person, be deemed to form part of his estate for the purposes of this part of this Act upon which duty shall be payable under this part of this Act, and the payment of the duty upon the value of such property may be enforced against such property in the same way that duty under this part of this Act is enforceable, and as if such person had bequeathed or devised the said property to the person to whom the same may have been conveyed, assigned, given, delivered, or transferred."

The section then goes on to deal (1) with conveyances or assignments, gifts, deliveries, or transfers intended to take effect upon the death of the person making the same, which are "to be deemed to have

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

been or to be made as the case may be with intent to evade the payment of the duty" under the Act, and (2) with donations *mortis causâ* which are "to be deemed to form part of the deceased's property for the purposes of estimating the duty."

The question of the meaning of the expression "with intent to evade the payment of duty" was discussed in the judgment of this board delivered by Lord Hobhouse in *Simms* v. *Registrar of Probates*, [1900] A. C. 323, 48 W. R. Dig. 184. Although the construction of the South Australian Act which was there in question involved the consideration of points not to be found in the present case, their lordships are of opinion that the principle of the decision must be applied, and that in conformity with that decision it must be held that the enactment contained in the earlier part of section 115 of the Victorian Act of 1890 extends to and strikes at colourable transactions only. It will be observed that in its terms the enactment is absolute without limitation of time or amount. It is difficult to suppose that the Legislature could have intended that on the death of a person dying after the passing of the Act a strict account should be taken of all transfers and gifts which the deceased had ever made in the whole course of his life being moved thereto more or less by the desire of avoiding payment of death duties, a motive which, in conjunction with others, operates frequently in the case of gifts to charitable institutions and certainly not unfrequently in the case of gifts to near relatives.

Then comes the question: Was the transaction as regards Kiddle's mortgage and McVean's mortgage real or only colourable? On the one hand there is the uncontradicted statement of Mr. John Frederick William Payne, who was examined and cross-examined on the subject. He seems to have given his evidence fairly and frankly. He was believed by the Chief Justice and not disbelieved by the Court of Appeal. He declared positively that in the case of both mortgages the gift to him was an absolute gift out-and-out not qualified by any reservation or trust or secret understanding of any sort or kind. On the other hand there is a circumstance which at first sight tends to create suspicion. Mr. John Frederick William Payne paid substantially the whole of the interest accruing on these mortgage debts to his father's account, and invested it or allowed it to be invested with his father's moneys. The learned Chief Justice thought that the peculiar position in which Mr. John Frederick William Payne was placed suggested an adequate and satisfactory explanation of his conduct. Mr. Payne, the father, had been a conveyancer. He retired from the profession, but still kept his office in Melbourne, and there he devoted his time and talents to the accumulation of money by prudent investments. Mr. John Frederick William Payne also began life as a conveyancer, but about twenty years ago, at his father's instance, he, too, gave up his profession. He was unmarried. He went to live in his father's house and assisted his father in the management of his business. He received no salary for his services, but he had the advantage of living in his father's house. There he had all he wanted. He had some means of his own, and from time to time he received presents from his father. He had no expensive tastes; his personal expenditure was not more than £300 or £400 a year. Then the intended disposition of his father's estate was no secret. There were three sons. They were to be residuary legatees in equal shares, and they were to bring into hotchpot all capital sums received from their father during his life. The gifts to Mr. John Frederick William Payne, large as they seem, were far short of his expectations under the will. The object of these gifts was, as he says, to accustom him to the management of business and the responsibilities of property, and to make him feel independent of his father, and possibly, he thinks, to induce him to marry. A younger brother who was married at the time had been advanced on his marriage. In these circumstances it does not seem so very extraordinary that the father should make large advances to his eldest son, and that the son, instead of hoarding the interest (which might have given rise to jealousy and ill-will), should throw the income which he did not care to spend into a common fund, investing it with his father's moneys for the ultimate benefit of himself and his brothers. Mr. Payne, the father, had such command of money and such skill in dealing with it that probably the son lost little or nothing by not keeping his own money in his own hands. On the whole their lordships see no reason to dissent from the conclusion at which the Chief Justice arrived. The judgment of the full court was based on a view which their lordships cannot accept. They thought that there could be no "reasonable motive" for making the gifts in question unless it were found in the intent to evade payment of duty. "The motive for saving probate duty," they say, "reconciles with reason what would otherwise appear to be useless proceedings." Though the gift might be a perfected gift and the conveyance might fulfil all legal requisites, a manifest desire on the part of the donor to avoid payment of duty was in their opinion enough to prove an intent to evade payment of duty within the meaning of the enactment.

There remains the question as to McCulloch's mortgage. That was the testator's property at the time of his death. The debtor as well as the testator resided in Victoria and was domiciled there. The debt, though a specialty debt in New South Wales, was a simple contract debt in Victoria. That being so, it seems to their lordships that the Chief Justice and Hood, J., who dissented on this point from their colleagues, were right in holding that the debt was an asset in Victoria and recoverable under a Victorian probate, although it may well be that in order to discharge the mortgage probate duty would also have to be paid in New South Wales, and the debt, if recovered in Victoria, might be retained in court until the mortgagees were in a position to discharge the mortgage. This result seems to their lordships consistent with the practice as established in England, and their lordships see no reason why a similar rule of practice should not be held to apply in an analogous case in the states of the Australian Commonwealth.

Their lordships will therefore humbly advise his Majesty that the order of the full court should be discharged, each party paying his own costs of the appeals thereto, and the order of the Chief Justice restored.

As the appellants have succeeded in their appeal and the respondents are successful in the cross-appeal there will be no order as to costs here.

Solicitors for the appellants, *Burton, Yeates, & Hart.*

Solicitors for the Crown, *Freshfields.*

## Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 27.

*In re* AN ARBITRATION BETWEEN THE GODSTONE RURAL DISTRICT COUNCIL AND THE CATERHAM URBAN DISTRICT COUNCIL. (*a.*)

*Local government—Conversion of part of rural district into urban district—Adjustment of property and liabilities—"Property, income, debts, liabilities, and expenses"—Highway expenses—Loss of income to rural district—Local Government Acts,* 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 62; *and* 1894 (56 & 57 *Vict. c.* 73), *s.* 54.

*By an order made under section* 57 *of the Local Government Act,* 1888, *part of a rural district was converted into an urban district, and the property and liabilities of the rural district council, so far as regarded the area comprised in the new urban district, became vested in the urban district council, including the liability to maintain the highways. The rural district council claimed an adjustment of the income, liabilities, and expenses, under section* 62 *of the Act, in respect of the maintenance of the highways, upon the ground that the contributions formerly received by the rural district council from the area comprised in the new urban district exceeded the cost of the maintenance of the highways in that district, and that therefore there would be a loss of income to them by reason of the order.*

*Held, that this loss of income was a matter for adjustment under the words "property, income, debts, liabilities, and expenses" in section* 62 *of the Act.*

*Section* 54 *of the Local Government Act,* 1894, *does not apply to such a case.*

Appeal by the Caterham Urban District Council from the judgment of Wright, J., upon an award of an arbitrator stated in the form of a special case.

In 1864 the Godstone highway district was formed under the provisions of the Highway Act, 1862. It consisted of the parishes of Bletchingley, Chelsham, Crowhurst, Farleigh, Godstone, Horne, Limpsfield, Lingfield, Oxted, Tandridge, Tatsfield, Titsey, Warlingham, Woldingham, and Caterham. The area of the Godstone Union, being the rural sanitary district of Godstone, consisted of the same parishes with the exception of the parish of Lingfield, which was in the East Grinstead Union. The parish of Lingfield was transferred to Godstone under the provisions of the Local Government Act, 1894, as from the appointed day.

In 1894, by virtue of the provisions of the Local Government Act, 1894, the Godstone Rural District Council became the successors of the Godstone Rural Sanitary Authority and of the Godstone District Highway Board, and the latter board ceased to exist, and all the powers, duties, and liabilities of the Godstone Rural Sanitary Authority and of the Godstone District Highway Board were transferred to the Godstone Rural District Council.

On the 18th of October, 1898, the county council of Surrey, in pursuance of the provisions of the Local Government Acts, 1888 and 1894, made an order constituting the parish of Caterham a special urban district, and on the 16th of February, 1899, this order was (with certain alterations) confirmed by an order of the Local Government Board. Under these orders the parish of Caterham ceased to form part of the rural district of Godstone, and was converted into and constituted an urban district; and the highways thereof had been since the 17th of April, 1899, under the separate control and management of the Caterham Urban District Council, and the parish of Caterham had ceased to contribute towards the highway expenses of the Godstone Rural District Council. By paragraph 8 of the order, on and after the day of the first meeting of the urban district council all the property and liabilities which were attaching to or vested in the Godstone Rural District Council, so far as regarded the area comprised in the urban district of Caterham, passed to and vested in the Caterham Urban District Council; but until such day the powers, duties, liabilities, and property of the rural district council should continue to be exercisable by, attached to, and vested in the rural district council. Any sum required to be paid by any authority affected by this order in pursuance of any agreement or of any award under the Acts might be paid out of such fund as should be determined by the agreement or by the award. In default of an agreement being made under the Acts as to any matters requiring adjustment by reason of a doubt as to the parties who should enter into such agreement, or for any other reason, the matter should be referred to the county council, who might make such order therein as might seem to such council to be equitable.

The Godstone Rural District Council proposed before the arbitrator to prove that during the three years preceding the 1st of April, 1899, and while the parish of Caterham was part of the district of the Godstone Rural District Council, the latter received from rates levied in the parish of Caterham for highway purposes a sum considerably greater than that expended during the same period by the Godstone Rural District Council in respect of the maintenance and repair of highways in the parish of Caterham. They tendered a document showing the half-yearly expenditure upon highways in the parish of Caterham and the remainder of the rural district of Godstone during the six half-years to the 31st of March, 1899, the assessable values of the parish of Caterham and the remainder of the rural district of Godstone, upon which general expenses were apportioned in respect of such half-years, the half-yearly contributions by Caterham towards highway expenses, and the half-yearly excess of contribution over expenditure. The Caterham Urban District Council admitted, for the purposes of the case, the correctness of the facts stated in this document, but contended that, assuming the facts to be as therein stated, there was no matter requiring adjustment under the provisions of section 62 of the Local Government Act, 1888.

The Godstone Rural District Council made a claim against the Caterham Urban District Council for that their income, liabilities, and expenses in respect of the maintenance and repair of highways were affected by the above orders by reason of loss of contributions from the parish of Caterham to the maintenance and repair of highways in the Godstone rural district; that is to say, that the contributions which had been withdrawn from the Godstone Rural District Council in consequence of the orders exceeded what it cost the council to maintain the highways in the parish of Caterham in proper repair, and the rates for the maintenance and repair of highways in the Godstone rural district had increased in consequence of the loss of the contributions from the parish of Caterham by the operation of the orders; and the Godstone Rural District Council alleged that they were entitled to have the claim adjusted by arbitration under section 62 of the Local Government Act, 1888.

The arbitrator was of opinion that the claim was a matter requiring adjustment under section 62, but consented to make his award in the form of a special case. If the court should be of opinion that the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

contention of the Caterham Urban District Council was correct in law, then judgment was to be entered for them with costs. If the court should be of opinion that the contention of the Godstone Rural District Council was correct in law, then judgment was to be entered for them for a declaration that they were entitled to have their claim adjusted by arbitration under section 62 of the Local Government Act, 1888.

Wright, J., held that he was bound by the decisions in *In re Rochdale Union and Haslingden Union*, 47 W. R. 322, [1899] 1 Q. B. 540, and *In re Buckinghamshire County Council and Hertfordshire County Council*, [1899] 1 Q. B. 515, 47 W. R. Dig. 114, to decide in favour of the contention of the Godstone Rural District Council, and accordingly he gave judgment for them.

The Caterham Urban District Council appealed.

*R. M. Bray, K.C.*, and *Montague Shearman*, for the appellants.

*C. A. Russell, K.C.*, and *George Humphreys*, for the respondents.

*In re Rochdale Union and Haslingden Union*; *In re Buckinghamshire and Hertfordshire County Councils*; *In re Sowerby Council and Mytholmroyd Urban Council*, 74 L. T. Rep. 313, 44 W. R. Dig. 92; Public Health Act, 1875, ss. 144, 145; Local Government Act, 1888, ss. 32, 57, 59, 62; Local Government Act, 1894, ss. 25, 29, 54, 68.

VAUGHAN WILLIAMS, L.J.—The question which we have to determine in this case is one that is raised by the arbitrator in the special case, and that question is raised by the contention of the Caterham Urban District Council that in respect of the claim of the Godstone Rural District Council there is no matter requiring adjustment under section 62 of Local Government Act, 1888; and by the decision of the arbitrator that the claim is a matter requiring adjustment under the section. Stated shortly, the claim of the Godstone Rural District Council is this. They say that, as the parish of Caterham has now been constituted a separate unit as an urban district, and as that parish was before the separation a constituent part of the rural district of Godstone, having regard to the order and the scheme embodied in the order for the constitution of the urban district of Caterham as a separate unit, there are matters which, under the provisions of the Local Government Act, 1888, ought to be adjusted as between Godstone and Caterham. The particular matter as to which it is claimed to have an adjustment relates to the maintenance and repair of the roads within the new urban district of Caterham, and it was put upon the ground that while the parish of Caterham was part of the rural district of Godstone the rates levied in the parish of Caterham for highway purposes exceeded in amount the sum expended upon the maintenance and repair of the roads within the parish, and that the maintenance and repair of these latter highways will now be taken over by the urban district of Caterham, and that therefore the Godstone Rural Council will now lose this profit, which is said to be £600 a year. We have to say whether this constitutes a matter which ought to be adjusted under section 62 of the Local Government Act, 1888.

Wright, J., has somewhat reluctantly held that this profit, which Godstone will cease to enjoy by reason of the constitution of the parish of Caterham into a new urban district, is a loss of income which ought to be adjusted within the meaning of section 62 and in coming to that conclusion he felt himself bound by the decision of this court in *In re Rochdale Union and Haslingden Union*. I agree with Wright, J., that that case completely covers the question raised in the present case, and it is a decision which is binding upon us, and the case of *In re Buckinghamshire County Council and Hertfordshire County Council*, before the Divisional Court, seems to me to have gone upon the same lines. For that reason I think that the decision of Wright, J., must be supported. But at the same time I think it right to consider the grounds upon which it is sought to distinguish the case of *In re Rochdale Union and Haslingden Union* from the present case. In *In re Rochdale Union and Haslingden Union* the adjustment was claimed under section 68 of the Local Government Act, 1894, which deals with the adjustment of "property, income, debts, liabilities, and expenses"—words which are similar to the words in section 62 of the Local Government Act, 1888. Now it will be seen that section 62 differs from other sections in the Act by the inclusion of the words "income and expenses." It is in consequence of the inclusion of those words in section 62 that it has been held that the loss of income caused by the withdrawal of an area which yields a profit is a matter which requires adjustment under that section, and which can be adjusted by agreement between the parties, or, in default of agreement, by arbitration. It follows from the authorities to which I have referred that *primâ facie* this loss of income which has accrued to Godstone by reason of the order constituting Caterham a new urban district is a matter which falls within section 62. The grounds upon which it is said that in this case such a loss of income cannot be properly dealt with by the arbitrator under section 62 are these. It is said, in the first place, that the scheme of the county council under section 57 of the Local Government Act, 1888, which was approved by the Local Government Board, has in fact dealt with this matter, and the way in which it is said that the county council has dealt with it is that in paragraph 8 of the order all the property and liabilities which were attaching to or vested in the Godstone Rural District Council, so far as regarded the area comprised in the urban district of Caterham, passed to and vested in the Caterham Urban District Council, and it is said that the proper inference from that is that, as the order has not dealt with this income, the county council did not think it was a matter for adjustment at all. I do not think that that is the proper inference. It is plain, if one looks further into the order, that the county council thought that there might be some matters which required adjustment. In my opinion, therefore, the county council has not so dealt with this matter as to exclude a subsequent adjustment. It is then said that under the later words of paragraph 8 of the order the adjustment, in default of agreement, must be made by the county council. I cannot agree. It is next said that section 62 of the Act of 1888 has no application at all to this case, because, whatever might have been the state of things prior to the Local Government Act, 1894, by reason of section 54 of that Act this subject-matter of adjustment is now outside the jurisdiction of the arbitrator. The argument was that, whereas section 62 of the Act of 1888 includes "income and expenses," one finds in section 54 of the later Act a provision which, it is said, governs this matter, and which only contains the words "property, debts, and liabilities." It was said that section 54, sub-section 1 (*c*) and sub-section 2 (*b*), apply to such a case as this, and that therefore the matters for adjustment are limited to property, debts, and liabilities I confess that, when this argument was put forward, I felt myself more than half persuaded; but afterwards the argument on behalf of the respondents displaced the view I was at first inclined to take. Section 54 of the Act of 1894 provides that: "(1) Where a new borough is created, or any other new urban district is constituted, or the

area of an urban district is extended." Then follows clauses (*a*) and (*b*), which relate to purely parochial matters, and which have no bearing upon this case. Then comes (*c*): "Provision shall also (where necessary) be made for the adjustment of any property, debts, and liabilities affected by the said creation, constitution, or extension." Then comes sub-section 2: "The provision aforesaid shall be made . . . (*b*) where any other new urban district is constituted by an order of the county council under section 57 of the Local Government Act, 1888." There is no doubt that the words of sub-section 2 (*b*) are wide enough to cover the present case, and it is accordingly urged that the matters for adjustment are limited by sub-section 1 (*c*). The words, as I have said, are wide enough to include this case; but if we were to hold that, upon the creation of a new urban district, the matters for adjustment are for all purposes limited by sub-section 2 (*c*), we must come to the conclusion that it was intended to repeal section 62 of the Act of 1888 so far as this matter of income and expenses is concerned. I do not think that we ought so to read section 54, sub-section 2 (*c*). As Wright, J., pointed out in his judgment, we ought to deal with section 54 as governing those matters which it was necessary to deal with owing to the creation of parish councils under the Act of 1894. That argument, therefore, for the reasons given by Wright, J., cannot prevail.

I should like now to say a few words as to what we must be taken to decide in the present case. It has been suggested that what Godstone is claiming is a sum which would represent the capitalized value of £600 a year, and we were told that that sum was about £36,000. I wish to say most emphatically that there is nothing in our decision that that is the measure of the claim. The arbitrator will have to take relevant matters into consideration. I am not going to lay down a measure for the arbitrator, but I will merely point out certain matters which go to show that the measure is not represented by capitalizing the annual sum of £600. That capitalization is based on the assumption that, had it not been for the order creating the Caterham urban district, matters would have gone on for ever as they were before—that is to say, that the proportion of contribution to expenses would have remained unaltered. It is also based on the assumption that the roads in Godstone rural district, the liability for the maintenance of which is still retained by the Godstone Rural District Council, would be more useful to Caterham than to any other area in the original district. Let me take, however, another view. One cannot help thinking that there are roads in Godstone, the liability for the maintenance and repairs of which remains in the Godstone Rural District Council, which will be useless to Caterham, and that would be a matter to be taken into consideration in arriving at the amount, if any, which ought to be paid by Caterham to Godstone upon the adjustment. I was the more impressed by this by something which counsel for the respondents strongly urged in argument. I had put it to him that one was reluctant to come to the conclusion he contended for because it seemed to have no basis in natural justice. I pointed out that if there was an amalgamation of a number of units into one unit, and the amalgamation was not intended to be permanent, it is difficult to see why, upon the separation of that unit into its different parts, the different parts should be under a liability to maintain the income of the respective parts as at the time when they were members of the same unit. *Primâ facie* upon the dissolution of the unit each part would go back to its antecedent position. But counsel pointed out that there is a foundation of natural justice for an adjustment in the present case, because the roads in the Godstone district will probably be much more useful to Caterham, which has gradually grown into a town, than to any other member of the original unit. If it be true that that is in any sense a foundation for adjustment, it follows that the prospect of that state of things not being permanent, and anything that militates against the truth of the proposition that the roads in Godstone are more useful to Caterham than to any other member of the original district, must be taken into account. I do not say that in the particular circumstances of this case the facts are such that it will become necessary to give effect to all these considerations, except one general matter which any arbitrator is bound to take into consideration—namely, the permanency or otherwise of the existing proportion of expenditure to income. In these circumstances, I feel much more easy about the results of the conclusion at which we have arrived than if we thought that the result would be that Caterham would have to pay to Godstone anything approaching the capitalized value of £600 a year. The appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion, and I have little to add to the judgment of Vaughan Williams, L.J. It seems to me to be impossible to differ from the judgment of Wright, J. He followed the principles laid down by this court in *In re Rochdale Union and Haslingden Union*. It is true that that was a decision under sections 36 and 68 of the Local Government Act, 1894, whereas we are dealing with an order made under section 57 of the Local Government Act, 1888, in respect of which the necessary adjustment has to be made under section 62 of that Act. Still, in my opinion, if the claim put forward in *In re Rochdale Union and Haslingden Union* was admissible, as it was held to be, the claim put forward on behalf of the Godstone Rural District Council for adjustment is admissible here. That is all that we are required to decide. We are only asked whether the claim for adjustment is admissible. I quite agree with Vaughan Williams, L.J., that we are not to be taken as laying down that the sum payable is £36,000, which is said to be the capitalized value of £600 a year, or anything like it.

MATHEW, L.J.—I agree with Stirling, L.J., that there is little that need be added to the judgment of Vaughan Williams, L.J. It was contended for the appellants that an adjustment by arbitration could not have been intended because of the difficulty of arriving at any satisfactory conclusion. It was pointed out that no directions are given to the arbitrator as to the course that he should pursue, and as to the grounds upon which he has to make his award. It was asked if it could have been intended that he should capitalize the savings on the assumption that the existing state of things would be permanent. I desire to guard myself against being supposed to sanction any such calculation. The arbitrator will no doubt closely scrutinize any figures laid before him and consider the changes that may take place in the future. For instance, he may see that a district rural in character at present may in the near future tend to become urban. Again, that hereafter the extent of the user of the roads in Caterham may possibly be increased and involve additional expense. I should be slow to come to the conclusion that the claim as promulgated by Godstone for £36,000 was reasonable or equitable.

*Appeal dismissed.*

Solicitor for the appellants, *F. B. Winter.*

Solicitors for the respondents, *Cooper, Turner, & Evans*, for *E. A. Head*, East Grinstead.

From K. B. Div. and Chan. Div. (Vaughan Williams and Stirling, L.JJ.) } Feb. 16.

KOLCHMANN v. MEURICE.

*Practice—Charging order—Shares—Power to order sale—Judgments Act,* 1838 (1 & 2 *Vict.* c. 110), *s.* 14—*Ord.* 46, *r.* 1—*Service of writ out of jurisdiction—Action to enforce charging order—Ord.* 11, *r.* 1 (e).

*Where a judgment creditor has obtained a charging order under section* 14 *of the Judgments Act,* 1838, *upon shares in a company standing in the name of the judgment debtor, the court has no power to make an order for the sale of the shares in the original action, but a separate action must be brought for that purpose.*

Leggott *v.* Western, 32 *W. R.* 460, 12 *Q. B. D.* 287, *approved.*

*Ord.* 11, *r.* 1 (e) *does not apply to the case of an action to enforce a charging order obtained under section* 14 *of the Judgments Act,* 1838, *and consequently leave cannot be granted to issue a writ for service out of the jurisdiction in such an action.*

Moritz *v.* Stephan, 36 *W. R.* 779, *approved.*

Appeals from orders of Walton, J., and Joyce, J.

On the 14th of March, 1902, the plaintiff recovered judgment against the defendant in an action in the King's Bench Division for £4,303. The defendant was out of the jurisdiction of the court, being resident in Paris.

On the 28th of May the plaintiff obtained a charging order absolute, under section 14 of the Judgments Act, 1838 (1 & 2 Vict. c. 110), whereby it was ordered that the defendant's interest in certain shares in an English company standing in his name should stand charged with the payment of the amount of the judgment.

Section 14 enacts that a charging order made thereunder shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. The section also provides that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of the order.

After the expiration of the six months the plaintiff took out a summons in the action by way of equitable execution asking for an order to enforce the charging order by a sale of the shares.

Walton, J., was of opinion, on the authority of *Leggott* v. *Western*, 32 W. R. 460, 12 Q. B. D. 287, that plaintiff's proper course was to commence a fresh action to enforce the charging order, and he accordingly refused to make an order for sale on this summons.

The plaintiff then applied in the Chancery Division for leave to issue a writ for service on the defendant out of the jurisdiction, under ord. 11, r. 1 (*e*), in an action asking to have an account taken of what was due under the judgment and to have the charging order enforced by a sale of the shares.

Joyce, J., refused the application, on the authority of *Moritz* v. *Stephan*, 36 W. R. 779.

The plaintiff appealed from both refusals, and it was arranged that the two appeals should be heard together.

*Beddall, ex parte*, for the plaintiff.—Walton, J., was mistaken in thinking that he had no jurisdiction to order a sale in the original action. The court has ample jurisdiction to grant relief by way of equitable execution in an action without the necessity of starting fresh proceedings. Section 24, sub-section 7, of the Judicature Act, 1873, is as follows: "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." The case of *Leggott* v. *Western*, by which Walton, J., considered himself bound, is, no doubt, an express decision of a Divisional Court to the effect that an order for the sale of shares comprised in a charging order under the Judgments Act, 1838, cannot be made in the original action, but that it is necessary for the judgment creditor to institute separate proceedings for that purpose. But other authorities show that an agreement to compromise an action may be enforced in the action itself by an order for a stay, and that an order for the appointment of a receiver by way of equitable execution may be made in an action, without in either case any necessity for instituting separate proceedings: *Eden* v. *Naish*, 26 W. R. 392, 7 Ch. D. 781; *Smith* v. *Cowell* 29 W. R. 227, 6 Q. B. D. 75; *In re Gaudet Frères Steamship Co.*, 12 Ch. D. 882, 28 W. R. Dig. 49; *Salt* v. *Cooper*, 29 W. R. 553, 16 Ch. D. 544. As to the question of service out of the jurisdiction, Joyce, J., followed the decision of North, J., in *Moritz* v. *Stephan*. The ground of that decision was that an action to enforce a charging order was not an action founded on breach of contract within the meaning of ord. 11, r. 1 (*e*). But it has always been held to be the law that an action of debt lay on a judgment: Com. Dig., Debt, A, 2; *Williams* v. *Jones*, 13 M. & W. 628. And by section 14 of the Judgments Act, 1838, a judgment creditor who has obtained a charging order on shares is in the same position as if the judgment debtor had actually made a charge in his favour. An action to enforce a charging order is, therefore, an action *ex contractu*. Unless the court overrules either *Leggott* v. *Western* or *Moritz* v. *Stephan*, it will be impossible for the plaintiff to get any benefit from his charging order.

VAUGHAN WILLIAMS, L.J.—In my judgment both appeals fail. The argument has been ingenious, but the ingenuity suggests to my mind *primâ facie* a doubt as to whether the applications ought to be granted. When we consider that the state of legislation and procedure has been such as has rendered it possible that applications like the present might have been made during all the years which have elapsed since the passing of the Judicature Act, and when we find that in practice such applications have not been made, that alone, in my opinion, is sufficient to make us look very carefully to see why such procedure should never have been attempted to be adopted. I am not contented with the answer that the decision in *Leggott* v. *Western* has been acquiesced in because in most cases it was not worth while to question it. What is the procedure which it is suggested should be adopted? The judgment creditor has obtained an order charging the defendant's interest in certain shares with payment of the judgment debt, and it is suggested that, without any further proceeding other than a summons in the original action to give effect to that charging order, the court ought to make an order for the sale of the shares. In my judgment

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

we ought not to do so. I think that the decision in the case of *Leggott* v. *Western* is right, and is conclusive on this point. Further, with an order limited as this charging order is to the defendant's interest in the shares, it would practically be very difficult, if not impossible, to work out an order for sale. That part of the case therefore fails.

With regard to the appeal from the refusal of Joyce, J., to allow service of a writ out of the jurisdiction, it is only necessary to read rule 1 (*e*) of order 11 to see that that rule—the only rule relied on—has no application whatever to this case. It is impossible to say that the action which it is proposed to bring could be called an action for breach of contract. This appeal, therefore, also fails.

STIRLING, L.J.—I am of the same opinion. With regard to the first appeal, the only order which we could possibly make would be an order that the defendant's interest in the shares should be sold. In the absence of any evidence as to what that interest consists of, it seems to me that it would be impossible to make any order for sale which could be successfully worked out. Apart from the difficulty as to making the order in the original action, I think that the order would be futile. But further, I do not differ from the decision in *Leggott* v. *Western*, which has been in force so long.

With regard to the second appeal, I agree that this case does not fall within ord. 11, r. 1 (*e*). The plaintiff desires to enforce his charge against the defendant's shares. But there is no power to issue a writ for service out of the jurisdiction in an action to enforce a charge against personal property.

*Appeals dismissed.*

Solicitors for the plaintiff, *Pakeman & Read.*

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From Chan. Div.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) Feb. 5.

VAN PRAAGH *v.* EVERIDGE. (*a*.)

*Vendor and purchaser—Mistake—Bidding for wrong property—Contract signed by auctioneer—Authority—Error in date—Statute of Frauds.*

*A bidder at an auction bid for one property in the belief that he was bidding for another. The property was knocked down to him, but on finding out his mistake he refused to sign the contract. The auctioneer signed the contract on his behalf. The contract signed had been prepared with a view to an earlier sale, and bore date one month earlier than the actual date of the sale.*

*Held, that there was no memorandum in writing of the alleged contract sufficient to satisfy the Statute of Frauds.*

*Decision of* Kekewich, J., [1902] 2 *Ch.* 266, 50 *W. R. Dig.* 181, *reversed.*

This was an appeal from a decision of Kekewich, J. (reported [1902] 2 Ch. 266, 50 W. R. Dig. 181).

The plaintiff was the owner of a freehold house situate at Frognal, Hampstead, and known as "Saradith."

On the 18th of November, 1901, this house was put up for sale by auction. Two other properties were offered for sale at the same time—namely, an estate known as Parson's Mead, Ashtead, and No. 24, Cullum-street, in the City of London.

The defendant, who was a builder, attended the auction with the intention of bidding for Parson's Mead. He was present in the auction room at the commencement of the sale, and took a seat in the second or third row from the front. Affixed to the auctioneer's rostrum was a large notice stating the order of sale to be as follows: "(1) "Saradith," Hampstead; (2) Parson's Mead, Ashtead; (3) 24, Cullum-street." There were also distributed about the sale room a number of smaller printed notices to the same effect.

The auctioneer, on entering the rostrum, began by stating the order in which he would offer the properties, and he then proceeded to offer the Hampstead property, which he fully described.

The defendant made three or four offers for this property and it was ultimately knocked down to him for £4,500. The defendant, who was somewhat deaf, believed that he was bidding for the Ashtead property. The auctioneer then sent his clerk to the defendant for his name and address to fill up the necessary contract, but the defendant objected that he had not purchased the Hampstead property but had purchased the Ashtead property. The clerk informed the auctioneer that the defendant denied having bought the Hampstead property, but the auctioneer, who had proceeded some way with the description of the Ashtead property, declined to interrupt the sale of that property, which was ultimately bought in at £16,000.

Before Lot 3 was offered the defendant had an interview with the auctioneer and told him that he had made a mistake and believed that he was bidding for the Ashtead property. The auctioneer replied that he must hold him to his bargain and requested him to sign the contract. This the defendant refused to do. Accordingly the auctioneer, before leaving the rostrum, signed the contract as agent for the defendant.

The particulars and conditions of sale used with reference to the sale of "Saradith" were prepared with a view to a sale on the 17th of October, 1901, which was eventually postponed till the 18th of November. On the actual sale the date on the outside of the particulars was altered to the 18th of November, but the dates in the conditions and contract at the end were not altered. The result was that the contract which was signed appeared as "Dated this 17th day of October, 1901," and commenced "I . . . do hereby acknowledge that I have this day purchased."

The conditions stated: (3) That the purchaser should at the close of the sale pay a deposit of £10 per cent. on the amount of the purchase-money, and should pay the remainder "on the 21st day of November, 1901 . . . at which time . . . the purchase shall be completed." (4) The purchaser should within seven days after the delivery of the abstract send his objections and requisitions. (7) The purchaser should deliver engrossment of conveyance four days at least before the 21st of November, 1901, and the draft was to be left for perusal and approval by the vendor at least seven days before delivery of the engrossment. And lastly, if the purchaser should neglect or fail to comply with any of the above conditions, his deposit money should be forfeited to the vendor, who might with or without notice re-sell the property.

The defendant having repudiated the contract, the plaintiff commenced the present action for specific performance and damages. The defendant resisted the action on the ground of mistake, and alleged that he never agreed to purchase the Hampstead property. He also pleaded that there was no memorandum of the alleged contract sufficient to satisfy the Statute of Frauds.

Kekewich, J., held that there had been a *bonâ fide* mistake on the part of the defendant, but that the

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

mistake was no answer to an action for specific performance. He also held that the error in the dates did not prevent the contract from being a good memorandum.

The defendant appealed.

*Stewart Smith, K.C.*, and *Norman Craig*, for the appellant.—In the first place, there was no *consensus ad idem*, and therefore no binding contract. Secondly, it is impossible to suppose that the defendant could have authorized the auctioneer to sign on his behalf a contract in these terms. There is therefore no memorandum sufficient to satisfy the Statute of Frauds. [They were stopped by the court.]

*Warrington, K.C.*, and *Frederic Thompson*, for the vendor.—Apart from the errors in the dates, the contract is a sufficient memorandum to satisfy the Statute of Frauds, and is one which could have been signed by the auctioneer on behalf of the defendant. The error in the dates is a mere clerical error, and as a matter of fact the correct date appears on the particulars.

COLLINS, M.R.—I think that the point raised by the defendant that the contract bears date the 17th of October, when the sale actually took place on the 18th of November, is sufficient to dispose of this case. The plaintiff cannot succeed in the absence of a contract. The Statute of Frauds requires a contract to be evidenced by some memorandum in writing, and there is no such memorandum here, for there is no contract on the 18th of November, and on the 17th of October, the date mentioned in the contract as the date of sale, there was no sale. The auctioneer could have no authority to sign this contract importing conditions which are applicable to a sale a month earlier than the actual sale. Consequently, the plaintiff has no contract on which he is entitled to sue. There is a supplemental point as to whether the parties were *ad idem*. I do not think they were, but I will say nothing further with regard to that point as it is not necessary to decide it. The result is that the appeal must be allowed.

ROMER, L.J.—I agree.

COZENS-HARDY, L.J.—I also agree. I observe that Kekewich, J., in giving judgment held that the wrong date in the contract was not a "substantial error." With that I cannot agree, for the contract imposes substantial conditions on the purchaser. The appeal must be allowed with costs.

Solicitors, *Edward Chester; Law & Worssam.*

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From Chan. Div.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) Jan. 21, 22.

*In re* GREENWOOD.
GOODHART *v.* WOODHEAD. (*a.*)

*Will—Construction—Condition that devisee should take testator's name—Condition precedent—Condition subsequent—Death of devisee in lifetime of tenant for life—Impossibility of performance—Act of God.*

*A testator devised real estate upon trust for his daughter for life, and after her death for her children; and if she should have no child, then upon trust for his cousin, on condition, nevertheless, that if the testator's wife should be then living she should have the enjoyment of the dwelling-house for the remainder of her then life, and on further condition that he should take and use the testator's name, but subject to the payment of certain legacies. The devisee died in the lifetime of the testator's daughter without ever having taken the testator's name.*

*Held, on the construction of the will, that the condition was a condition subsequent which was not intended to operate unless and until the devisee actually came into possession of the estate. The performance of the condition having been rendered impossible by act of God, the estate consequently passed discharged from the condition.*

*Decision of* Joyce, J., [1902] 2 *Ch.* 198, 50 *W. R. Dig.* 186, *reversed.*

This was appeal from a decision of Joyce, J. (reported [1902] 2 Ch. 198, 50 W. R. Dig. 186).

The testator, J. N. Greenwood, by his will, dated the 24th of May, 1853, devised his real estate to trustees upon trust for his daughter Jane during her life for her separate use, and after her death upon trust for her children or remoter issue born in her lifetime as she should appoint, and, in default of appointment, upon trust for all her children, or her only child if but one. And if she should have no child, the testator devised his real estate to his cousin, W. A. Newsome, his heirs and assigns, on condition, nevertheless, that in case the testator's wife should be then living she should have the use and enjoyment for the then remainder of her life of the dwelling-house in which the testator then resided, and on further condition, nevertheless, that he take and use the name of Greenwood only, but subject to the payment of certain legacies therein mentioned.

The testator died on the 11th of August, 1853, and his wife was also dead. The testator's daughter Jane was now the wife of William Woodhead. She had had no issue and was now in her fifty-ninth year.

W. A. Newsome died intestate on the 5th of November, 1855, leaving his only son, Colonel W. Newsome, his heir-at-law. Colonel Newsome died on the 26th of July, 1900. The plaintiff was his administrator with the will annexed, and for the purpose of passing his administration accounts it became necessary to ascertain the value of the interest, if any, which Colonel Newsome took in the real estate devised by the will of J. N. Greenwood.

Accordingly the plaintiff took out a summons against the trustees of the will of J. N. Greenwood and Mrs. Woodhead, the testator's heiress-at-law, for a declaration that the plaintiff, as the legal personal representative of Colonel Newsome, was entitled to the real estate devised in trust by the will of the testator in remainder after the death of Mrs. Woodhead without children, subject to the payment of the legacies therein mentioned.

Joyce, J., held that the condition, being one which might be performed by the devisee at any time he pleased, was broken by the death of the devisee without having performed it. He therefore dismissed the summons.

Subsequently it was ascertained that W. A. Newsome had died in a lunatic asylum, into which he had been admitted on the 26th of April, 1855, and that previously to his admission he had suffered from an attack of insanity which was alleged to have commenced in April, 1854.

In these circumstances the case was re-argued before Joyce, J., who, however, adhered to his original judgment.

The plaintiff appealed.

*Haldane, K.C.*, *Badcock, K.C.*, and *E. S. Ford*, for the appellant.

*Neville, K.C.*, *Hughes, K.C.*, and *Clayton*, for Mrs. Woodhead.

*Leigh Clare*, for the trustees of the will.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The following authorities were referred to in the course of the argument: *Woodhouse* v. *Herrick*, 3 W. R. 303, 1 K. & J. 352; *Lady Langdale* v. *Briggs*, 4 W. R. 703, 8 De G. M. & G. 391; *Egerton* v. *Lord Brownlow*, 4 H. L. Cas. 1; *Gulliver* v. *Ashby*, 4 Burr. 1929; *In re Farrer & Champion*, [1887] W. N. 202; Sheppard's Touchstone, 132, 157.

COLLINS, M.R.—This is an appeal from Joyce, J., on the construction of a will. I need only briefly summarize the point which gives rise to the question from the head-note of the report in the court below, which is, "The testator, by his will dated in 1853, devised his real estate to his daughter for her life, and after her death for her children, and if she should have no children the testator devised his real estate to N. on condition that he should take and use the testator's name only." I refer to the exact words of the condition because I think the whole question turns upon what was the intention of the testator as disclosed by the terms in which he himself has imposed the condition which is the subject of this inquiry, the question being in effect, Was the condition a condition precedent or a condition subsequent, and if a condition subsequent, subsequent to what date? If it was a condition precedent it is admitted on all hands that it has not been performed, and therefore the devisee never obtained the benefit of the devise. If it is a condition subsequent, what on the true construction of the will is the date to which it is subsequent? Now, the wording of the will is this: [His lordship read the material words and stated the facts, and continued:] The question is, whether the devisee, having died within the lifetime of the tenant for life, and not having taken the name of Greenwood, failed to perform the condition, and therefore took nothing under the devise. Now, the learned judge has held, in the first instance with some hesitation, but he has, I think, held the condition to be a condition subsequent, or at all events he has treated the condition as not being a condition precedent. If it was a condition precedent it is conceded that it has not been performed, and that the devisee never took the estate. But treating it as a condition subsequent, the learned judge has nevertheless arrived at the conclusion that it was not performed, and that its performance was not excused by the act of God—namely, the death of the devisee during the lifetime of the tenant for life, his ground being that there was a vested interest in the devisee and that he had it in his power at any time after the estate vested in him in remainder, although not in possession, if he had been so minded to take the name, and that therefore he cannot be said to have been prevented by his own death, as he might have performed it at any time during his own lifetime. Therefore, this being a condition subsequent which it cannot be asserted that he was excused by the act of God from performing, he has failed to perform the condition, and accordingly the estate has gone from him. Now that conclusion depends, in my opinion, entirely upon the construction of the will and the true intention of the testator in creating this condition, and as to that, upon the authorities cited to us, it seems to me clear that even where the condition is one dealing with real estate, if it is so framed in such terms that it is capable of being construed fairly as a condition subsequent and not as a condition precedent, the court ought to construe it as a condition subsequent. Where the intention of the testator, as evidenced by the words used and the disposition he has made, is more consistent with the inference that he did intend the condition to be a condition subsequent and not a condition precedent, then if the words are capable of admitting both constructions the court ought to hold it to be a condition subsequent. Now in this case it seems to me that the words themselves in which the condition is framed point to this, that the time the testator is dealing with is the death of the tenant for life. Then, and not till then, as it appears to me, this condition comes into force, and the testator obviously does not regard it as coming into force till that time. He is dealing first of all with what he calls a condition that the property is to be enjoyed by his wife if living. Strictly speaking that is not a condition at all, but it is material in so far as it points to the death of the tenant for life as the period of time which was present to the mind of the testator, because it is all one sentence, and the time referred to in the first part affecting that which is called a condition as to his wife's enjoyment seems to me to be the same time as that which is dealt with in the subsequent part—namely, the conditions affecting the right of the devisee to take the estate. These are the words, "on condition, nevertheless, that in case my wife shall then be living," clearly showing that the point of time in his mind is the death of the tenant for life, "she shall have the use and enjoyment for the then remainder of her life," and so on, "and on further condition, nevertheless, that he take and use the name of Greenwood only." Now it seems to me that that language points clearly to his taking and using the name as soon as and after he comes into possession and not before. If that be the fair meaning of it, then in my opinion, both according to the words used and the common sense of the thing, his wish is that the person who takes his estate, not as the owner in remainder, but as the owner in possession, shall bear his name. That is the object the testator wishes to carry out, and in my opinion he could not have intended, and it is very unlikely that he did intend, that there should be any obligation or inducement whatever put upon the person to take his name before the occasion arose for taking it—that is, before he became entitled to hold the estate in possession. The devisee is to take and use the name just as he is to take and use the estate. The two things being put together, Joyce, J., has held that it was competent for the devisee to have taken the name before he came into possession. He never did come into possession, but Joyce, J., says that it was competent for him to have taken the name, and that therefore he cannot say he was prevented by the act of God from taking it, because he might have taken it during his life. Now it seems to me, and indeed it was admitted by counsel for the respondent, that if on the fair construction of this will the obligation to perform this condition did not arise until after possession was taken, then it was not *ad rem* to point to the fact that the devisee had the opportunity to do the act before the occasion for doing it arose. That is not a matter with which we are concerned at all. The obligation to do the act and the immunity from not doing it are both measured by the same standard—namely, what are the limits of the condition; in other words, when does the obligation arise under the condition. If the right conclusion is that the condition is meant to operate only after possession taken, then the excuse for not performing it arises then, and not till then, and it is immaterial to consider whether the devisee could have performed it at an earlier date. The question is, is he excused by the act of God from doing it within the time within which the testator contemplated that he should do it. If the time when the estate falls into possession is the standard, obviously the devisee was incapacitated from performing it, because he had previously died. It seems to me, therefore, that on the true construction of the will this condition was a condition subsequent: that the devisee was prevented from performing it by the act of God, and

that therefore the person claiming under him is in a position to retain the estate. On these grounds I do not think that the decision of Joyce, J., can be supported, and in my opinion the appeal should be allowed.

ROMER, L.J.—I also am of opinion that upon this will the condition, upon which the question the subject of this appeal turns, was a condition subsequent in the truest sense of the term. That is to say, I think it only contemplated Mr. Newsome doing something upon or after the death of the testator's daughter without leaving children. The wording of the condition supports that view and the position in which it is supports that view because it appears amongst a bunch of conditions so called. Whether they were strictly so called or not I need not pause to deal with, because the gift is to Mr. Newsome on the death of the daughter without leaving children on condition that in case the testator's wife shall then be living she shall have the use and enjoyment for the then remainder of her life, and then on further condition that he shall take and use the name of Greenwood only, which to my mind points to something he is then to do. Then it goes on: "And subject to the payment of the following legacies"—again clearly pointing to something he has to do after that time. The position and the wording of the condition to my mind shows that, as I have said, it was strictly speaking a condition subsequent—that is to say, a condition solely intended to refer to and dealing with something that he was to do when he became possessor of the estate. Now I think that is borne out by considering this, what could be the only object and intention of the testator in this case when he wanted Mr. Newsome to take and use the name, except that he contemplated his becoming the owner of the estate? He only wanted him to use the name as owner of the estate. It does not appear to me that the testator had contemplated anything with reference to Mr. Newsome irrespective of the estate or a time when he never could have come into possession of the estate. It seems to me to have in no wise concerned the testator what Mr. Newsome might have done with regard to using or abandoning the name before he came into possession of the estate. I think it was because Mr. Newsome was to come into possession of the estate that he then required him as the possessor of that estate to take and use the name, and as I have said, I think that is borne out by the other considerations in the case. At any rate, to my mind, on the construction of this will, it appears to me that is what the testator meant and has said. I cannot help thinking that a condition of this kind ought to be construed strictly, and construing this condition accordingly, it appears to me that, seeing this condition was one which, under the circumstances, could not have been complied with, the result is that the estate is held free from the condition. I therefore think that this appeal ought to succeed, and that the decision of the learned judge in the court below should be reversed.

COZENS-HARDY, L.J.—I agree, and I have very little to add. Assuming that this is a condition subsequent—not to repeat the language of the clause—it is, as Romer, L.J., has said, in the midst of a series of clauses stating certain things to be done whenever the estate falls into possession—not things to be done before possession was acquired, but things to be done after. Now, if it was a condition subsequent it was subsequent to what? Subsequent, it seems to me, to the actual enjoyment in possession of the estate. There is no obligation whatever upon Mr. Newsome to do anything until after the event, which might never have happened, did happen of the estate becoming an estate in possession, and I doubt very much indeed whether any act done by Mr. Newsome before the estate came into possession would in any way be relevant to the performance of the condition. If, for instance, Mr. Newsome had in the daughter's lifetime taken the name of the testator, and had then abandoned it and survived the death of the daughter some time, and came into possession of the estate, and had done nothing afterwards with regard to the name, as at present advised I do not think the case would have been altered. If that be not so, it seems to me that it is plain that there is a time in which this condition might be complied with—namely, the whole period before the estate fell into possession. If that be the true construction, then in my view the appeal is right, and the judgment of the court below must be reversed.

Solicitors, *Robins, Hay, Waters, & Hay; Jaques & Co.*, for *Watts & Sons*, Dewsbury.

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From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) June 30; July 1; Dec 6, 12, 1902.

AFLALO v. LAWRENCE & BULLEN (LIMITED). (a.)

*Copyright—Literary copyright—Encyclopædia—Contributor and publisher—Employment and payment—Ownership of copyright—Separate publication—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18.

*In a case where an author agrees with publishers to write for payment articles for an encyclopædia to be published by them, and there is no express agreement as to the ownership of the copyright in the articles, it is not to be inferred as a matter of law from the fact of employment and payment that the employment was on the terms that the copyright should belong to the publishers. And such articles are "separately published" within the meaning of the definition of "book" in section* 2 *of the Copyright Act*, 1842.

*So held by* Romer *and* Stirling, L.JJ. (dissentiente Vaughan Williams, L.J.)

*Held, by* Vaughan Williams, L.J., *that in the absence of evidence to the contrary the true inference was that the copyright in the articles was to belong to the publisher, and that they were not "separately published."*

Sweet *v.* Benning, 3 *W. R.* 519, 16 *C. B.* 459, *discussed.*

*Decision of* Joyce, J. (50 *W. R.* 24, [1902] 1 *Ch.* 264), *affirmed.*

This was an appeal from a decision of Joyce, J. (reported 50 W. R. 24, [1902] 1 Ch. 264).

In the year 1896 the plaintiff, Frederick George Aflalo, conceived a scheme for the publication of a work called "The Encyclopædia of Sport," and submitted it to the defendants, a firm of publishers, with a view to their undertaking the publishing of it.

The work was to consist of articles, arranged alphabetically, relating to various branches of sport, contributed and signed by persons well known in connection with the various subjects.

The defendants agreed to publish the work, and on the 10th of July, 1896, they entered into an agreement in writing with Mr. Aflalo, providing for the publication of the work at their expense, and for the payment by them to Mr. Aflalo of £500 for his editorial expenses besides reimbursing him the postage expenses, and for the insertion in the preface

(a.) Reported by H. W. LAW, Esq., Barrister-at-Law.

of a statement that Mr. Aflalo had suggested the scheme.

It was further agreed that Mr. Aflalo should write without further fee 7,000 words of the special articles and contribute all the unsigned articles that might be required; that the defendants should supply him with an assistant; that he should be entitled to pursue his other literary work so far as it did not interfere with the due performance of his editorial duties, and that should the defendants consider it desirable to discontinue publishing the encyclopædia before Part X. had been completed they would pay Mr. Aflalo £250, provided that the stoppage of the work was not caused by his own action.

The encyclopædia was published in parts, and was ultimately completed in 1899 under the part editorship of Mr. Aflalo, who contributed, in accordance with the agreement, a signed article entitled "Sea Fishing."

Shortly before the date of the above-mentioned agreement Mr. Aflalo had arranged with Mr. Charles Henry Cook, well known as a writer on angling under the pseudonym of "John Bickerdyke," for the latter to contribute signed articles of 5,000 words each to the encyclopædia; and Mr. Cook accordingly contributed three articles which were published in the encyclopædia, entitled respectively "Coarse Fish," "Pike," and "Trout," for which the defendants paid him at a fixed rate of £2 per 1,000 words.

Mr. Aflalo and Mr. Cook were severally registered as proprietors of the copyright of the articles contributed by them; but in 1900 the defendants, without the knowledge or consent of either of them, published an abridged edition of the encyclopædia called "The Young Sportsman," which included the articles contributed by Mr. Aflalo and Mr. Cook.

Mr. Aflalo and Mr. Cook thereupon demanded the discontinuance of the further sale and publication of this book, and compensation for infringement of copyright; and on the defendants refusing they brought this action asking for an injunction to restrain the publication and sale of "The Young Sportsman" and for damages. The defendants contended that as they were the registered proprietors of the copyright of "The Encyclopædia of Sport" the plaintiffs had no copyright in their articles; and they counterclaimed for a declaration to that effect, and for an order expunging from the Book of Registry the plaintiffs' entries of copyright, and for damages.

Joyce, J., held that there was no special circumstance in the nature of the work or the terms of employment leading to the inference that the copyright of the articles in question was intended to be in the publishers, and that it was therefore in the authors.

The defendants appealed.

The appeal was first argued on the 30th of June and the 1st of July, and was further argued, by direction of the court, on the 6th of December on the question whether the plaintiffs had acquired a title by separate publication.

*Younger, K.C.*, and *J. L. Gilmour*, for the appellants.—In the absence of special circumstances, of which there are none here, when you have a case of employment and payment, the copyright is vested in the publishers, and this is the ordinary inference to be drawn. If the judgment of the court below is right, not only the respondent, but all the other contributors, can deprive the publishers of all rights in their articles, on the publication of which the publishers have expended a large sum. Section 18 of the Copyright Act was intended to deal with cases of employment and payment. If the publishers are held entitled to the copyright the writers of the articles are in no way injured, except that they cannot republish their actual articles, and it is always possible for writers to reserve the copyright when contributing to encyclopædias. No real distinction can be drawn between the literary skill required here and that required in *Sweet* v. *Benning*, 3 W. R. 519. 16 C. B. 459. There was no publication in a separate form here. [They also cited or referred to *Lamb* v. *Evans*, 41 W. R. 405, [1893] 1 Ch 218; *Walter* v. *Howe*, 29 W. R. 776. 17 Ch. D. 708; *Barfield* v. *Nicholson*, 2 Sim. & St. 1; *Hatton* v. *Kean*, 8 W. R 7, 29 L. J. C P. 20; and *Bishop of Hereford* v. *Griffin*, 16 Sim. 190.] The conclusion that the copyright was intended to remain with the author would be utterly unbusiness-like—*per* Bowen, L.J., in *Lamb* v. *Evans*, [1893] 1 Ch., at pp. 227-8. The Pictorial Copyright Act of 1862 confirms our interpretation of section 1 of the older Copyright Act and of *Sweet* v. *Benning*.

*Hughes, K.C.*, and *R. J. Parker*, for the respondents.—It is clear that apart from section 18 the copyright is in the writer, and in cases arising on the Dramatic Copyright Act—*Shepherd* v. *Conquest*, 4 W. R. 283, 17 C B. 418; *Levy* v. *Rutley*, 19 W. R. 976, L. R. 6 C. P. 523; *Eaton* v. *Lake*, 36 W. R. 277, 20 Q. B. D. 378—the fact of employment has been held not to affect the question. The author can sue for infringement before separate publication: *Johnson* v. *Newnes*, 43 W. R. 572, [1894] 3 Ch. 663. *Bishop of Hereford* v. *Griffin* has always been treated as an authority for the proposition that the copyright remains in the writer notwithstanding employment and payment, and it is the only decision in the books on the case of encyclopædias: see also *Smith* v. *Johnson*, 12 W. R. 122, 4 Giff. 632. *Sweet* v. *Benning* may have been rightly decided on the facts of the case, but some of the observations of Jervis, C.J., and Maule, J., as to the presumption that the copyright is in the publishers, which is said to be raised by employment and payment, go too far, and were not necessary for the decision. In the absence of agreement the copyright remains in the author.

They also cited *Moffatt* v. *Gill*, 50 W. R. 528. 86 L. T. Rep. 465, and *White* v. *Geroch*, 2 B. & Ald. 298. [ROMER, L.J., referred to *Mayhew* v. *Maxwell*, 9 W. R. 118, 1 Joh. & Hem. 312.]

*Cur. adv. vult.*

Dec. 18.—The following judgments were delivered:

VAUGHAN WILLIAMS, L.J., after stating the facts, continued: The judgment of Joyce, J., cannot, in my opinion, be supported unless the plaintiffs have vested in them the copyright in their contributions to the encyclopædia. By section 2 of the Copyright Act of 1842, "copyright" is defined as "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied," and "book" is defined as meaning and including "any volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." And by section 3 the copyright in a book is made to endure for the natural life of the author and a term of seven years from his death, and is declared to be the property of the author and his assigns. In my opinion the plaintiffs do not get the copyright in their articles by virtue of section 3; for nothing is a book unless it is separately published, and I think these articles were not separately published. I think the publication here is the encyclopædia, which was edited by one of the plaintiffs as the paid agent of the publishers. The only other section of the Act which, in my opinion, can give the plaintiffs the copyright is section 18, which is as follows: "Provided also that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his com-

position in a separate form who by any contract, express or implied, may have reserved or may hereafter reserve to himself such rights, but every author reserving or retaining or having such right shall be entitled to the copyright in such composition when published in a separate form according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid." Clearly there is no such reservation in this case. With regard to the question whether the copyright is vested in the appellants, Joyce, J., seems to assume that it is not vested in them unless you can find special circumstances from which the court can infer it. I think, however, that the true result of *Sweet* v. *Benning* is that the copyright is to be inferred to belong to the publisher unless there is evidence to the contrary. Jervis, C J., says (16 C. B., at p. 480): "At the close of the argument we intimated an opinion that the plaintiffs had a copyright within the meaning of the 18th section, because it seemed to us—and I believe we all remain of the same opinion—that where the proprietors of a periodical employ a gentleman to write a given article, or series of articles or reports, expressly for the purpose of publication therein, of necessity it is implied that the copyright of the articles so expressly written for such periodical, and paid for by the proprietors and publishers thereof, shall be the property of such proprietors and publishers; otherwise it might be that the author might, the day after his articles has been published by the persons for whom he contracted to write it, republish it in a separate form, or in another serial, and there would be no correspondent benefit to the injured publishers for the payment they had made." These observations are perfectly general, and not based in any way on special circumstances relating to the employment of the reporters in *Sweet* v. *Benning*. Then Maule, J., says, at p. 484: "But, though no express words to that effect are stated in this special case, I think that where a man employs another to write an article or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer, subject, of course, to the limitation pointed out in the 18th section of the Act." Cresswell, J., at p. 488, says: "Under the circumstances stated in the special case, the copyright in the reports in question clearly vested in the plaintiffs as the proprietors of the work for which they were prepared." And Crowder, J. (at p. 489), says that, "looking to the language of the 18th section and the facts stated in the special case, it seems to me that it was not necessary that there should be any express stipulation as to the terms upon which the reports were to be composed in order to confer the copyright upon the plaintiffs; but that the terms might be inferred from the general nature and character of the employment; and that sitting as we do, with power to draw such inferences as a jury might draw, we may reasonably arrive at the conclusion that the undertaking between the authors of those reports and the proprietors of the work in which they were published was that the latter should have the copyright therein." The whole case seems to me to show that in the absence of evidence to the contrary the court will infer, from the fact of employment and payment, that the copyright is to belong to the employer. No doubt in *Walter* v. *Howe* Jessel, M.R., said that the evidence did not show that the proprietor of the newspaper was entitled to the copyright or that the author was not the owner of it; but *Sweet* v. *Benning* was not cited, and his judgment is really based on the non-registration of the newspaper. I think also that in *Lamb* v. *Evans* the Court of Appeal affirmed *Sweet* v. *Benning* and the principle laid down in it. This appears from the judgment of Lindley, L.J., who states, [1893] 1 Ch., at p. 225, the nature of the articles in that case, which were merely the headings to groups of advertisements with translations, and says that the view of Maule, J., in *Sweet* v. *Benning* may very safely be acted upon. And Bowen, L J. (at p. 227-8), says that *Sweet* v. *Benning* would be an authority if necessary for the proposition that the terms may be gathered from the transactions. Then he says that you may collect the terms from the nature of the business itself; "and it seems to me impossible, as a matter of business, to suppose that these headings were composed and furnished to the plaintiff upon any other terms than that he was to have the copyright in them, because otherwise those who also composed them and furnished them to the plaintiff might themselves have published them and defeated his object." If in the case of a book so composed and published employment and payment afford *primâ facie* evidence that as between the publisher and the various authors employed by him to write the articles, the publisher will have whatever property the law will give him in the book, I think the appellants ought to succeed; for I cannot find in the written agreement, or in any of the circumstances of the case, or in the nature of the encyclopædia and articles, anything whatever to negative this presumption. On the contrary, one cannot suppose, as a matter of business, that the publishers employed the writers of the articles on such terms that the writers could print, publish, and sell these very articles the day after the encyclopædia was published. I decline to draw the inference that the writers were employed on the basis that they should licence the publishers to issue the first publication of the articles; and I consider that the inference from the nature of the employment arises equally whether the contract is oral or contained in a written document, and is not an addition to the contract but an inference from it, just as the indemnity of the agent by the principal is an inference from a written contract of agency. I think we cannot uphold the judgment of Joyce, J, without overruling *Sweet* v. *Benning*; and I think we ought not to do this after such a lapse of time, and after it has been approved in *Lamb* v. *Evans*, even if we thought it wrong, and for myself I think it was quite right. In addition to the authorities bearing directly upon the question I may refer to *Shepherd* v. *Conquest*, where Jervis, C.J., in my opinion, inclines to the view that the employer may become the owner of the copyright *ab initio*. I think the principle laid down by Leach, V.C., in *Barfield* v. *Nicholson*, that the person who forms the plan and embarks in the speculation and employs various persons to compose different parts of the work is the author and proprietor, is clearly recognized by section 18, and that we ought to decide in favour of this principle unless we are prepared to hold that the conditions of section 18 cannot be satisfied without express terms.

ROMER, L.J.—I think this appeal fails. The respondents are admittedly the writers of the articles in question and are *primâ facie* entitled to the ordinary rights of authors; and if the appellants say that they have acquired some of the author's rights so as to entitle them to publish the articles separately the *onus* of proving this lies on them. Under section 18 they must establish three things: (1) Employment by them of the respondents to compose the articles, (2) that the articles were composed on the terms that the

copyright should belong to the appellants, and (3) that the latter paid for the articles. I think it cannot rightly be said that in every case of an article written for an encyclopædia mere proof by the proprietor of the encyclopædia of employment and payment of the writer of the article *primâ facie* gives the copyright to the proprietor. The Legislature has expressly said that not only must there be employment and payment, but it must be established that the employment was on the terms that the copyright should belong to the proprietor. Those terms cannot therefore of necessity be implied from the fact of employment and payment; nor ought they to be implied in every case where the author does not prove they were not part of the contract. I think that proof by the proprietor of employment and payment does not as a matter of law throw on the author the *onus* of proving that they were not part of the contract; for the section is dealing with a class of books and periodicals as to which the payment by the employer to the author may well be for the right of separate publication only, and not for the copyright. It may well be worth the proprietor's while to employ and pay a writer of an article on the terms that the writer retains the copyright, since the proprietor gets the benefit he chiefly desires by being able to publish the article; and though no doubt the term that the copyright shall belong to the proprietor may be inferred in his favour, even though not expressly mentioned, from the special circumstances of the case, yet there must be special circumstances to justify the inference. Therefore I think that the observations of Jervis, C.J., and Maule, J., in *Sweet* v. *Benning* go too far, unless they are construed in reference to some particular circumstances of that case; and the observations of Shadwell, V.C., in *Brown* v. *Cooke*, 16 L. J. Ch. 140, and of Jessel, M.R., in *Walter* v. *Howe* fortify me in this opinion. I think that in this case there are no special circumstances to justify the inference; certainly not in the case of Mr. Cook, though that of Mr. Aflalo is not so clear. But in his case there is the written contract between him and the proprietors of the encyclopædia purporting to set forth the exact terms of his employment and containing no term that the copyright in his articles shall belong to the proprietors; and I think under the circumstances that such a term ought not to be inferred as a matter of fact, while I have already pointed out why I think that it cannot be inferred as a matter of law. With regard to the further point taken by the defendants, which formed the subject of the argument on the rehearing, I need only say that I adhere to the view which I took in *Johnson* v. *Newnes*, and hold that the articles in question were "separately published" within the definition of "book" in section 2 of the Act. With regard to the proviso at the end of section 18, I think it deals with the case of an author who has reserved or retained a right of separate publication, which seems to me to presume that he has not the ordinary copyright, and to be addressed only to the case where the author, under the first part of the section, has parted with his copyright. But even if the proviso has a larger operation, it clearly implies that the author alone is entitled to the right of separate publication; and the plaintiffs are therefore entitled to the injunction granted by Joyce, J.

STIRLING, L.J.—The first question in the action is whether the defendants are or are not entitled to the copyright in four separate articles signed by the plaintiffs respectively, and contributed to the "Encyclopædia of Sport" published by the defendants. The answer to the question depends on section 18 of the Copyright Act, 1842; and under it the defendants, in order to make out their title, must establish three things—(1) That they employed the plaintiffs respectively to compose the respective articles for publication in or as part of the encyclopædia; (2) that the articles respectively were composed under such employment, on the terms that the copyright therein should belong to the defendants; and (3) that such articles have been paid for by the defendants. There is no dispute that the defendants have proved the existence of the first and third of these facts, but there is a great contest as to whether or not they have established the second. Now the agreements between the plaintiffs and the defendants have been reduced to writing; and neither agreement contains any express stipulation as to the proprietorship of the copyright in the articles. It has, however, been decided in two cases, *Sweet* v. *Benning* and *Lamb* v. *Evans*, that such stipulations need not be express, but may be inferred; and although in those cases the agreements were verbal only, it is contended that the like inference ought to be drawn in the present case. In *Sweet* v. *Benning* the learned judges who took part in the decision give the reasons for it in somewhat different terms. Crowder, J., appears to me to have arrived at his conclusion as to the terms on which the reports then in question were composed as an inference of fact from the general nature and character of the employment. I also think that each of the learned judges who constituted the Court of Appeal in *Lamb* v. *Evans* drew a similar inference from the nature of the employment and the surrounding circumstances of the case. I admit that Jervis, J., and Maule, J., in *Sweet* v. *Benning* used language which is susceptible of the interpretation that the inference drawn by them was one of law and not of fact; but I am not sure that they really meant this; if they did, I can only say, with all the deference which is justly due, and which I fully entertain, to such high authorities, that I am unable to see that it is in accordance with a sound construction of an Act of Parliament which requires three conditions to be satisfied in order that the copyright may belong to the publisher, to hold that the existence of one of the three is to be inferred as a matter of law from that of the other two. I think, therefore, that the inference which has to be drawn is one of fact and not of law. If, in the present case, we had to deal with verbal contracts, I should feel great difficulty in drawing an inference of fact similar to that which was drawn in *Sweet* v. *Benning* and *Lamb* v. *Evans*. The plaintiff Cook, for example, is a writer of great reputation on the subjects of the articles composed by him; he received for each what certainly appears the moderate sum of £10. So far as I can see, such an expenditure on the part of the publisher might well be made to secure the increase of reputation likely to accrue to the encyclopædia by reason of its containing articles by a writer of such eminence, even though the copyright should remain vested in him. The inference appears to me to be still more difficult to draw where, as here, the agreements between the plaintiffs and defendants have been reduced to writing. The written documents on the face of them appear to contain the whole of the agreements between the parties, and there is no evidence that they were intended to express only part of them. In these circumstances the presumption is that the writings contain everything material which has been agreed on; and evidence of surrounding circumstances is only admissible for the purpose of construing them. When the documents are construed in the light of surrounding circumstances it does not appear to me that any stipulation as to proprietorship

of the copyright can be spelt out of either of them. Incidents as to which a written contract is silent may, no doubt, be annexed either by virtue of some usage, or by the general law—as, for example, the obligations as to title imported into a contract for the sale of land, and the warranty of seaworthiness implied in a policy of marine insurance. In the present case there is no evidence of any usage, and, as I have already said, it is not, in my judgment, in accordance with the provisions of section 18 of the Copyright Act, 1842, to hold that one of three necessary conditions for the existence of the proprietorship of the copyright can, as a matter of law, be inferred simply from the existence of the other two. If such an inference were drawn in this case it seems to me that we should be using the surrounding circumstances, not to construe the documents, but to add to them.

The second question is whether the plaintiffs are entitled to any copyright or right of action which would enable them to maintain this action. It is contended that the plaintiffs are entitled to the copyright in these articles by virtue of section 3 of the Copyright Act, 1842, which provides "that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure" for the period therein mentioned "and shall be the property of such author and his assigns." It is said that none of these articles constitutes "a book," but that each of them is only part of a book. In *White* v. *Geroch* a precisely similar question arose under the statute 54 Geo. 3, c. 156 (repealed by the Copyright Act, 1842), which provided that from and after the passing of the Act the author of any book or books which should thereafter be composed, and be printed and published, and his assignee or assigns should have the sole liberty of printing and reprinting such book or books for the time mentioned. The plaintiff there sued in respect of the infringement of the copyright in a musical composition which formed a single sheet of a book containing a large number of other musical pieces not composed by the plaintiff. It was held by the Court of King's Bench that he was entitled to maintain the action. Abbott, C.J., said: "I am of opinion that any composition, whether large or small, is a book within the meaning of this Act of Parliament. It is perfectly clear that it would be a book if printed as a separate and distinct work; and if so, it seems to me that it does not lose that character by being found in company with other compositions." These observations apply to the signed articles of which the plaintiffs claim the copyright. It is said, however, that this decision does not apply to the Act of 1842, because section 2 provides "that in the construction of this Act the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published"; and it is said that none of these articles constitute a volume, or a part or division of a volume, separately published. In my judgment this argument ought not to prevail. The object of the Act of 1842, as expressed in the preamble, was "to afford greater encouragement to the production of literary works of lasting benefit to the world"; and the provisions of the statute show that this object was intended to be effected by conferring greater benefits on authors than were enjoyed by them under the preceding statutes. It could not have been the intention of the Legislature, therefore, to take away from authors any benefit which they possessed before, and the definition clause ought not to be read so as to produce such an effect, unless its language is susceptible of no other meaning, and, in my opinion, the true meaning and effect of that language is not to cut down but to extend the meaning of the word "book." Even if this were not so, I should still be of the opinion that the plaintiffs' signed articles, being distinguished from the rest of the volumes in which they are found, were separately published within the meaning of section 2. I think, therefore, that under section 3 the plaintiffs acquired copyright in these articles subject to the provisions of section 18, if and so far as that section affects the rights of the plaintiffs. This conclusion agrees with the opinion expressed by Shadwell, V.C., in *Bishop of Hereford* v. *Griffin*, by Stuart, V.C., in *Smith* v. *Johnson*, and Romer, L.J., when a judge of first instance, in *Johnson* v. *Newnes*.

There remains the question whether there is anything in section 18 to affect the rights of the plaintiffs. It was suggested that the words at the close of the section—"Every author reserving, retaining, or having such right" (that is, a right of publishing his composition in a separate form) "shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid"—might be held to impose on the plaintiffs the obligation of publishing their articles in a separate form in order to acquire the copyright. I am not, however, prepared to differ from the construction placed on these words by Romer, L.J., in *Johnson* v. *Newnes*—viz., that they only refer to a case where the author has parted in the first instance with the copyright to the proprietor of the work in which it appears. In any case, I should be of opinion that, even if the plaintiffs were not yet entitled to the copyright in these articles, they would be entitled to restrain the defendants from publishing them separately, on similar grounds to those given by Lord Hatherley, when Vice-Chancellor, in *Mayhew* v. *Maxwell*. Although I regret that Vaughan Williams, L.J., differs, and I necessarily feel some distrust as to the conclusion at which I have arrived, I think that the appeal fails, and ought to be dismissed.

*Appeal dismissed.*

Solicitors, *Dixon, Elkin, & Dixon; Field, Roscoe, & Co.*

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## High Court of Justice.

Chan. Div. Kekewich, J. — Dec. 5.

*In re* BROWNE'S POLICY. (*a.*)
BROWNE *v.* BROWNE.

*Married Woman—Insurance policy—"For the benefit of his wife and children"—Second wife—Children of second marriage—Participation—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 11.

*Where a man effects an insurance policy on his own life "for the benefit of his wife and children," his surviving wife (if any), whether his then living wife or one he may have married after the date of the policy, and his surviving children, whether by his then living wife or any after-taken one, are entitled to participate in the policy moneys.*

On the 31st of December, 1891, George Henry Browne effected an insurance on his own life "for the benefit of his wife and children" under the powers conferred by section 11 of the Married

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

Women's Property Act, 1882. At the date of the policy he had a wife living and children of that marriage. She died in 1894. In 1895 G. H. Browne married the defendant, Florence Browne, by whom he also had children. G. H. Browne died intestate, leaving his second wife, the defendant Florence, and children of both marriages surviving him. His widow took out letters of administration to his estate.

A summons was taken out by the children of the first marriage against the widow and the child of the second marriage to determine on the construction of the policy whether the respondents were entitled to any and what share of the policy moneys.

The summons was argued in chambers, but the written judgment was delivered in court.

*J. Gatey*, for the children of the first marriage.

*J. Austen Cartmell*, for the widow, relied on *In re Seyton, Seyton* v. *Satterthwaite*, 35 W. R. 373, 34 Ch. D. 511, and *In re Davies' Policy Trusts*, [1892] 1 Ch. 90, 40 W. R. Dig. 141, as showing that the widow and children took as joint tenants.

*Hon. Frank Russell*, for the child of the second marriage.

*Cur. adv. vult.*

Dec. 5.—KEKEWICH, J.—This case was argued in chambers, but having reason to believe that the points in issue are likely to be, if they have not already been, raised in other cases, I have deemed it right to give my judgment in court. Mr. George Henry Brown, on the 31st of December, 1891, effected a policy of assurance on his own life under the Married Women's Property Act, 1882, s. 11, for the benefit of his wife and children. At that date he had a wife living, and there were also living children of his by her. That wife died, and he subsequently married the defendant Florence Browne, by whom also he had children. Florence Browne survived him, and so did children of each marriage. The questions are, first, whether Florence Browne takes any interest under the policy; and second, whether the children entitled to take are the children of one marriage exclusive of the children of the other, or whether children of either marriage stand on the same footing. It is settled that all parties interested under a policy in this form take as joint tenants. Regarding the case apart from the language of the Married Woman's Property Act, 1882, one is met by the presumption, which is rather one of common parlance and common sense than of law, though it has been recognized by legal authority, that a married man speaking of his wife intends his wife at that time and does not contemplate one whom he may marry after her death, and the observation holds good as to the allusions by another to a given man's wife. But in construing an instrument intended to make provision for a wife after the husband's death this seems to lose weight, and is countervailed by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision. A similar line of reasoning points to the conclusion that he intended to benefit all the children, which is strengthened by the reflection that he cannot reasonably be supposed to have intended to benefit only the children living at the date of the policy to the exclusion of afterborn children by the then existing wife. The claim of the children by the second wife to share in the policy moneys is, I think, unanswerable, and if they are let in, I fail to see any good reason for excluding their mother. Turning to the Act, I find little assistance in the language used, which really throws me back on the proper construction of the policy. The Act says such a policy shall create "a trust in favour of the objects therein named." No one is in the strict sense named in this policy, and the word is not happily used. There is no reason why the trust should not include objects as yet unascertained, and of course the ordinary marriage settlement creates a trust of that character. Therefore what the Act means is that there is a trust created by the policy in favour of the persons designated thereby, and for such interests as are there stated according to the true construction of the instrument. I hold that by his wife and children the settlor intended his surviving wife (if any) and his surviving children whether by his then living or any after-taken wife. I made the order in chambers for the appointment of a trustee and the payment of costs out of the policy moneys. This will be embodied in an order to be dated the 5th of December declaring the construction of the policy according to this judgment.

Solicitors, *Patersons, Snow, Bloxam, & Kinder*, for *J. G. Bishop*, Brynmawr, Brecon.

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K. B. Div. (Kennedy, J.) — Jan. 24.

MATVEIEFF & CO. v. CROSSFIELD. (*a*.)

*Insurance—Marine—Custom at Lloyd's—Periodical settlement between broker and underwriter—Bankruptcy of broker—Liability of underwriter.*

*A policy of insurance was effected on a cargo of tea by an insurance broker on behalf of the plaintiff, and the defendant, a member of Lloyd's, subscribed the said policy. In accordance with a custom at Lloyd's, the broker and the defendant had a running account which was periodically settled, whereby premiums due to the defendant were set off as against losses due to the broker.*

*A loss under the said policy was thus settled in an account.*

*The broker, before paying the plaintiff the sum so due, became bankrupt, and the plaintiff sued the defendant.*

*Held, that the plaintiff was not bound by the custom unless he knew of its existence, and that it lay on the defendant to prove that the plaintiff knew of the custom; and that* Sweeting *v.* Pearce, 9 *W. R.* 343, *was not affected by* Robinson *v.* Mollett, *L. R.* 7 *H. L.* 802, 24 *W. R. Dig.* 222.

Action tried in the Commercial Court.

A policy of marine insurance was effected by insurance brokers, on behalf of the plaintiffs, on a cargo of tea.

The said policy was partly underwritten by the defendant, who was a member of Lloyd's.

The insurance brokers and the underwriter had a running account which they were in the habit of periodically settling, the underwriter setting off premiums due to him against losses due by him to the brokers on policies effected by the brokers.

During the currency of the policy the tea was totally lost by perils insured against.

The brokers settled their account with the defendant, and in that account the loss was credited to the brokers. The brokers failed to pay the sum so due to the plaintiffs and became bankrupt, whereupon the plaintiffs sued the underwriter.

The defendant set up a custom of Lloyd's whereby insurance brokers and underwriters mutually settled losses in respect of policies and premiums due upon policies effected by the insurance brokers with the underwriters, and alleged that the plaintiffs had knowledge of the custom. He further contended

(*a*.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

that even if the plaintiffs did not know of the custom, they were bound by it, for the employment of the broker to effect a policy at Lloyd's was sufficient to bind the assured by its custom. The defendant also contended that the case of *Sweeting* v. *Pearce*, 9 W. R. 343, was no longer law since the decision of *Robinson* v. *Mollett*, L. R. 7 H. L. 802, 24 W. R. Dig. 222.

The plaintiffs admitted that such a custom existed, but denied that they knew of its existence.

*J. A. Hamilton, K.C.*, and *Lochnis*, for the plaintiffs.

*Scrutton, K.C.*, and *Mackinnon*, for the defendant.

KENNEDY, J.—I find as a fact that the plaintiffs did not know of the custom, and I hold that it lies on the defendant to prove that the plaintiffs knew of its existence. In my opinion *Sweeting* v. *Pearce* is not affected by *Robinson* v. *Mollett*.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Walton, Johnson, Bubb, & Whatton.*

Solicitors for the defendant, *Thomas Cooper & Co.*

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K. B. Div. (Wright, J.) — Jan. 22, 23.

COLUMBUS CO. (LIMITED) v. CLOWES. (a.)

*Contract — Damages — Negligence — Plans negligently drawn by architect.*

*The plaintiffs, lessees of a piece of land, intending to erect a factory thereon, employed the defendant, an architect, to prepare plans for the building. The architect, acting on unauthorized and incorrect information as to the dimensions of the building site, drew up his plans accordingly, and neglected to measure the site himself. The plaintiffs paid the defendant for the plans, believing them to be correct, but owing to financial difficulties were unable to proceed with the building operations, and eventually sold their interest in the site, when it was discovered that the plans were incorrect. The plaintiffs thereupon sued the defendant, claiming the return of the money paid as having been paid upon a consideration which had wholly failed, or, in the alternative, damages for negligence.*

*Held, that the consideration had not wholly failed, but that the plaintiffs were entitled to nominal damages in respect of the defendant's negligence.*

Action tried by Wright, J., without a jury.

The plaintiffs, the lessees of a piece of land, employed the defendant, an architect, to prepare plans and specifications for certain buildings to be erected on such land, and to engage a quantity surveyor to take out the quantities from those plans.

The defendant, acting on information given him by some unauthorized person as to the dimensions of the piece of land, which information was incorrect, as it represented the dimensions to be somewhat less than was actually the case, did not measure the site himself, but prepared plans and specifications in accordance with such information, and employed a quantity surveyor to take out the quantities from these plans.

The plaintiffs thereupon, in the belief that the plans and quantities were correct, paid both the defendant and the quantity surveyor £200 each for the work respectively done by them.

Owing to financial difficulties the plaintiffs were unable to erect the intended buildings. They subsequently sold their lease, when it was discovered that the plans and quantities were not correct, as they did not cover the whole of the building site. Thereupon the plaintiffs brought the present action against the defendant for the return of the money paid as having been paid upon a consideration which had wholly failed, or, in the alternative, for damages for negligence.

At the trial evidence was given that the defendant had made borings on the land in question in order to ascertain how deep it would be necessary to put the foundations in; and the quantity surveyor proved that the difference in the quantities which he had taken out from the original plans and the quantities which would be necessary in the case of plans covering the whole of the piece of land would be represented by about £40.

*Bray, K.C.* (*F. P. M. Schiller* with him), for the plaintiffs.—There was a total failure of the consideration, and the plaintiffs were entitled to recover the money they paid for the plans in ignorance of the fact that they were incorrect: *Milnes* v. *Duncan*, 6 B. & C. 671. In *Monneypenny* v. *Hartland and Others*, 1 C. & P. 352, it was laid down that if a surveyor makes an estimate which turns out to be incorrect to a considerable amount through his omitting to examine the ground for the foundation of the work, he is not entitled to recover anything for his plans, specifications, or estimates made for that work. In the alternative the plaintiffs are entitled to recover damages in respect of the money they have paid for the plans which are now useless.

*Gore-Browne, K.C.* (*A. G. McIntyre* with him), for the defendant.—There has been no total failure of consideration. The defendant is entitled to be paid for the work he has actually done. The plans could have been altered so as to make them apply to the actual dimensions of the building site, and therefore they are not worthless. Even if it is assumed that the defendant acted negligently in not himself measuring the site, yet it has not been shown that the plaintiffs have suffered any real damage, for even if the plans had been accurate, they have never been in a position to make use of them.

*Bray, K.C.*, in reply.—The plaintiffs are entitled to the amount they paid for the plans as if they had been correct. The fact that they never used the plans is immaterial.

He cited *Jones* v. *Just*, 16 W. R. 643, L. R. 3 Q. B. 197.

*Cur. adv. vult.*

Jan. 23.—WRIGHT, J.—This is a singular case and is not, as far as I can ascertain, covered by any authority. The plaintiffs employed the defendant, an architect, to prepare plans for a factory and offices to be erected on a piece of land of which they, the plaintiffs, were lessees. The defendant was incorrectly informed by some person who had no authority from the plaintiffs to give any information to the defendant that the site on which the buildings were to be erected was of certain dimensions. The defendant, assuming this information to be correct, drew his plans on that assumption, and neither measured nor surveyed the site himself. It has not been contended on behalf of the defendant that he was right in so acting, and it was admitted that it was his duty to measure and survey the site before drawing up his plans. The consequence of this mistake was that the plaintiffs paid the defendant for plans which were in fact incorrect; and they contend that they are entitled to recover the money which they have paid for the plans because the plans are worthless, and that there has therefore been a total failure of consideration. Alternatively they contend that they are entitled to the damages which they have sustained owing to the negligence of the defendant.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

I have come to the conclusion that there was not a complete failure of consideration. In my opinion the design of the plans is to some extent available for a site of the real size, for I think upon the evidence in this case that a small addition to the quantities which have been taken out in accordance with the plans is all that is necessary in case of a building of the proper size. A good deal has been done which is really of much the same value as if the plans had been correct. I think, however, it is clear that the plaintiffs are entitled to some damages, for it has been proved that the defendant did act negligently. In order to arrive at what those damages should be it is necessary to divide the case. As regards the borings and other work carried out by the defendant the plaintiffs got, I think, full value. As regards the plans there is no evidence before me that, whether correct or not, they have any value in themselves. It seems, therefore, to me, that the most that the plaintiffs can get is the reasonable cost of making the plans good. But then there arises this difficulty. The defendant, if he had made them good, would have been bound to do so without charging anything. If, however, the plaintiffs had called in another architect he would in all probability have insisted on making entirely new plans and have refused to make any use of the original plans. Now would that have been reasonable? I think not. A plaintiff who has suffered damages must act reasonably and not incur unnecessary expenses. That is one of the first principles of the law as to damages. To me it seems perfectly clear that the plaintiffs have not suffered any real damage, as owing to their financial position they were never able to make use of the plans. Therefore I think they are only entitled to nominal damages.

Then we come to the other part of the case—namely, the question as to quantities. That question rests on a different basis. Quantities were necessary in order to enable the plaintiffs to obtain tenders for the carrying out of the work, and I therefore think the plaintiffs are entitled to the cost of adapting them to the plans which would be necessary in the case of a building to cover the larger site. It has been shown in evidence that the cost of so doing would amount to about £40.

I therefore give judgment for the plaintiffs for £40 in respect of the quantities, and forty shillings in respect of the plans.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Jacobs & Joseph.*

Solicitors for defendant, *Loughborough, Gedge, Nisbet, & Drew.*

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## Privy Council.

(*From the Supreme Court of Victoria.*)

July 9.

BANK OF NEW SOUTH WALES *v.* GOULBURN VALLEY BUTTER FACTORY CO (*a.*)

*Banker — Customer — Transfer from one account to another—Trust—Notice—Inquiry—Suspicion.*

*In the absence of circumstances which disclose a trust a banker is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

*A managing director of a company who was the holder of all the shares of the company carried on a similar business to that of the company on his own account, and the bankers were the same. It was known that his intention was to work the two businesses together. On three occasions he transferred large sums by cheque from the company's account to his own, and this was done in breach of his duty as a director.*

*Held, that, as under the circumstances there was no notice to the bank of any irregularity, or anything which should lead to an investigation or inquiry, the bank were not liable to refund to the company the sums transferred.*

The whole circumstances are given in their lordships judgment.

*Haldane, K.C., E. F. Mitchell* (of the Colonial bar) and *J. K. Young* for the appellants.

*Cohen, K.C.,* and *Montague Lush, K.C.,* for the respondents.

The judgment of their lordships (Lords MACNAGHTEN, DAVEY, ROBERTSON, LINDLEY, Sir FORD NORTH, and Sir ARTHUR WILSON), was delivered by

Lord DAVEY.—This is an appeal from an order of the full court of the Supreme Court of the State of Victoria, dated the 11th of October, 1900, reversing the judgment of the primary judge, Hodges, J., of the previous 4th of June, in an action in which the respondent company was plaintiff, and the appellant, the Bank of New South Wales, was defendant. The object of the action (so far as material) was to recover from the bank three sums of £1,022, £668, and £619 2s. 10d., which it was alleged had been improperly transferred from the respondent company's account at the bank to the account of one Alexander Lindsay Ballantyne, and so lost to the company.

The company was incorporated in October, 1895, under the Companies Act, 1890, of the State of Victoria with a capital of £1,200 divided into forty-eight shares. The principal object of the company was to carry on the business of a creamery and butter factory and deal in butter and other similar products, and it was empowered by its memorandum of association to carry on its business either singly or in connection with any other corporation, companies, firms, or persons. The articles provided for the appointment of a managing director, and the directors were empowered to delegate to the managing director for the time being such of their powers and authorities as the directors should think fit.

In and for some years prior to June, 1898, Alexander Lindsay Ballantyne was carrying on business in Melbourne as a dairy farm produce merchant, and kept his banking account at the Flinders-street branch of the appellant bank. He was apparently in good credit and had been allowed to overdraw his account from time to time to the extent of about £4,000 against the security of bills for collection and boxes of butter.

In the month of May, 1898, Ballantyne arranged for the purchase of all the shares in the company with a view to the amalgamation of his own and the company's businesses. This arrangement was effected by two documents both dated the 3rd of June, 1898, and pursuant thereto all the shares were transferred to Ballantyne or his nominees, and Ballantyne and two of his nominees were elected directors. Ballantyne was elected chairman of the board, and on the 6th of June, 1898, he was appointed managing director of the company.

Ballantyne informed Mr. Earle, the manager of the Flinders-street branch of the bank, of his purchase of the shares. And on some day between the 31st of May and the 9th of June he called on Earle. What then took place is the

stated by Earle, whom the courts below treated as an honest and credible witness: "He asked me if I had any objection to his bringing the account of the Goulburn Valley Butter Co. from the Royal Bank to my bank. I said that I had no objection, and asked him if he was going to close up his own account. He said that he was not going to close it up, and I asked him why he did not keep one account for the whole business. He said that he wished to keep his old connection together, and thought that some of his old customers would deal with A. L. Ballantyne, but would not deal with the Goulburn Valley Butter Co., and for that reason he would buy produce from his old customers in the name of A. L. Ballantyne and pay them with A. L. Ballantyne's cheque, but that the goods so bought would go into the Goulburn Valley Butter Co.'s works to be made up by them, sold by the company, and the proceeds of the sale paid into the company's account, and therefore the two accounts would require to be adjusted, and for that purpose he said that he would leave me two cheques signed in blank—one by the Goulburn Valley Butter Co., and one by himself, and I was to use these cheques as I thought fit for adjustment purposes."

Ballantyne's account of the interview was as follows:

"*Q.* Anything else done the same day?—*A.* I said to Mr. Earle that as I had undertaken to pay the company's debts—about £900, roughly speaking, within a fortnight my account might be overdrawn, and that I would give him the company's cheque to hold in blank and one of my own cheques to adjust from time to time as occasion might arise. The company had not any assets and were not able to pay the liabilities as they became due.

"*Q.* Was anything said about goods?—*A.* I said I would be supplying the company with goods myself during the whole of June, and that would be a reason for my account being bigger.

"*Q.* Did you explain to him what goods?—*A.* I told him I was going to amalgamate the two businesses together, and that with the idea of holding the goodwill of both my own business and the company's business I would draw cheques on both accounts—eventually I purposed trading under the name of the Goulburn Co. altogether, so as to retain all the business I could."

On the 9th of June an account was opened in the name of the company at the Flinders-street branch of the bank, and two cheques, one signed by Ballantyne personally and one signed by him as managing director for the company, but both undated and blank in amount, were handed to Earle. At this date Ballantyne's account was overdrawn to the extent of £667 15s. against security. Some point was made of this in the court below, but their lordships do not attach any importance to it because it is clear that, applying the principle of *Clayton's case*, 1 Mer. 572, the balance to his debit had run off before the 5th of September. Between the 9th of June and the 5th of September both accounts were operated on by payment in of sums to credit and the drawing of cheques upon them.

On the 5th of September, 1898, Ballantyne's account was overdrawn to the extent of £1,354 15s. 10d. against security amounting to £335 showing a net debit of £1,019 15s. 10d., while the company's account was in credit to the extent of £430 1s. 7d., and security was held by the bank amounting to £652, showing a net credit of £1,082 1s. 7d. On that date Ballantyne called at the bank and Earle mentioned to him the state of the accounts. Ballantyne then suggested that the accounts should be adjusted by making a transfer from the company's account, and by his direction the company's blank cheque was filled up with the sum of £1,022, and dated the 5th of September, 1898, and it was initialled by Ballantyne. The amount of the cheque was on the same day debited to the company and credited to Ballantyne's account. This is the first sum claimed in the action.

On the 30th of September, 1898, a similar transaction took place. Another blank cheque of the company which had been given to Earle in place of the previous one was filled up by Ballantyne's directions with the sum of £668 and initialled by him. The amount was credited to Ballantyne's account, which was then overdrawn to the amount of £667 4s. 1d. This is the second amount in question.

On the 5th of November, 1898, a cheque of that date of the company for £619 2s. 10d. was paid over the counter to the credit of Ballantyne's account in the ordinary way. At that date Ballantyne's account was overdrawn to the extent of £619 2s. 10d. against security amounting to £228. This is the third and last sum claimed.

To complete the story, it appears that on the 25th of November, 1898, Ballantyne's account was in credit and the company's account was overdrawn. Earle, without any communication with Ballantyne, filled up his blank cheque in favour of the company with the amount of £231 2s. 8d., and placed it to the credit of the company's account. This has not been objected to.

On the 18th of January, 1899, the company went into liquidation, and in the following March Ballantyne's estate was placed under sequestration. Earle stated in his evidence that he had no suspicion of Ballantyne's financial difficulties until December, 1898, and no attempt was made to fix him with earlier notice.

It should be mentioned as the court below attached some importance to it that in July, 1898, Ballantyne sold four of the company's shares to a Mr. Stone, and another share to a Mr. Shingler, who continued to hold them until the liquidation. In the view which their lordships take of the transactions this circumstance does not, however, appear to them material.

The respondent's case as originally pleaded was in effect that the above-mentioned sums were paid to the appellant bank in breach of Ballantyne's duty as managing director for the purpose of discharging his private indebtedness to the bank, and that the bank had notice thereof, but in the course of the trial the respondent obtained leave to amend and set up the case that the transactions in question were *ultra vires* of the company. The primary judge found that the bank had acted in good faith and without notice of any irregularity and breach of trust on the part of Ballantyne, and that the transactions were not *ultra vires* of the company. The full court held that the transaction entered into, if carried out, would have been *ultra vires*, and that it was *ultra vires* as carried out, whatever agreement was entered into.

It is a little difficult to see what it exactly was that is said to have been *ultra vires* of the company. Ballantyne's proposal to work his own business in connection with that of the company as disclosed by him to Earle was certainly not *ultra vires*. Nor was the giving of blank cheques for the purpose of adjusting the two banking accounts in itself *ultra vires*. It is not a prudent or very businesslike act of a manager of a company or anybody else to entrust another with a blank cheque, but no liability is incurred until the cheque is made use of and the fact and extent of liability will then depend on the

circumstances of the case. If Earle had taken upon himself to fill up a blank cheque on the company's account he would very likely have imposed upon the bank the obligation of showing that the company was at that date indebted to Ballantyne in the amount. But he did not do this. Both on the 5th of September and the 30th of September the cheque was filled up under Ballantyne's direction and with an amount authorized by him on behalf of the company. The transaction therefore was precisely the same as if the company's cheque for the amount in favour of Ballantyne had been handed to the bank with directions to place the amount to Ballantyne's account. This was in fact the form of the third transaction in question.

The learned counsel for the respondent admitted that if the company was indebted to Ballantyne at the respective dates of the three cheques in the amounts for which they were drawn no question could be raised. The question therefore is narrowed to this: whether there was any duty on the part of the bank or its manager to inquire into the state of the account between Ballantyne and the company. There is no evidence that Earle knew that the company was not indebted to Ballantyne or that the latter was not justified in filling up the cheques for the amounts they bear, and Earle states in his evidence that his belief was that any transfer Ballantyne made was simply transferring money that the company was owing to him. The course of business as described to Earle would necessarily result in cross accounts between Ballantyne and the company, and probably in the latter becoming indebted to Ballantyne, and indeed there would be no objection in the company making advances to Ballantyne to enable him to meet his engagements for butter on their account. The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque: *Gray* v. *Johnstone*, 16 W. R. 842, L. R. 3 H. L. 1; *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282, 41 W. R. Dig. 9; and is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons: *The Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693, 47 W. R. Dig. 9. On the other hand, a banker is not justified of his own motion in transferring a balance from what he knows to be a trust account of his customer to the same customer's private account: *Ex parte Kingston, In re Gross*, 19 W. R. 910, L. R. 6 Ch App. 632. Their lordships are of opinion that Earle was not bound to inquire into the state of the account between the parties. He had no materials to enable him to do so, and it is difficult to suggest anyone of whom he could have made inquiry other than Ballantyne himself. Their lordships therefore hold that the bank is not affected with notice of any irregularity on Ballantyne's part.

The learned Chief Justice seems to have thought that there was some agreement and intention on the part of Earle and Ballantyne to discharge the latter's previous indebtedness to the bank out of the company's money. Questions were also put to Earle in his cross-examination as to his view of the propriety of the transactions in other circumstances. It is possible that Earle was imperfectly acquainted with the law relating to joint stock companies, and that he placed some and perhaps undue reliance on the fact of Ballantyne being sole owner of the shares. But the bank is bound only by Earle's acts and knowledge, and not by his opinions on legal questions. In their lordships' judgment the evidence does not warrant the inference of an agreement between Earle and Ballantyne to discharge the latter's private debts out of the company's money, and the cheques were not in fact applied (as assumed by the Chief Justice) in discharge of Ballantyne's indebtedness existing on the 9th of June.

Their lordships will humbly advise his Majesty that the order of the full court of the 11th of October, 1900, should be discharged, and there should be substituted for it an order dismissing the respondent's appeal to the full court with costs. The respondent will also pay the costs of this appeal.

Solicitors, *Walleson & Malleson; Flegg & Son.*

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## Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — March 4.

ANDERSON v. RAYNER. (*a*.)

*Ship—Seaman—Injury in service of ship—Medical expenses after being brought back to home port—Liability of shipowner—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 207, *sub-section* 1.

*By section* 207, *sub-section* 1, *of the Merchant Shipping Act*, 1894, "*If the master of, or a seaman or apprentice belonging to, a ship receives any hurt or injury in the service of the ship, the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the master, seaman, or apprentice until he is cured, or dies, or is brought back, if shipped in the United Kingdom, to a port of the United Kingdom, or if shipped in a British possession to a port of that possession, and of his conveyance to the port, and in case of death the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages.*"

*Held, that the words "until he is cured, or dies, or is brought back," qualify the liability of the shipowner to pay the expense of providing the necessary surgical and medical advice and attendance and medicine for the injured seaman as well as the expenses of his maintenance, and that therefore the shipowner's liability in respect of both ceases upon the injured seaman being brought back to a home port.*

Appeal from the judgment of Wills, J.

The plaintiff was the master of a ship belonging to the defendant, which traded between Liverpool and Falmouth. While on a voyage from Liverpool to Falmouth the plaintiff was injured by an accident in the service of the ship, and the ship was brought back to Liverpool, where the plaintiff was landed. In consequence of the accident he incurred, when on shore, expenses for medical attendance and medicine to the amount of £28, and he brought this action under section 207, sub-section 1,* of the Merchant Shipping Act, 1894, to recover that amount from the defendant. It was not alleged that the accident was caused by any negligence on the part of the defendant.

Wills, J., held that the words, "until he is cured, or dies, or is brought back" to port, applied only the obligation of the shipowner to pay for the expenses of maintenance, and did not qualify the obligation to pay for the necessary surgical and medical attendance and medicine; and that therefore this latter obligation was an absolute one, and the plaintiff was entitled to recover.

The defendant appealed.

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* The sub-section is set out in the head-note.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-Law.

*Horridge, K.C.*, and *Dawson Miller*, for the defendant.—The ordinary grammatical construction of section 207, sub-section 1, is to read the words, "until he is cured, or dies, or is brought back" as qualifying the obligation to pay both for medical expenses and for expenses of maintenance. The section, which is substantially a re-enactment of section 228 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), has imposed a new obligation upon the shipowner—namely, to pay for medical and maintenance expenses if a seaman is injured in the service of the ship. There is no reason why the obligation of the shipowner to pay for the expenses of maintenance should cease upon the injured seaman being brought back to a home port, and the obligation to pay for medical expenses should continue. The scope of the section is to make the shipowner liable for these expenses while the seaman is away from home, but not after he has been brought back. Again, the onus lies upon the plaintiff of showing that the section imposes the liability he contends for, and if the words of the section are doubtful he has not made out his case.

*W. F. Taylor, K.C.*, and *Keogh*, for the plaintiff.—Section 207, sub-section 1, of the Act of 1894 differs somewhat from section 228 of the Act of 1854. By this latter section the shipowner is made liable to pay for "the expense of providing the necessary surgical and medical advice, with attendance and medicines, and of his subsistence until he is cured, or dies, or is brought back." In section 208 of the Act of 1894 the phraseology is altered, and the section is divided into two heads, the first relating to the medical expenses, and the second, beginning with the words "and also," relating to the expenses of maintenance. The first head is cut off from the second, and the qualifying words, "until he is cured, or dies, or is brought back," refer solely to the second head. It is clear from the section that the shipowner may have to pay for some expenses after the ship has come back to a home port, because he is liable in case of the death of the seaman to pay his funeral expenses. If the section does not apply to this case it will be futile as regards coasting ships and many other ships, because they do not carry a medical man (see section 209), and therefore there can be no medical expenses until the return to port. This is a section passed in favour of seamen, and the court should lean towards a construction that will extend its benefits and not curtail them.

VAUGHAN WILLIAMS, L.J.—I cannot adopt the suggestion that we should give this section a construction favourable to the plaintiff because it has been passed in favour of seamen. I venture to think that the old canon of construction still prevails—namely, that if it is contended that a statute has imposed a liability beyond that which the common law imposes, the statute must do so in plain terms and must not leave the matter in doubt. In the present case I apply that principle, and say that it is by no means clear from the words of section 207, sub-section 1, that the statute intended to impose upon the shipowner any liability either for medical expenses or for the expenses of maintenance after the injured seaman has been brought back to a home port. It seems to me, when I look at the various provisions of the section, that the general intention of the section, notwithstanding the provision as to funeral expenses, is merely to impose the liability on the shipowner, both for medical and maintenance expenses, until the injured seaman is cured, or dies, or is brought back to a home port. The defendant therefore is not liable for these expenses, and the appeal must be allowed.

STIRLING, L.J.—I am of the same opinion. I cannot construe the section as imposing any liability on the shipowner for the expenses of providing medical advice and medicines to the injured seaman after the latter has been brought back to a home port. The scope of the section covers the time when the seaman is away from a home port. It is not denied that the liability for the expenses of maintenance ceases upon the seaman being brought back to a home port, and in my opinion the same holds good of medical expenses.

MATHEW, L.J.—I am of the same opinion. Section 207 is practically a re-enactment of section 228 of the Merchant Shipping Act, 1854. During the period since that Act came into operation, nearly fifty years ago, it never seems to have occurred to anyone to place the construction now contended for upon the section. That tacit acquiescence in a particular view seems to me to be a strong indication as to what is the true construction of the section. The section constitutes one of the great safeguards of the seaman, because it imposes a liability upon the shipowner to look after the seaman while on board the ship and to bring him back to a home port.

*Appeal allowed.*

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*, for *Simpson, North, Harley, & Birkett*, Liverpool.

Solicitors for the defendant, *H. Forshaw & Hawkins*, Liverpool.

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From Registrar in Bankruptcy. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 27.

*In re* A DEBTOR.
*Ex parte* THE DEBTOR. (*a.*)

*Money-lender—Harsh and unconscionable transaction—Re-opening—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-section* 1.

*A transaction may be "harsh and unconscionable" within the meaning of section* 1, *sub-section* 1, *of the Money-lenders Act*, 1900, *by reason of excessive interest merely, and the standard to be applied is not the same as that applied by a court of Equity before the Act.*

Wilton & Co. *v.* Osborn, [1901] 2 *K. B.* 110, 49 *W. R. Dig.* 124, *overruled.*

This was an appeal from a receiving order made by Mr. Registrar Hope.

The question turned on the construction of section 1 of the Money-lenders Act, 1900.

The petitioning creditor was a money-lender from whom the debtor had borrowed small sums of money at rates of interest amounting in one case to 80 per cent. per annum, in another case to so much as 200 per cent. The total amount lent was £50. The creditor had recovered final judgment under order 14, and had served the usual bankruptcy notice.

At the hearing of the petition the debtor claimed relief under the Money-lenders Act, 1900, on the ground that the interest charged was excessive.

The registrar had felt himself debarred from reopening the transaction by reason of the decision of Ridley, J., in *Wilton* v. *Osborn*, [1901] 2 K. B. 110, 49 W. R. Dig. 124, which had since been followed by Channell, J., in *Barnett* v. *Coronna* (reported in the *Times* of 16th June, 1902). Both learned judges had held that excessive interest was not of itself sufficient ground for affording relief under the said Act.

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

The debtor appealed.

Section 1, sub-section 1, of the Act is as follows: "Where proceedings are taken in any court by a money-lender for the recovery of any money lent after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, renewals, or any other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise or alter, any security given or agreement made in respect of money lent by the money-lender, and, if the money-lender has parted with the security, may order him to indemnify the borrower or other person sued."

*Germaine, K.C.*, and *Cooper Willis*, for the debtor.—The creditor is getting over 90 per cent. for a total loan of £50. This is a fair case for the registrar to reopen the bargain. The intention of the Legislature in passing the Act was to give additional relief to the borrower. It is possible to construe the words "or otherwise" as words of extension, no less than as words of definition. If the decision of Ridley, J., in *Wilton* v. *Osborn* is upheld, then the Act of Parliament is rendered nugatory. The debtor is a bank clerk, and if the receiving order is confirmed he will lose his sole asset—viz., his salary: *In re Otway*, [1895] 1 Q. B. 812, 43 W. R. Dig. 17.

*Scarlett*, for the petitioning creditor.

COLLINS, M.R.—This case comes in a peculiar way from the learned registrar. On the hearing of the case the registrar deemed himself bound by the decision of Ridley, J., in *Wilton* v. *Osborn*, but he granted an adjournment for the purpose of the parties raising here the question whether the judgment of Ridley, J., in that case was right. The learned judge held that the only standard to be applied in money-lending transactions was that which was adopted by a court of equity before the Act. If that decision is not right, it will be necessary for the transaction to be discussed before the registrar again. Now, is this money-lending Act a statutory enactment that the standard to be applied in money-lending transactions is that laid down by the courts of equity and no other? To begin with, it is extraordinary that in an Act "for amending the law with respect to persons carrying on business as money-lenders" the Legislature should go through all these formalities for the purpose of leaving the law precisely as it stood before the Act. The whole purpose of the Act is to make some changes beneficial to the borrower. [Here his lordship read the section.]

Now, it has been held by Ridley, J., that, having regard to these words, the Legislature must be taken to have enacted that this statute provides for relief only on the grounds where equity formerly granted relief. It appears to me that the relief given by this enactment is not thus limited. Whatever was the law, it seems to me that this particular enactment does not bind the court to say that they are bound to conform to the standard of the court of equity. This effect was not intended by the statutory enactment, nor does it follow from the natural grammatical construction of the words. The courts of equity gave relief in certain conditions only—namely, when there was a fiduciary relation, when there was fraud, undue pressure and so on. They did not regard excessive interest alone as a ground for such relief unless the parties were under full age, or there was some particular relation between them. It seems to me that there is nothing to prevent the court from construing that a bargain is harsh and unconscionable on the ground of excessive interest alone, even as regards a borrower of full age and standing in no special relation to the lender. The words, as I have said, do not grammatically admit of the interpretation accorded to them by Ridley, J. To leave out the words "or otherwise" from the section, which in effect was done by the learned judge, is not a fair way of construing the Act. There are two classes of transaction mentioned in the section—one the harsh and unconscionable transaction, the other the transaction where the court of equity would grant relief. To make the standard that of the court of equity alone would, as I have said, be to defeat the general purpose of the Act. The learned registrar, by reason of the decision of Ridley, J., felt himself debarred from inquiring further into the facts, and therefore, that bar being now removed, the case must go back to him in order that he may consider afresh the whole question as to whether relief ought to be granted.

ROMER, L.J.—I am of the same opinion. I think that the section of the Act is not free from difficulty. But, in my opinion, it was intended to extend the right to relief of the borrower, as against the money-lender, beyond that which existed before the Act in a court of equity. The phrase "harsh and unconscionable" stands by itself; it is an isolated phrase and not bound up with the phrase which follows so as to limit the words "harsh and unconscionable" to cases where the courts of equity prior to the Act would have given relief. The words "or otherwise" are equivalent to "in other respects," or some such words. I think that in this section the words "harsh and unconscionable" ought not to receive an artificial meaning by saying that they must have reference to the rules of equity before the passing of the Act. A transaction may be harsh and unconscionable without necessarily being one in respect of which relief would have been given by a court of equity before the Act.

I disagree with the decision of *Wilton* v. *Osborn* in so far as it purported to limit the operation of the section. This appeal ought to succeed, and the registrar should have an opportunity of going into the question whether the transaction was harsh and unconscionable.

COZENS-HARDY, L.J.—Was this Act intended to alter the law or leave the law exactly as it stood before the Act, and by law I mean law and equity? The strictly grammatical construction of the words is against the decision of Ridley, J.

I should be sorry to lay down any rule which would debar the court from considering the question except under the circumstances which formerly prevailed in equity.

I should be sorry to have to say that the interest may not be so excessive as to justify the court in saying that a transaction is harsh and unconscionable.

In considering the question the court must have

regard, not only to the rate of interest, but to the risk and all other circumstances. The learned registrar must now consider what he was not at liberty to consider before.

*Appeal allowed.*

Solicitors, *H. W. Chatterton; Alfred Slater.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb 21.

MASKELYNE AND COOKE *v.* SMITH. (*a.*)
PALMER, *Claimant.*

*Fraudulent conveyance—Assignment to trustee for creditors—Deed of arrangement—Registration—Affidavit—List of creditors—Omission—Intentional exclusion of particular creditor—Delaying creditors—Bona fides—13 Eliz. c 5—Deeds of Arrangement Act,* 1887 (50 & 51 *Vict c.* 57), *ss.* 5, 6.

*A deed of arrangement is not necessarily void under section 5 of the Deeds of Arrangement Act,* 1887, *because in the affidavit by the debtor filed on registration, under section 6 sub-section* 1, *the name of a particular creditor is omitted.*

*A deed of assignment to a trustee for creditors is not necessarily void under* 13 *Eliz. c.* 5, *because the debtor intentionally excluded a particular creditor from the benefits of the deed.*

*Where a deed of assignment to a trustee for creditors is impeached as being void under* 13 *Eliz. c.* 5, *the test is whether the deed was really a bonâ fide deed for the benefit of creditors or whether its object was to benefit the debtor at the expense of the creditors.*

*Decision of the* Divisional Court ([1902] 2 *K. B.* 158, 50 *W. R. Dig* 62) *affirmed.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) on the hearing of an appeal from the Westminster County Court (reported [1902] 2 K. B. 158, 50 W. R. Dig. 62).

In February, 1900, the plaintiffs, Messrs. Maskelyne and Cooke, who were public entertainers, gave an entertainment for the benefit of a hospital, and the defendant Smith, who was a market gardener, gave them a guarantee to secure the payment of the fees which they charged for the entertainment.

In May, 1900, the defendant, being in debt, executed a deed assigning all his real and personal estate to the claimant Palmer as trustee for his creditors to secure a composition of 20s. in the pound, payable by instalments of £10 a month. The deed provided that until default by the debtor in payment of the instalments he should be allowed to use and deal with the estate for the purposes of his business or such other purposes as the trustee might think proper, but subject to the control and supervision of the trustee. It also provided that the trustee should not be bound to interfere with the debtor in the conduct of the business further than he should think necessary. The defendant did not consider that Maskelyne and Cooke were business creditors, and accordingly he did not include their names in the list of creditors which he gave to the trustee. The deed did not contain a schedule of creditors, and on the registration of the deed under the Deeds of Arrangement Act, 1887, the schedule to the affidavit by the debtor, filed as required by section 6, sub-section 1, did not contain the names of Maskelyne and Cooke.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

In April, 1901, the plaintiffs sued the defendant for payment of what was due under the guarantee, and, having obtained judgment, they levied execution on goods found on the defendant's premises.

The trustee having claimed the goods under the deed of assignment, the sheriff interpleaded, and an interpleader issue was directed to be tried between the execution creditors and the claimant.

On the hearing of the issue the county court judge found that the defendant had acted honestly in executing the deed, but that he had intended that Maskelyne and Cooke should not stand on the same footing as other creditors, and he held that on this ground the deed was void under 13 Eliz. c. 5. He also held that the deed was void on the ground that the names of Maskelyne and Cook were not in the list of creditors in the schedule to the affidavit filed on the registration of the deed.

The Divisional Court reversed the decision of the county court judge, and gave judgment for the claimant. They held, first, that a deed of arrangement was not void because the name of a creditor had been *bonâ fide* intentionally omitted from the affidavit filed on the registration of the deed; and, secondly, that a deed of assignment to a trustee for creditors was not void under 13 Eliz. c. 5, merely because the debtor did not intend to include a particular creditor in the benefits of the deed.

The execution creditors appealed.

*Mackaskie, K.C.*, and *Thorn Drury*, for the execution creditors.—The deed is void on the face of it under 13 Eliz. c. 5. The net effect of the deed is that the debtor not only keeps present possession of his property, but may dispose of it either for the purposes of his business or for any other purposes that the trustee may assent to. It is a deed made for the benefit of the debtor and not of his creditors. The case is governed by *Spencer* v. *Slater*, 27 W. R. 134, 4 Q. B. D. 13. The cases of *Boldero* v. *London and Westminster Loan and Discount Co.*, 28 W. R. 154, 5 Ex. D. 47, and *Alton* v. *Harrison*, 17 W. R 1034, L. R. 4 Ch. App. 622, are distinguishable. Secondly, the deed is void under section 5 of the Deeds of Arrangement Act, 1887, because the names of the execution creditors were not inserted in the list of creditors contained in the schedule to the debtor's affidavit filed on the registration of the deed as required by section 6, sub-section 1, of that Act. The words "his creditors" in that sub-section mean all his creditors: *In re Batten, Ex parte Milne*, 37 W. R. 499, 22 Q. B. D. 685.

*Bray, K.C.*, and *J. S. Pritchett*, for the claimant, were not called upon.

VAUGHAN WILLIAMS, L.J.—In my opinion the decision of the Divisional Court ought to be affirmed. I will deal with the points raised in the case in the order in which they were dealt with by the Lord Chief Justice. The question is whether this deed of arrangement with creditors is void. The first ground on which it is suggested that it is void is because the names of particular creditors, Maskelyne and Cooke, were omitted from the list of creditors contained in the schedule to the affidavit filed on the registration of the deed. I cannot agree with that contention. It appears that the defendant had given the plaintiffs a guarantee signed by himself and two other persons in respect of an entertainment which the plaintiffs gave for a charitable object. I think it is quite possible that this debt was omitted from the schedule because the debtor thought it was a contingent debt. But, however that may be, I entirely agree with the Lord Chief Justice that there is nothing in the Deeds of Arrangement Act, 1887, which makes the registration bad if there has been an honest omission

of the name of a particular creditor. When I look at the Act to see what appears to be the purpose of the registration which is required, it seems to me to be plain that the Act does not make it a condition precedent to the validity of a deed that the affidavit or the schedule should contain the names of all the creditors. This Act requires the debtor to make the affidavit before registration, not for the information of creditors, but for the purpose of satisfying the officer who has to register the deed with proper evidence that the statute has been complied with. I am of opinion that the mere omission of a name does not render the deed void.

The other point which is taken is that the deed is void under the statute of Elizabeth. I am far from saying that a deed of assignment on trust for creditors cannot be void under the statute. The deed must be looked at in each particular case, and where the deed considered as a whole appears to be made not really for the benefit of creditors, but to enable the debtor to retain his property or part of his property for his own benefit, then it is not the less within the statute because it is drawn in the form of a deed for the benefit of creditors. But I see no reason for inferring that this deed is anything but in truth a deed for the benefit of creditors. [His lordship referred to the provisions of the deed.] It seems to me to be quite plain that this is an honest deed intended for the benefit of creditors, and is not intended to delay or defeat creditors by giving a benefit to the debtor. In my opinion the cases of *Spencer* v. *Slater*, *Boldero* v. *London and Westminster Discount Co.*, and *Alton* v. *Harrison* are all consistent with the same principle—viz., that the proper test is whether the deed is really a *bonâ fide* deed for the benefit of creditors, or whether its object is to benefit the debtor at the expense of the creditors. I therefore think the appeal should be dismissed.

STIRLING and MATHEW, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the execution creditors, *Seal & Edgelow.*

Solicitors for the claimant, *Wood & Sons.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 20.

SMITH *v* THE GOLD COAST AND ASHANTI EXPLORERS (LIMITED). (*a.*)

*Frauds, Statute of—Agreement for service—Engagement for one year to commence on the day following that on which the contract was made—No memorandum—Action to recover damages for breach of agreement—29 Car. 2 c. 3, s. 4.*

*A contract for service for one year, the performance of which was to commence from the day following that on which the contract was made,*

*Held, not a contract that was "not to be performed within the space of one year from the making thereof" within the meaning of those words in section 4 of 29 Car. 2, c. 3.*

Dictum *of* Willes, J., *in* Cawthorne *v.* Cordrey, 13 *C. B. N. S.* 406, 11 *W. R. C. L. Dig.* 164, *and of* Brett, L.J., *in* Britain *v.* Rossiter, 27 *W. R.* 482, 11 *Q. B. D.* 123, *at p.* 125, *approved.*

Appeal by the defendant company from a judgment of the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.), who had reversed a decision of the Common Serjeant of the City of London.

The action was brought in the Mayor's Court by the plaintiff, a solicitor, claiming damages for breach of contract to employ him as solicitor to the company abroad.

The company pleaded that the action would not lie, because the contract was one not to be performed within a year, and therefore, as it was not in writing, could not be sued upon.

The facts, so far as material, were these:

The plaintiff, in answer to an advertisement, applied to be appointed solicitor to the defendant company on the Gold Coast. He attended a meeting of the board, held at the London offices of the company, on the 6th of December, 1901, and he alleged that all the terms were arranged at this meeting, and that he was then engaged for one year certain from the morning of the 7th of December if he could produce a certain document signed by the agent-general of West Australia showing that he had practised as a solicitor in that colony.

On the following day, the 7th of December, the plaintiff called with the document referred to, but subsequently the board gave him notice that his services would not be required, and the plaintiff then commenced these proceedings.

The Common Serjeant directed the jury to find for the defendants, as he ruled that the contract for a year's service, being one that did not begin until the day following that on which it was made, was one that could not be sued on in the absence of some memorandum or note thereof in writing signed by or on behalf of the defendants, by reason of section 4 of 29 Car. 2, c. 3.

The plaintiff appealed.

The Divisional Court on the 15th of January, 1903, allowed the appeal.

Lord Alverstone, L.C.J., in the course of his judgment, said the cases show that if a contract of service for a year begins on a day later than the day next after that on which the contract was made, it is within the statute. What, then, is to be done if the agreement of service is made on one day, as here, on the 6th of December, and the service is for a year to commence on the following day (the 7th of December), and would terminate therefore on the 6th of December in the following year? It might be said in popular language that such an agreement was one not to be performed within a year. But the matter had been discussed *obiter* in *Cawthorne* v. *Cordrey*, 13 C. B. N. S. 406, 11 W. R. C. L. Dig. 164, where there was an expression of opinion in favour of the statute not applying. That *dictum* was approved by Brett, L.J., in *Britain* v. *Rossiter*, 27 W. R. 482, 11 Q. B. D. 123, at p. 125. That seems to me sufficient authority for saying that a contract of service for one year to commence on the next day is not necessarily one that falls within the Statute of Frauds. For these reasons I think the learned Common Serjeant ought to have left the case to go to the jury, and we must therefore direct a new trial.

Wills and Channell, JJ., concurred.

The defendant company entered an appeal in the interlocutory list to have the preliminary question decided whether the provisions of the statute applied or not to this contract, and the appeal now came on for argument.

*A. T. Lawrance, K.C.* and *C. Herbert Smith*, for the defendants.—We submit, first, that the judges of the Divisional Court misconceived the evidence as to the day on which the contract was to commence. We contend that the contract of employment was from the 6th of December, to commence on the 8th,

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

[VAUGHAN WILLIAMS, L.J.—That is a question of fact and was found against you by the Common Serjeant.] Assuming that two days intervened from the making of the contract and commencement of service, then on the authority of *Cawthorne* v. *Cordrey*, approved in *Britain* v. *Rossiter*, the action clearly, by reason of the contract sued on not being in writing, cannot be maintained. Even if your lordships hold against us on that point, the *dictum* of Willes, J. (which seems to be supported by the opinion of Byles, J.) in *Cawthorne* v. *Cordrey* is not binding on this court, and ought not to be supported. The *dictum* was referred to by Brett, L.J. in *Britain* v. *Rossiter*, 11 Q. B. D., at p. 125, in these words: "If a contract is made on a day, say Monday for a service for a year, to commence on the following day, say a Tuesday, the service is to be performed within 365 days from the making of the contract, but inasmuch as the law takes no notice of part of a day, and the contract was made in the middle of the Monday, the service to be performed within 365 days after that, the law did not count that half day of Monday, and therefore the contract was to be performed within 365 days after it was made, that was, within a year." That was the contention of the plaintiff in this case, and if your lordships are against our submission, that in fact the contract of service was not to commence until the 8th, and hold that the *dictum* is sound where a day or part of a day intervenes only between the making of a contract and the commencement of service, we cannot carry the case farther. We submit, however, that the words of the statute "not to be performed within the space of one year" are too clear for the *dictum* in *Cawthorne* v. *Cordrey* to override their simple and obvious meaning, and that here the defendants are entitled to judgment whether the services were to begin on the 7th or the 8th.

The plaintiff, who appeared in person, was not called on.

VAUGHAN WILLIAMS, L.J. — In this case the defendants appeal from a decision of the Divisional Court directing a new trial. It is sufficient for me to say that I think there is evidence upon which it could rightly be held that the contract of service made on the 6th of December was in this case to commence on the following day. That being so, the Common Serjeant was wrong in adopting the course he did, and there must be a new trial to decide whether there has been such a breach of contract by the defendants as renders them liable in damages to the plaintiff.

STIRLING and MATHEW, L.JJ., concurred.

*Order for new trial affirmed.*

Solicitors for the defendants, *Parker & Richardson.*

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From K. B. Div.
(Earl of Halsbury, L.C., Lord Alverstone, L.C.J., and Sir F. Jeune, P.) Feb. 16.

KIRKWOOD v. CARROLL AND CUTLER. (a.)

*Promissory note—Payment by instalments—Clause giving time—Condition as to rights of holder—Stamp duty—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 3, *sub-sectio s* 1, 3; *s.* 9, *sub-section* 1; *s.* 16; *s.* 83, *sub-sections* 1, 3; *s.* 97, *sub-section* 2—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 4, 10, 33.

*The plaintiff sued as holder for value of a document in the form of a joint and several promissory note, which provided for payment of certain money by instalments, and that in case default was made in payment of any one of the instalments the whole amount remaining unpaid should become due and payable forthwith. The document also contained, at the end of it, the following clause: "No time given to or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party."*

*Held that the document was a good promissory note within the Bills of Exchange Act*, 1882, *and was not invalidated by reason of the clause at the end of it.*

Yates *v.* Evans, 61 *L. J. Q. B.* 446, 40 *W. R. Dig.* 219, *approved.*

Kirkwood *v.* Smith, 44 *W. R.* 480, [1896] 1 *Q. B.* 582, *overruled.*

Appeal from Wright, J., on a special case for the opinion of the court.

The plaintiff in the action claimed £125 as the amount due from the defendants as makers jointly and severally of a promissory note for £125 dated the 24th of January, 1901, and payable by instalments of £5 per week.

The promissory note was as follows: "Croydon, 24th day of January, 1901.—£125.—We jointly and severally promise to pay Mr. John Kirkwood (carrying on business in the name or style of the Provincial Union Bank), or order, the sum of one hundred and twenty-five pounds for value received by instalments in manner following—that is to say, the sum of £5 on Thursday, the 31st day of January inst. (1901), and the sum of £5 on the Thursday in every succeeding week until the whole of the said one hundred and twenty-five pounds shall be fully paid, and in case default is made in payment of any of the said instalments the whole amount remaining unpaid shall become due and payable forthwith. No time given to or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party."

This document was signed by the defendants and witnessed, and was stamped with a two-shilling bill or note stamp.

The plaintiff was the holder for value of the said document.

The defendants having made default in the payment of the instalment due on Thursday, the 31st of January, 1901, the plaintiff sued them on the document.

The defendants contended that said instrument was not duly stamped and could not be given in evidence or be available for any purpose whatsoever, and they submitted that the instrument was not and could not be sued on as a promissory note owing to the last clause contained therein.

The questions submitted for the decision of the court were (1) whether the said instrument was a promissory note; (2) whether the instrument was duly stamped.

Wright, J., held, following *Kirkwood* v. *Smith*, 44 W. R. 480, [1896] 1 Q. B. 582, that the instrument was not a good promissory note within the Bills of Exchange Act, 1882, but that it was duly stamped as a promissory note within section 33 of the Stamp Act, 1891.

Cross-appeals were entered against this decision.

The plaintiff now appealed from the learned judge's decision that the instrument was not a promissory note within the Bills of Exchange Act, 1882, and the defendants appealed from the decision that the instrument was duly stamped.

*J. E. C. Adams*, for the defendants.—The instrument is not a promissory note, but only an agreement, and should be stamped as such; the bill or note

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

stamp impressed on it is not the proper stamp. Section 10 of the Stamp Act, 1891, provides that "a stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available, for an instrument of any other description"; and further, that "an instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped unless it is stamped with the stamp so appropriated." In *Ashling* v. *Boon*, 39 W. R. 298, [1891] 1 Ch. 568, it was held that a promissory note bearing only a penny receipt stamp could not, as it was insufficiently stamped, be admitted in evidence to prove the receipt of the money for which the note was given. By section 4 of the same Act it is provided that "an instrument containing or relating to several distinct matters is to be separately and distinctly charged as if it were a separate instrument with duty in respect of each of the matters." Even if this instrument is a promissory note it is nevertheless also an agreement, and so, in accordance with the above section, requires two stamps, one as a promissory note and one as an agreement, therefore it is not duly stamped.

*W. E. Vernon* for the plaintiff.—[The court did not call upon him to argue the point as to whether the instrument was duly stamped.] The instrument is a good promissory note within the Bills of Exchange Act, 1882. *Yates* v. *Evans*, 61 L. J. Q. B. 446, 40 W. R. Dig. 219, is an authority in favour of that contention. In that case there was in the instrument a clause giving time to the makers, and it was there held that the instrument, which was in the form of a joint or several promissory note, was not by reason of such a clause an agreement requiring to be stamped as an agreement, but was a good promissory note. In the case of *Kirkwood* v. *Smith*, by which case the learned judge in the court below felt he was bound, the case of *Yates* v. *Evans* was not cited. Lord Russell of Killowen, L.C.J., in *Kirkwood* v. *Smith* held that if the document contains something more than is referred to in section 83, sub-section 3—namely, "a pledge of collateral security with authority to sell or dispose thereof," it is not valid as a promissory note. That decision is wrong in law and ought not to be followed, for by section 97, sub-section 2, which was not referred to in that case, it is provided that "the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques." Section 3, sub-section 3, and sections 9 and 16 all show that additions may be made to a bill of exchange or a promissory note without affecting its character as such. Section 3, sub-section 1, which speaks of a bill of exchange as being an "unconditional" order to pay a "sum certain," provides by sub-section 3 that "an unqualified order to pay, coupled with (*a*) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional." Section 9 provides that the sum payable by a bill is "a sum certain" within the meaning of the Act (section 3) although it is required to be paid "(*a*) with interest, (*b*) by instalments, (*c*) by stated instalments, with a provision that upon default of payment of any instalment the whole shall become due." And section 16 provides that "the drawer of a bill, and any indorser, may insert therein an express stipulation (1) negativing or limiting his own liability to the holder, (2) waiving as regards himself some or all of the holder's duties." It is clear, therefore, that the addition of the time clause at the end of this instrument does not affect it as a good promissory note within the Act.

Earl of HALSBURY, L.C.—I think this instrument is a promissory note within the Bills of Exchange Act, 1882. The clause as to giving time which was added at the end of it does not in my opinion, deprive it of its character as a promissory note. Certainly making the sum payable by instalments or making the whole amount due if default be made in payment of any instalment does not affect its position as a promissory note. I think *Yates* v. *Evans* was rightly decided. *Kirkwood* v. *Smith* was decided without considering the sections of the Bills of Exchange Act, 1882, to which we have been referred in the present case, and cannot any longer be regarded as an authority.

Lord ALVERSTONE, L.C.J., and Sir F. JEUNE, P., concurred.

*Plaintiff's appeal allowed; defendants' appeal dismissed.*

Solicitor for both parties, *J. G. Lincoln.*

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From Chan. Div.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) } Feb. 11.

FINCHLEY ELECTRIC LIGHT CO. *v.* FINCHLEY URBAN DISTRICT COUNCIL. (*a*.)

*Local government—Street—Fee simple of road—Vesting in local authority—Electric light company—Overhead wires—Area of user—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*General Turnpike Act,* 1822 (3 *Geo.* 4, *c.* 126), *s.* 84.

*The effect of section* 149 *of the Public Health Act,* 1875, *is to vest in the local authority so much of the actual soil of a street as is necessary for the control, protection, and maintenance of the street as a highway for the public. The section in no way considers the title of the original owner of the soil, and the rights of the local authority under the section are neither increased nor diminished according to the extent of such original ownership. Nor are the rights of the local authority increased by the fact that it is impossible to point to any actual owner. Thus where the ownership in fee simple in the soil of a road was originally acquired by turnpike trustees under* 3 *Geo.* 4, *c.* 126, *and the road subsequently became vested in an urban authority,*

*Held, that all that vested in the urban authority was so much as was necessary for the purposes of the user of the road by the public as a highway.*

*Decision of* Farwell, J. (50 *W. R.* 470, [1902] 1 Ch. 866), *reversed.*

This was an appeal from a decision of Farwell, J. (reported 50 W. R. 470, [1902] 1 Ch. 866).

The plaintiffs were a limited company incorporated in August, 1900, having as one of the objects of its formation the supply at Finchley and elsewhere of electricity for lighting and other purposes. Since the incorporation of the company the plaintiffs had begun to develop their business in the district of Finchley.

The defendants in the action, the Urban District Council of Finchley, had obtained in 1899 a provisional order from the Board of Trade empowering them to undertake the necessary works for supplying electricity to the inhabitants of their district.

On the 19th of April, 1901, a compromise was

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

effected in an action commenced by the defendants, and an order was taken by consent whereby the present plaintiffs undertook that they would not without the council's license open or break up any road vested in the council until fourteen days after application had been made to the council for liberty to open the road in question.

On the 28th of September, 1901, the plaintiffs carried their wires across the Regent's Park-road, at a height of more than thirty feet above the ground.

On the 1st of October the defendants caused the wires to be cut.

The plaintiffs then brought the present action, claiming an injunction to restrain the defendants from breaking, cutting, severing, or otherwise interfering with the electric cable of the plaintiffs over or across the Regent's Park-road, or from hindering and obstructing the plaintiffs in the erection of electric lines over or across roads or streets within the urban district of Finchley.

The Regent's Park-road was constructed by certain turnpike trustees under the provisions of a special Act of Parliament (7 Geo. 4, c. xc.). The site of one side of the road where the plaintiffs' wires crossed formed part of land acquired by the turnpike trustees under an indenture dated the 7th of November, 1828. The said site was duly conveyed to and vested in the turnpike trustees, their heirs and successors, in fee simple, free from any reservations in favour of the owners of the adjoining lands or other reservations. This conveyance was made under the powers of the Turnpike Roads Act, 1822, s. 84.

In 1872 the turnpikes were removed from the Regent's Park-road, and from 1878 (on the constitution of the Finchley Local Board) and onwards the road was maintained by the defendants.

By section 149 of the Public Health Act, 1875, "all streets being or which may at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority."

Farwell, J., held that in the circumstances the fee simple which was vested in the turnpike trustees vested in the urban authority. He therefore dismissed the action.

The plaintiffs appealed.

*Buckmaster, K.C.*, and *W. Mackenzie*, for the appellants.—It is established that section 149 of the Public Health Act was never intended to give the local authority anything more than so much as is necessary to enable them to perform their duties: *Mayor, &c., of Tunbridge Wells* v. *Baird*, [1896] A. C. 434, 45 W. R. Dig. 92; *Wandsworth Board of Works* v. *United Telephone Co.*, 32 W. R. 776, 13 Q. B. D. 904.

*Chubb* (*Upjohn K.C.*, with him), for the respondents.—Under the Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), this land was conveyed to the turnpike trustees in fee. They became trustees of the fee for the public, and the decisions on section 149 of the Public Health Act show that there is now under that section vested in the local authority all the property and rights formerly vested in the public: *Coverdale* v. *Charlton*, 27 W. R. 257, 4 Q. B. D. 104; *Rolls* v. *Vestry of St. George*, 28 W. R. 867, 14 Ch. D. 785; *Wandsworth Board of Works* v. *United Telephone Co.*

COLLINS, M.R.—This is an appeal from the decision of Farwell, J., who has held in the case of a street called Regent-road, that, owing to the peculiar circumstances by which the land forming a part of that street was originally acquired, the local authority have, under the 149th section of the Public Health Act, acquired a right to a much larger interest in the land than they would have done had it been an ordinary street, part of a highway repairable by the inhabitants at large.

Now the basis of Farwell, J.'s, decision, as I understand it, is this: Regent-road is made up of what I may call one strip of ordinary street, which has become a street in the ordinary way. The other strip was originally part of a turnpike road. It had been acquired by the trustees of the turnpike road for the purpose of their road, and they had acquired the fee simple. It ceased afterwards to be a turnpike road, and became a highway repairable by the inhabitants at large; but the fact was that the trustees who acquired it had acquired the fee simple, and, being no longer required by them for the purpose of a turnpike road, the question where the beneficial ownership of the soil is may be doubtful. The trustees still remained, and, as far as I know, do still remain the legal owners of what they bought. That is the position of that part of this street. Then the local authority comes in under the 149th section of the Public Health Act, 1875, and by that section this is enacted: [His lordship read the section, and continued:] There is no doubt in this case, and it is not disputed by anyone, that this street had become a highway repairable by the inhabitants at large, and therefore the right given by the 149th section to the local authority no doubt existed. That right is that these streets, pavement stones, and the material thereof, &c., shall vest in and be under the control of the urban authority. That was the whole of the right they acquired in the street.

It has been decided in a long series of cases that "vest" means that the local authority do actually become the owners of the street to this extent; they become the owners of all that air above and all that stratum below which is necessary for the ordinary user of the street as a street; but they are not entitled to anything in the air above or stratum below beyond that which is necessary for the ordinary user of the street as a street; for instance, they do not take that part of the subsoil which has to be used for the purpose of laying sewers. That point was clearly decided, in fact, most emphatically decided, in the case of *Mayor and Corporation of Tunbridge Wells* v. *Baird*, where the question was whether the local authority, by virtue of the vesting of the street, were entitled to make underground lavatories and conveniences of that kind. They asserted that that was a sort of use that a public authority might properly make of a street; but it was held by the House of Lords that that was going beyond the ordinary use of a street *qua* street—that the use of the street *qua* street did not involve the right to make excavations for the purpose of making lavatories and conveniences. They arrived at that decision following a line of cases beginning with *Coverdale* v. *Charlton* and the principle laid down there, that where you are construing an Act of Parliament which confers a right upon a public authority for which it does not pay, then you give the best effect to the intention of the Legislature by limiting the power which they get without paying for it to the area which is necessary to enable them to perform the duties imposed upon them in respect of the street as a street. There was a great deal of controversy as to what area was embraced under that definition, and in the case of *Wandsworth Board of Works* v. *United Telephone Co.*, in the Court of Appeal, the Lords Justices gave very elaborate descriptions of that which in their judgment was covered by the words in the section. The result appears to me to be this, that that which is vested in the local authority is what is called the area of

user. Instances were put of how far you might reasonably consider that the column of air above the surface of the street came within the area of user—for instance, fire escapes, being probably the highest things which could be reasonably brought within the area of user. The result, it seems to me, is clearly this: that all the stratum of air above the road which in any reasonable sense could be required for the user of the street as a street, and all the stratum below the surface which would be required for the purposes of the street as a street vest in and belong to the local authority.

Now, that being the law, which is now settled beyond all controversy by the numerous decisions culminating in *Mayor and Corporation of Tunbridge Wells* v. *Baird* in the House of Lords, it has been said in this particular case that the local authority get something more than that; that they have got not only the surface necessary for the purposes of the street and the column of air necessary for the purpose of the street, but also the soil *usque ad inferos* and the column of air above *usque ad cœlum*. The learned judge has adopted that conclusion, and I am sorry to say that, great respect as I have for the opinion of the learned judge, and great as the diffidence is with which I venture to differ from him, I am unable to follow him in this instance in his reasoning. His reasoning is this: He said the turnpike trustees, for the purpose of their road, acquired the absolute fee simple in the soil, and that therefore it must be taken that that is, as it were, a parliamentary declaration that the whole of the soil, the fee simple, was necessary for the purposes of the road, and the fee simple being necessary for the purposes of the road or street, then the local authority come in, and though having their rights only under the 149th section, which vests in them the street, the effect must be, that that which is vested in them is all that was acquired by the turnpike trustees for the purposes of their road; and because it must be assumed that the trustees acquired the soil *usque ad inferos*, for the purposes of the road, therefore the section of the Public Health Act vests the same, neither more nor less, in the local authority, notwithstanding the decisions which determines how much the local authority do get because they get it compulsorily without paying for it under the Act of Parliament. It seems to me that the standard which determines this question is, not how much below the owner has to give, but how much the local authority under the Public Health Act have the right to take. It does not seem to me that their right to take, or that which is given to them by virtue of their position, is any larger or any smaller by reference to the ownership of the soil below. It may be in one owner or it may be in twenty, but they take what they want and they take no more; and inasmuch as somebody must own the soil below they take their *quantum* from somebody, whether the somebody be one or more persons. To say that the soil is owned by a person who cannot point to the particular people for whom he is a trustee or who are beneficially interested in it, and that therefore the public authority under this particular section got more than they would get in the case where they could point to the owner beneficially interested, would not be capable of any logical justification. I hope I am not doing injustice to the learned judge's view, but as far as I understand it, that is the principle upon which he went. He says this: "It appears to me that the Act of Parliament when it says that the streets or roads shall vest in the local authority has said that so much of the land as is required for the purposes of the road shall vest in them, and that when another Act of Parliament has authorized trustees to acquire land in fee simple for the purposes of the road it is impossible for any court to say that the whole fee simple was not so acquired and required. Consequently in this particular case I have referred to the circumstances of the case, as did all the courts in the cases that have come before them heretofore; they have seen what was required for the purposes of the road. I have got something more than the actual physical requirements, because I have got the Act of Parliament authorizing the acquisition for the purposes of the road, and that being so, it appears to me I am bound to say that this land was acquired and required for the purposes of the road." Therefore he makes the standard here—for what purpose did the original owners require it, and how much did they get when they did acquire it; and then he holds that it all comes to the local authority under the operation of the 149th section of the Public Health Act. For the reasons which I have given I cannot agree with that view.

The particular point here is that the plaintiffs are an electric lighting company without any statutory powers, and they put up their wires at a point which it is admitted is outside what I have called the area of the user of the street. If the defendants were obliged to rely upon the decision in *Coverdale* v. *Charlton*, and to measure their rights by the standard laid down in that and the succeeding cases, they admit that these wires do not encroach upon that area. They rest their case on the ground, as I have said, that owing to the peculiar circumstances under which the soil of this road was held before they got it, they have got something more than they could have got under the ordinary law. Therefore we are dealing with a case where the wires in question are clearly outside the area of user, and the right to interfere with them must be justified by ownership in fee.

For the reasons I have given I think that that is not a reasonable contention, and the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. The defendants can only claim that the road in question here, the Regent's Park-road, became vested in the urban authority in the full sense in which they seek to maintain that it has been vested by relying on section 149 of the Public Health Act, 1875. Now that section has received by this time an authoritative definition by many cases which have shown what its true effect is. It was not by that section intended to vest in the public authority, or the urban authority, what I may call the full rights in fee of a street, as if that street was owned by an ordinary owner in fee having the fullest rights both as to the soil below and as to the air above. It is settled that the section in question was only intended to vest in the urban authority so much of the actual soil of the street as might be necessary for the control, protection, and maintenance of the street as a highway for public use. It would be sufficient for me to show that that is so by referring to what was said by the Lord Chancellor in the case of the *Mayor and Corporation of Tunbridge Wells* v. *Baird*, and also by Lord Herschell in the same case. Therefore section 149 was only intended to vest in the urban authority certain physical property, a certain limited physical part of the street, and what that physical part is is what I have already stated. That section has nothing to do with title; it is not considering a question of title. No matter what the title is of the person who owns the street, the section only considers how much of that street shall vest in the urban authority, and accordingly it does not matter whether the owner of this street at the time of vesting was a private owner or a trustee for a private owner, or a

trustee for a charity, or a trustee for a turnpike trust, or any other trustee. Questions of title in reference to section 149 of the Public Health Act, 1875, are wholly irrelevant. The section is intended to vest, as I have said, a physical property in the urban authority, and has nothing to do with the question of title.

Now that really concludes this case. But I will add a few words with respect to the view which appears to have been taken by my brother Farwell in regard to the case as showing how he arrived at the conclusion he has done. If I rightly understand him, he says, in the first place, that inasmuch as you find the turnpike trustees got their portion of the road in question here on which the whole case turns, in trust for making the turnpike road or for throwing it into the turnpike road—got the full fee, if I may use that expression—therefore you must conclude that the whole fee is necessarily to be vested in the urban authority: but, if I may say so with great respect to him, I do not think that is a right deduction. It might well be that under the Turnpike Road Act in question, if you look at its provisions, it was necessary for the turnpike trustees to acquire the full fee, possibly because the owners would not part with any less than the full fee; but, beyond that, the reason why the turnpike trustees had to get this portion of the road was, to follow the words of the Act, "for the purpose of widening, diverting, altering, and improving" the road. Those purposes are not the purposes for which streets are to vest in the urban authority under the 149th section of the Public Health Act. As I have pointed out, you only want to vest a portion of the street in them for the purpose of control, protection, and maintenance of the street as a highway for public use. This street or this portion of the street physically does not differ from any other street; there is nothing peculiar about this portion of the street which requires more of it to vest for the control, protection, and maintenance of the street than any other street. That being so, I respectfully think my brother Farwell has not come to a sound conclusion in basing his judgment on the point which he has.

As I gather he has also taken another point, which is this: He has pointed out if there is a legal estate outstanding, which there must be in the representatives of the old turnpike trustees, it is difficult to say who the holder of that estate is a trustee for, and therefore he seems to suggest that the legal estate may be or ought to be held in trust for the local authority. But it appears to me that if the local authority want to make out that the legal estate is held in trust for them the onus is upon them to do so, and they certainly have not discharged it; nor can the legal estate be said to be outstanding in trust for the public, as has been suggested on behalf of the respondents, whatever that may mean. If the legal estate were outstanding in somebody in trust for the public, all I can say is I cannot see how the local authority can be identified in that relationship with the public. The local authority want nothing but what they got under section 149, and have got nothing in them beyond what is conferred by section 149, and how that is limited I have already shown. Nor can it be said finally that the local authority is in possession of anything more than what is vested in them under section 149; really the local authority is only in possession of exactly that which was vested in them by virtue of section 149, and nothing more nor less.

It appears, therefore, to me that the judgment of the court below is not correct, and that the appeal must be allowed.

COZENS-HARDY, L.J.—I agree with the views which have been expressed, and I have very few words to add.

It seems to me the judgment under appeal can only be supported on the ground that everything acquired by the turnpike trustees under the deed of 1828 has vested in the defendants. I look in vain to discover any section having that operation and effect. The only section relied on is section 149. That section fixes the subject-matter, which is vested by reference to what is required for the ordinary user of a street as a street. It is wholly irrespective of the title to the stratum of the subsoil below or to the air above. I think it has been decided by all the courts that that is the meaning of section 149.

I therefore think the appeal should be allowed.

Solicitors, *Benham & Meyer; A. M. M Forbes.*

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## High Court of Justice.

Chan. Div. Kekewich, J. } Feb. 9.

*In re* INNES & CO. (IN LIQUIDATION). (*a.*)

*Company—Contributory—Issue of fully-paid shares without consideration—Liability of allottee*—Ultra vires.

*Two vendors arranged to sell their business and patent rights to a company to be formed for £6,000, payable as to £3,000 in cash and as to £3,000 in fully paid shares. By a subsequent agreement, duly filed, the vendors purported to sell the said assets to the company for £25,000, payable as to £3,000 in cash and as to £22 000 in fully-paid shares, to be allotted to the vendors "or their nominees." After satisfying the £6,000 payable to the vendors under the earlier arrangement, the remaining shares were allotted as fully paid-up shares without consideration amongst six persons, three of whom were directors of the company. No prospectus was ever issued, and there was admittedly no intention of placing any shares upon the public market.*

*Held, upon a claim by the liquidator of the company against the three director allottees, that they were liable as contributories who had paid nothing in respect of the shares allotted to them.*

This was a summons taken out by the liquidator of the above-named company against four respondents for a declaration that they were severally liable as contributories in respect of certain shares in the said company allotted to them as fully paid up, or in the alternative that the respondents were jointly and severally liable to make good the loss sustained by the company through the issue without consideration of the shares in question.

The material facts were as follows:

Prior to the formation of the company, Robert Innes and John Hepburn Innes carried on business as paint manufacturers, and they also owned a patent for a method of preventing corrosion in steam boilers.

In 1899 they entered into an arrangement with Messrs. Cockerline, Samman, and Hagerup, three of the respondents to this summons, and with three other persons, whereby the property was to be sold for £6,000 to a company to be formed. The £6,000 was to be paid as to £3,000 in cash and as to £3,000 in shares.

On the 7th of December, 1899, the company was

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

duly incorporated and was launched as a private company, with a capital of £25,000 in 2,500 shares of £10 each.

The only shareholders were the two Messrs. Innes, the Messrs. Cockerline, Samman, and Hagerup, and the three other persons, and the directors were the respondents—viz., Robert Innes and Messrs. Cockerline, Samman, and Hagerup. The shares were allotted in manner following: Messrs. Cockerline, Samman, and Hagerup, and the other three persons first took 50 shares each, for which they paid in cash. This answered for £3,000. The Messrs. Innes jointly took 300 shares as part of the purchase-money. That answered for another £3,000. Of the remaining 1,900 shares, representing the remaining £19,000, each of the six above-mentioned persons took 300 for his own benefit, while the outstanding 100 shares were held in suspense in joint names for purposes of making bonus payments to persons introducing business to the company. No prospectus was issued, and there was no intention to go to the public with shares.

In pursuance of the above-mentioned arrangement an agreement dated the 23rd of March, 1900, was entered into between the Messrs. Innes, as vendors, of the one part, and the company of the other part, whereby Messrs. Innes purported to sell their business and patent rights to the company for £25,000, as to £3,000 in cash, and as to £22,000 by the allotment to the vendors or their nominees of 2,200 fully-paid shares in the company, and this agreement was duly registered on the 28th of March, and the shares were duly allotted in the manner above stated. In November, 1901, the company went into voluntary liquidation, and in January, 1902, the liquidation was ordered to be continued under the supervision of the court. The liquidator sought to make each of the respondents liable as a contributory for the amount of the fully-paid shares which he received without payment therefor. He also claimed in the alternative on the ground of misfeasance. No fraud was imputed to the respondents, and it was agreed that the claim for liability as contributories should be disposed of before the alternative claim was opened.

*Gore Browne, K.C.*, and *Cozens-Hardy*, for the liquidator.—The consideration stated in the agreement was merely illusory, and we can therefore go behind it whether it is filed or not: *In re Theatrical Trust (Limited), Chapman's case*, 43 W. R. 553, [1895] 1 Ch. 771. We are not bound to impeach the contract itself. The whole transaction was *ultra vires* under the Companies Act, for the shares were allotted for nothing, and in addition these persons were in a fiduciary relation to the company: *In re Almada and Tirito Co.*, 36 W. R. 593, 38 Ch. D. 415.

They also cited *In re Wragg (Limited)*, 45 W. R. 557, [1897] 1 Ch. 796; *In re Newman & Co.*, 43 W. R. 483, [1895] 1 Ch. 674; *In re Carriage Co-operative Association*, 33 W. R. 411, 27 Ch. D. 322; and *In re Morvah Consols Tin Mining Co.*, 24 W. R. 49, 2 Ch. D. 1.

*Upjohn, K.C.*, and *Jessel*, for the respondents.—It is untrue to say that all that the company acquired was that which came from Messrs. Innes; it also acquired the capital, influence, and experience of the gentlemen who identified themselves with it; that was a reason for the consideration stated in the agreement being more than that agreed to be paid for the assets of Messrs. Innes. The court will not go behind the agreement on the mere question of sufficiency of consideration, and no *mala fides* is suggested; moreover, no one was damnified, because everyone was a party to the agreement; it was a private company, and the public were not deceived. That point was exactly covered by *In re Ambrose Lake Tin and Copper Co*, 28 W. R. 783, 14 Ch. D 390.

They also referred to *In re Western of Canada Oil &c., Co.*, 24 W. R. 165 1 Ch. D. 115; *In re Cærphilly Colliery*, 25 W. R. 618 5 Ch. D. 336; and *Salomon* v. *Salomon & Co*, 45 W. R. 193, [1897] A. C. 22.

KEKEWICH, J., stated the facts and continued: The point is a novel one, and although several cases point to the conclusion I have reached, they are only indications and not actual decisions. Now, these persons (*i.e.*, the vendors) made an arrangement (I avoid calling it an agreement) with the persons who afterwards controlled the company that the property should be sold for £6,000, £3,000 payable in cash and £3,000 in shares; the vendors fixed their own price as being the maximum reasonable price. Having done that, they entered into the agreement of the 23rd of March, 1900, and, as I take the evidence, it was thought fair and convenient that the company should be made to pay much more than £6,000—viz., £25,000—for what it acquired, and that no harm would be done if the extra shares were allotted to the promoters for their own benefit. Now this is not a case of moral fraud; that is not even suggested, but none the less it may be a case of "legal fraud" or "legal dishonesty." What happened was this: I take the case of Mr. Cockerline as a typical case. He had 300 shares allotted to him for which he paid, and was meant to pay, nothing. Can he now say, although he has paid nothing, that he can still hold them? The point which really impresses me is that the whole agreement was a sham; everybody knew that perfectly well, and that the property was worth only £6,000, and that the vendors could not have got one penny more for it. Yet for the purposes of the formal agreement which was put upon the file, the £6,000 was raised to £25,000, the object being to put all the extra shares in the directors' control for their own benefit. The value had been fixed at £6,000, and beyond that there was no value. The directors therefore knowingly paid a larger sum in shares for absolutely nothing. In my opinion they could no more do that than allot to anyone at 80 or 90 per cent. If they cannot do that, you are only reducing the proposition to its extreme limit in saying they cannot allot at nothing.

Two or three arguments put forward on behalf of the respondents deserve notice. First, it is said the court will not interfere with the estimate of the vendors of property as to its value; if people choose to be foolish enough to pay too much for what they buy still the court will not go behind the agreement which fixes the price. The answer to that is that in the present case there never was any estimate of value except the £6,000 figure, and it is absurd to treat the agreement as fixing the price when in fact it did nothing of the sort. Further, it is said that everybody concurred in and was a party to the agreement, and knowingly took shares upon the footing of the agreement, and it was never intended to put the shares on the public market. Now that is quite true; no one can now deny it, and everybody is bound by it. But in the cases to which I have been referred the acts in question have all been acts *intra vires* the company, but, if my view is right, this allotment was wholly *ultra vires* the company, and not possible in law. Then there was the argument based upon *In re Western of Canada Oil, &c., Co.*, where Mellish, L.J., says 1 Ch. D., at p. 128: "The shares in question were not allotted in pursuance of any contract made between the directors and the particular director to whom the allotment was made, but Walker being entitled to have paid-up shares allotted either to himself or his nominees, desired that they should be

allotted to particular directors as his nominees, and they were accordingly so allotted." But that upon the facts was not at all the case I have to deal with; here they were allotted to the directors on the nomination of the vendors, who were not really themselves entitled to them. Upon the whole, therefore, although there may be in words some difficulty in going behind the formal agreement (which is not sought to be set aside), yet I think, having regard to the evidence, that I ought to say that what was done was done in pursuance of the arrangement, and not of the agreement, which was merely a colourable agreement, and that I am bound to make these three gentlemen (only three are before me, for the respondent Robert Innes cannot be made liable) liable as contributories who have paid nothing upon their shares for the full amount remaining unpaid thereon. Declaration accordingly.

Solicitors, *Burn & Berridge; F. W. Hill.*

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Chan. Div. }
Byrne, J. } Nov. 29.

*In re* The Lord Mayor of Sheffield and the Trustees of St. William's Roman Catholic Chapel and Schools, Sheffield. (*a.*)

*Charity—Roman Catholic school—Sale with the consent of "bishop for the time being"—Persons "absolutely entitled"—Charity Commissioners—Lands Clauses Consolidation Act,* 1845, *s.* 69—*Charitable Trusts Act,* 1853.

*Trustees of buildings used as a Roman Catholic school who have power, with the consent of the Roman Catholic bishop of the diocese for the time being to sell the premises and give receipt for purchase-money, are persons "absolutely entitled" under the Lands Clauses Consolidation Act,* 1845, *s.* 69, *to receive payment out of the purchase-money for such premises paid into court under the said Act; and the consent of the Charity Commissioners to such payment out is not required.*

Petition.

This was a petition by the trustees of St. William's Roman Catholic Chapel and School, Sheffield, for the payment out to them as persons "absolutely entitled" under section 69 of the Land Clauses Act, 1845, of the sum of £1,500, being the purchase price of certain leasehold premises consisting of a schoolhouse and premises conveyed by an indenture dated the 8th of October, 1902, to the Corporation of Sheffield, and of which the said purchase-money had been paid into court by the said corporation on the 3rd of October, 1902.

The petition was only served on the Sheffield Corporation.

The facts of the case were as follows: By an indenture bearing date the 16th of April, 1863, the said leasehold premises were conveyed to the said trustees to hold for the residue of a term of 800 years created in 1720 upon trust to permit the schoolhouse to be used as a residence for a schoolmaster or schoolmistress, or both, and to be further used as a week-day school for Roman Catholic children as therein mentioned, with power with the consent of the Roman Catholic bishop of the diocese in which the district was situate for the time being, to sell the said premises or any part thereof, and to give a full discharge for the purchase-money.

The Corporation of the City of Sheffield, acting as the urban district council of the said city, under the powers conferred on them by the Working Classes Act, 1890, the Local Government Board Provisional Orders Confirmation (Housing of the Working Classes) Acts, 1894 and (No. 2) 1898, and the Land Clauses Consolidation Act, 1845, had agreed to purchase the premises for the sum above mentioned, such sum to include all claims for compensation, for loss, injury, or damage, and the sum had been duly assessed under the Land Clauses Consolidation Act.

*Kenyon Parker,* for the trustees.—The trustees are persons "absolutely entitled" to the money within the meaning of the Land Clauses Consolidation Act, and are therefore entitled to receive the money, which they require for the purpose of their trusts. No consent of the Charity Commissioners is probably necessary under the Charitable Trusts Act, 1853: *In re Spurstowe's Charity,* 22 W. R. 566, L. R. 18 Eq. 279; *In re Hobson's Trusts,* 26 W. R. 470, 7 Ch. D. 708. A doubt, however, exists on the matter because of the decision in *In re Smith,* 37 W. R. 199, 40 Ch. D. 386.

*R. J. Parker,* for the corporation.

Tudor on Charitable Trusts (3rd ed.), pp. 281-282, was also referred to in the argument, and Byrne, J., referred to Bourchier-Chilcott's Administration of Charities (2nd ed.), p. 26.

Byrne, J.—In his decision of *In re Morgan,* 48 W. R. 670, [1900] 2 Ch. 474, Stirling, J., pointed out that *In re Hobson's Trusts* has not been overruled. It is therefore a binding authority. It follows that the petitioners are absolutely entitled, and the consent of the Charity Commissioners is not required under the Charitable Trusts Act. I will make the order.

Solicitors, *Geare & Pease,* for *Wake & Sons,* Sheffield; *Richard F. & C. L. Smith,* for the Town Clerk of Sheffield.

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Chan. Div. }
Farwell, J. } Jan. 15.

Leeds Forge Co. (Limited) *v.* Deighton's Patent Flue and Tube Co. (Limited). (*a.*)

*Practice—Costs—Court of Appeal—Witness not called—Taxing-master's discretion—R. S. C.,* 1883, *ord.* 58, *r.* 4; *ord.* 65, *r.* 27 (29).

*Where special leave to adduce certain evidence before the Court of Appeal had not been obtained, and a witness who was present to give this evidence was not called upon, the taxing-master held that he had discretion under R. S. C.,* 1883, *ord.* 65, *r.* 27 (29), *to allow the costs of this witness.*

*Held, that there was nothing on which the taxing-master could exercise his discretion, and that the costs of the witness should be disallowed.*

Summons.

This was an application on behalf of the plaintiffs in the action to vary the taxing-master's certificate. The action originally came on before Cozens-Hardy, J., and was decided in favour of the plaintiffs, but this decision was afterwards reversed in the Court of Appeal, and the plaintiffs were ordered to pay the defendant's costs in the court below as well as in the Court of Appeal.

The plaintiffs objected to pay certain items on taxation, but the master on consideration overruled their objections and made his certificate.

(*a.*) Reported by J. Arthur Price, Esq., Barrister-at-Law.

(*a.*) Reported by J. H. Davies, Esq., Barrister-at-Law.

The present summons to review the taxation was then taken out by the plaintiffs, who objected to two items only—viz., the sum allowed for the counsel's view of the defendant's works, and the allowance to Mr. J. C., a witness who had attended the Court of Appeal to give evidence, but who was not called.

As to the counsel's view, the taxing-master stated, applying the amended sub-rule 29, ord. 65, r. 27, that the expense was properly incurred.

As to the second item it appeared that the defendants had obtained leave to adduce in evidence two sections of flues made by J. Brown & Co. (Limited) but they did not apply for leave to adduce in evidence a section of flue made by Messrs. C. D. Holmes & Co., and no evidence was given on that point. Mr. J. C. was the witness defendants had intended to call on the latter flue.

The taxing-master held that the allowance was reasonable and proper, and on the authority of *Oliver v. Robins*, 43 W. R. 137, considered that the court would not in a matter of this kind interfere with his discretion.

*A. J. Walter*, for the plaintiff.

*T. Terrell, K.C.*, and *J. C. Graham*, for defendants.

FARWELL, J., held that the first item allowed, although undoubtedly unusual, was still a matter for the taxing-master's discretion. The second item raised a rather novel point. This was not a case in a court of first instance, where the taxing-master held that the litigant was justified in bringing a witness to court although he was not called. This was a case of further evidence in the Court of Appeal. No special leave had been obtained by the defendants under ord. 58, r. 4, to adduce the evidence of J. C., and the witness was not called. There was nothing on which the taxing-master could exercise his judgment. He must disallow the costs of that particular witness.

The result was that the application succeeded as to the latter point but failed as to the first item.

Solicitors for plaintiff, *Vincent & Vincent*, for *Day & Yewdale*, Leeds.

Solicitors for defendants, *Harrison & Davies*, for *Carter, Rumsden, & Carter*, Leeds.

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Chan. Div. (Buckley, J.) Dec. 11, 16.

TOLLER *v.* SPIERS & POND. (*a.*)

*Factory—Two separate factories in one building—Common owner—Works required for protection from fire of both factories—Right of entry of owner to execute works — Validity of notice — "Tenement factory"—"Power supplied"—Factory and Workshop Act*, 1901 (1 *Ed.* 7, *c.* 22), *ss.* 14 (2) (7); 149 (1).

*Separate factories within the same building do not together constitute a tenement factory within section* 149 (1) *of the Factory and Workshop Act*, 1901, *unless the mechanical power which is supplied to them is supplied from a common source.*

*Where two separate factories in the same building which do not together constitute a tenement factory have a common owner, the owner has no right under section* 14 *of that Act, as against the occupier of one factory, to enter on that factory to do works which are reasonably required for the protection from fire of the other factory, by reason of the fact that works are also reasonably required for the protection of the factory on which he proposes to enter, even though such works are the same (or nearly the same) for both factories.*

*A building contained two separate factories, each supplying its own mechanical power. The local authority, purporting to act under section* 14 (2) *of the Act, served on the owner of the building a notice requiring him to construct certain works for the protection from fire of the two factories jointly*

*Held, that the notices was invalid, because* (1) *the two factories did not constitute a tenement factory, and were not, therefore, one factory within section* 14 (2); *and* (2) *it did not specify what works were required for the protection of both factories considered separately.*

*Held, consequently, that the owner had no power, as against the occupier of one factory, to enter his premises to execute works required for the protection of the other factory.*

Action with witnesses.

In this action the plaintiff was the owner, within the meaning of the Factory Acts, of a large building situate in Upper Thames-street, of which the lower part—that is to say, from the basement to the fourth floor (with the exception of the second floor), was in the occupation of the defendants and constituted one factory (hereinafter called factory A), while the fifth to the seventh floors constituted another factory (hereinafter called factory B), and were in the occupation of Messrs. Farwig. Each factory supplied its own mechanical power. The only staircases in the building were at the northern end.

The London County Council, as the authority empowered by the Factory Acts to deal with such cases, were advised that if a fire broke out in the middle of the building the southern end might be cut off from means of escape. The council had no power to interfere with the second floor, because it was not a factory. The scheme, therefore, which they adopted was the construction of a staircase at the southern end, commencing at the third floor, going up to the top floor, and communicating with the intermediate floors.

On the 13th of December, 1900, they served a certain notice under the Act which was then in force. This was now immaterial, except so far as it was incorporated into a later notice. An arbitration took place between the council and the plaintiff, which resulted in an award of the 4th of March, 1902.

In the interval the Factory and Workshop Act, 1901, had been passed, and the award was made under that Act, which is the Act now in force. In substance the award found that the building as a whole was not provided with such means of escape in case of fire as could reasonably be required; that the building contained two factories (A and B), and that the second floor was not a factory. It then found that certain staircases which had been proposed could not be reasonably required, because the occupiers of the second floor did not consent, and further awarded that the notice which the council had served should be amended so as to include the construction of the staircase above described.

Consequent upon that the council on the 10th of July, 1902, served an amended notice reciting the award, showing that it referred to the building as a whole, and requiring the construction of that staircase. Upon the question whether the staircase in question was reasonably required for the protection of factories A and B, or one and which of them, the relevant words of the award were these: "I find that a suitable staircase (describing it) communicating with each floor of the building intermediate between the third and seventh would materially diminish the risk of injury or loss of life in case of a fire breaking

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

out in any of the upper floors of the building, and would be reasonably required."

The question to be determined in the action was whether the plaintiff was entitled to compel the defendants to allow him to enter upon their demised premises for the purpose of executing the works described in the notice of the 10th of July, 1902.

*Astbury, K.C.*, and *R. J. Parker* for the plaintiff.—The owner has power to enter on the premises demised to the defendants: Factory and Workshop Act, 1901, s. 14 (2). All the provisions of that section have been complied with. The two factories together constitute a tenement factory within section 149 (1), and a tenement factory is one factory: section 14 (7). The notice, therefore, relating to the building as a whole, which has been served on the owner, is a good notice. The definition of a factory contained in section 149 (1) is sufficiently wide to include a separate building and a floor in a larger building. Some meaning must be given to the word "separate" in the definition of a tenement factory, and a separate factory is a factory which is in a building where there are other factories. A tenement factory is, therefore, a building in which there are two or more separate factories. Provided that mechanical power is "used," it is immaterial from what source it is "supplied." [BUCKLEY, J.—The words "where mechanical power is supplied" in the definition of a tenement factory are redundant, unless they mean "supplied in a particular manner"; and that manner can only be "from a common source"] Even if the two factories do not together constitute a tenement factory, the award finds, and if it does not, we are in a position to prove that the staircase is reasonably necessary for the protection of both factories; the notice to the plaintiff is therefore good on that ground, and he has power to enter on both factories to construct it. They called evidence to show that the staircase was reasonably necessary for the protection of both factories.

*Buckmaster, K.C.*, and *A. C. Clauson*, for the defendants.—The plaintiff has no right, apart from section 14, to trespass on our factory to carry out works. The two factories are not a tenement factory. The notice served by the London County Council is therefore bad. They ought to have considered what steps were necessary for the protection of each factory separately, and served a notice on the owner in respect of each. All the subsequent proceedings, being based on a bad notice, are ineffective. It is not sufficient to prove now that the council considers that the work is reasonably necessary for the protection of each factory considered separately.

*Astbury, K.C.*, in reply.—The Act does not require a separate notice to be served on the owner in respect of each factory. Provided that the staircase is required for the protection of both factories, it is immaterial that it is more necessary for the one than for the other. With regard to what is reasonably necessary, the only persons who have a *locus standi* are the local authority and the owner. The owner is compellable to carry out the award, notwithstanding any agreement with the occupier. The plaintiff, as the owner of the whole building, is entitled to waive any informality in the notice.

*London County Council* v. *Lewis*, 69 L. J. Q. B. 277, 48 W. R. Dig. 64, and *London County Council* v. *Brass*, 17 Times L. R. 504, were referred to.

BUCKLEY, J., in giving judgment, said: The defendants say that the plaintiff has not the right adversely to them to enter upon their demised premises to execute that work. The plaintiff asserts that he has. This is the question to be determined. It is clear that the plaintiff has no such right unless the statute gives it to him. Thus the question is whether the statute gives it him. Upon this the first material inquiry is whether the two factories (factory A and factory B) constitute what the Factory and Workshop Act, 1901, calls a "tenement factory" so as to be deemed one factory. By section 14 (7) of that Act it is provided that for the purposes of that section the whole of a tenement factory shall be deemed to be one factory. Section 149 defines a tenement factory. I do not read the definition at length. To ascertain whether factories A and B are a tenement factory or not, I must first see whether they are in one building. The answer is in the affirmative. Then is each of them in law a separate factory? I think it is. A factory, textile or non-textile, is defined in the earlier part of the same section, and means premises wherein mechanical power is used for some purpose as there defined. But is this a factory where mechanical power is "supplied to different parts of the same building occupied by different persons"? I think plainly it is not. Those words obviously do not mean simply a factory where mechanical power is used. That is already involved in the word "factory." They point not to the user, but to the "supply" of mechanical power to different parts of the same building—a supply, for instance, by the occupier of the one factory to the occupier of the other factory, or a supply to both from some external source by a third person, including and perhaps meaning the person of whom the tenement is held. The owner of a tenement factory, whether he is an occupier or not, is responsible for many matters relating to the factory instead of the occupier, including matters relating to machinery: see section 87. Every factory is one which uses mechanical power, and the words "where mechanical power is supplied," &c., cannot mean to repeat something which is already imported by the use of the word "factory." Moreover, the verb is not "used," but "supplied," meaning, I think, "taken by the factory occupier from a source of supply external to himself." The factories A and B in the present case are, so to speak, self-contained factories. Each factory occupier produces his own mechanical power by arrangements within his own factory. Factories A and B are, in my judgment, for all purposes of the Act separate factories, and do not constitute a tenement factory. It results that the council here have to do with two separate factories.

I look next to see what powers the statute gives to the owner of factory A, as against the occupier of factory A, to require the latter to allow the former to enter upon his premises to do works. The only right is under section 14 (2) of the Act of 1901. Let me take four cases, assuming that in each case there is a common owner of A and B. First suppose that A is not a factory at all, but that B, the factory above, is in danger of fire, and that the council think it reasonably necessary to make a staircase through A for the protection of B. It is plain that the owner has no power to do anything of the kind as against the occupier of A. In that case A is not within the Act at all. This has, in fact, been decided in *London County Council* v. *Lewis*. It is exactly what has occurred here with reference to the second floor of this building. Secondly, suppose that A is a factory but is effectually provided, so far as it is concerned, with means of escape in case of fire, but that B is not so provided. Is there anything in the Act to enable the owner of factory A to enter, as against the occupier of factory A, to do works for the benefit of factory B? In my judgment there is not. This seems to be involved in *London County Council* v. *Brass*, although the report is not very clear. The effect of section 14 (2) is, in my

judgment, that the owner of the factory which is in danger can be required to carry out works for the protection of the factory which is in danger, and that the owner of that factory has power to execute works so reasonably required "notwithstanding any agreement with the occupier" of that factory. The statute gives him, as against his tenant, the right to enter and do works required in respect of the property included in the demise, but it gives him no other rights. Whether the works are "reasonably required" or not, is to be determined in manner directed by the statute. I may pause here to say that a point was raised that the occupier was not present when the award was made, and is not, therefore, bound by the award. This, I think, is a false point. The machinery of the Act is to provide statutory means for determining what are the means of escape reasonably required. That machinery includes an arbitration between the council and the owner. When the machinery of the Act has been honestly used, and the means of escape reasonably required has been ascertained, the statute gives the owner, as against the occupier, the right to enter and do those works. But, thirdly, suppose both factories are unsafe, has the owner of both, as against the occupier of one of them—*e g.*, factory A—any right to enter and execute works for the protection of factory B by reason of the fact, which is here assumed, that works are also reasonably required for factory A? I think not. The only right, as against the occupier of factory A, is to enter and do works for the protection of factory A. The existence of that right does not carry with it the further right at the same time to do further or other or any works for the benefit of factory B. Lastly, suppose that works which are (or to a large extent are) the same for both are reasonably required for the benefit of both A and B, is the owner entitled to enter on the occupier of A so execute a work which will be available for both by opening an escape for persons in A through B and for persons in B through A. I think not. The only operation of the statute is that it is no trespass for the owner of A to enter against the occupier of A to do works for the benefit of A. It gives no power to open through A an exit for persons in B. Those persons in passing through A would be trespassers. The statute does not render this not a trespass.

With these observations upon the scope of the Act I pass to that which the London County Council have done. [His lordship then stated the facts as to the award and notices, and continued:] It seems to me that in the acts thus done the council can only have proceeded legally under the Act if the fact were (as in my judgment it is not) that the building in question is a tenement factory, and is therefore to be deemed one factory. They have never taken upon themselves to ascertain and have never given any notice based upon any conclusion as to what is necessary for the protection of factory A as a separate factory. Treating A and B together they arrive at certain conclusions with regard to a work which will benefit both, and will do so by opening to each a means of escape through the premises of the other. What conclusion they would have arrived at if they had considered A alone, and [or] upon the footing that they could not give each a right of escape through the premises of the other I find myself quite unable to say. They might, for instance, have recommended simply as regards factory A that the skids or floor openings between the third and fourth floors should be closed, and a staircase constructed at the southern end giving communication between the third and fourth floors. In the case of a fire in either of those two floors there would then have been the means to reach the staircase at the northern end by going up or down, as the case might be, to the other of them and passing to the northern end of the building I only give this as an illustration. The point is that the works reasonably required for factory A, if that factory alone had to be considered, have not been taken into consideration by the council, and they have not given any notice to do works other than works for the benefit of factories A and B considered jointly, and the works specified are works which would give to each a means of escape through the premises of the other. Under section 14 (2) of the Act of 1901 it was the duty of the council, I think, to serve on the owner of factory A a notice in writing specifying the measure necessary for providing means of escape reasonably required for persons in factory A. The owner, as against the occupier of factory A, would have been entitled to enter and do those works. But, as it seems to me, the proceedings which have been taken in respect of the two factories jointly have been wrongly taken and are ineffectual, and the works required are, for the reasons I have stated, inadmissible. To support this action it is necessary to find in the Act a provision that two factories which have a common owner shall for the purposes of section 14 be deemed to be one factory. There is no such provision in the Act. I have thus decided simply the question of law (an important one, no doubt) which arises upon the construction of this statute. What has been the particular cause of friction between the plaintiff and defendants I do not know. It is not material to anything which I have to decide. I think that the plaintiff is wrong in contending that he has against the defendants a legal right to enter and do these works. This is the whole question involved in the action. On this question the plaintiff, in my judgment, is wrong. I dismiss the action, with costs.

Solicitors, *Peake, Bird, Collins, & Co.; Linklater, Addison, Brown, & Jones.*

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## House of Lords.

From C. A. (England). Nov. 14.

### BEDDINGTON AND ANOTHER v. BAUMANN AND ANOTHER. (a.)

*Power—Appointment—Settled land—Lease by appointor after exercise of power by will—Lease with premium—"Capital money"—Wills Act,* 1837 (1 *Vict. c.* 26), *ss.* 24, 27—*Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *s.* 22 *sub-section* 5 —*Settled Land Act,* 1884 47 *&* 48 *Vict. c.* 18), *s.* 4.

*Real estate was settled for A. H. B. for his life, and after his death for his children as he should by will appoint, and in default of appointment for his children generally as therein provided. A. H. B. appointed part of the estate to one son and part to another, and afterwards granted leases under the Settled Land Act,* 1882, *of parts of the appointed property and received large premiums, which were paid to trustees of the settlement and invested.*

*Held, that the appointments did not include the premiums, for the will of A. H. B. showed no intention of dealing with them, and therefore they went as in default of appointment under the settlement.*

*Decision of the* Court of Appeal (sub. nom. Beddington *v* Beddington, In re Moses, [1902] 1 *Ch.* 100, 50 *W. R Dig.* 131) *affirmed.*

Gale *v.* Gale, 4 *W. R.* 277, 21 *Beav.* 349, *approved.*

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(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Henry Moses, by his will made in March, 1873, devised to trustees his freehold estate upon trust for his son, A. H. Beddington, for his life, and after his death for all and every the child and children of A. H Beddington, or for any one or more exclusively of the others of them, and for such estates, interests, and in such shares and proportions, manner and form, as A. H. Beddington should by his will appoint, and in default of such appointment, and so far as the same should not extend, for all his children, who being sons should attain twenty-one, or being daughters should attain that age or marry, as tenants in common in certain shares as therein provided.

H. Moses died in 1875, and A. H. Beddington made a will in 1892 by which he appointed part of the estate to one of his sons, and part to another.

In 1895 A. H. Beddington granted leases under the Settled Land Act, 1882, of parts of the appointed property and received large premiums which were paid to the trustees of the will of H. Moses and invested by them.

A. H. Beddington died in June, 1900.

It was held by the Court of Appeal that the appointments did not include the premiums, that the will of A. H. Beddington showed no intention of dealing with them, and consequently they passed as in default of appointment under the settlement made by H. Moses's will: *In re Moses, Beddington* v. *Beddington*, [1902] 1 Ch. 100, 50 W. R. Dig. 131.

By the Settled Land Act, 1882 (45 & 46 Vict c. 38): Section 22 (5).—"Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall for all purposes of disposition, transmission, and devolution be considered as land, and the same shall be held for and go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement."

By the Wills Act, 1837 (1 Vict. c. 26): Section 24.—"Every will shall be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will."

*Haldane, K.C., Norton, K.C.*, and *J. G. Fawcus*, for the appellants, cited *Gale* v. *Gale*, 4 W. R 277, 21 Beav. 349, which was criticized by Lord St. Leonards in his work on Powers, c. 7, s. 7 (8th ed.), p. 308; and in *In re Johnstone's Settlement*, 28 W. R. 593, 14 Ch. D. 162.

*Blake* v. *Blake*, 28 W. R. 647, 15 Ch. D. 481, and *In re Dowsett*, 49 W. R 268, [1901] 1 Ch. 398, were also referred to.

*Levett, K.C., Upjohn, K.C., Wace*, and *Leverson*, for the respondents, were not called upon.

Earl of HALSBURY, L.C.—When the facts which raise this question come to be understood, and the only questions which are subjects for deliberation sufficiently appear, the matter is really reduced to a very narrow compass. I confess for myself that I am so very well satisfied with the judgments which have been already delivered by the Court of Appeal that I should be content simply to say that I affirm those judgments and have nothing to add; but simply for the sake of clearness, to show what points are, in my opinion, established as matters of law, I propose to state very shortly what appears to me to follow from the judgments so delivered, in the reasoning of which I entirely concur. In the first place, the question is simply what is the effect and meaning of the will which, under the circumstances of this case, is supposed to be under construction—I say supposed to be under construction, because it is not a fact that there is anything ambiguous in the language of the will itself. The question is whether, in the language of Cozens-Hardy, L.J., the general principle is applicable to the determination of this case that, where you are dealing with a will which is an ambulatory document, you have no right to refer to the circumstances under which it was made, or the date at which it was made, or the property that existed at the time when it was made; you are remitted by virtue of section 24 of the Wills Act to the moment of death to show what it is that is being disposed of. In passing, I may say that the effort which has been made to fix upon the word "property" some such signification as to evade the proper application of that provision appears to me to be disposed of by the interpretation which the Wills Act itself in its interpretation clause gives to the word "property." Practically, therefore, it comes to this, whether, apart from any special direction or language in the instrument—whether it was a disposition of the man's own property, or whether it was an appointment, seems to me to be for this purpose perfectly immaterial—you can find in the instrument that the person who made that testamentary instrument has made a disposition, if it was property, or executed a power of appointment, if it was a power of appointment, in such words and under such circumstances as to show that he was not devising the particular property alone, but that he was intending that something which should represent that property, if it had undergone a change between the two periods—the time of the death and the time of the making of the instrument—should nevertheless pass to the person whom he had made his devisee or appointee. Of course, the broad proposition which Cozens-Hardy, L.J., lays down cannot be doubted. When you are dealing with a will you are dealing with an ambulatory instrument, and it operates nothing, and can operate nothing till it becomes consummated by the death of the testator—it must wait till then. That is a principle which I think no one has controverted or can controvert—that it must speak from the date of the death of the testator, as section 24 of the Wills Act says, in relation to the property of the testator, whether it is real or personal, or, what comes within section 24 by virtue of the interpretation clause, a power of appointment which may be in him at the time of his death.

Now, the facts here are very simple. At the time of the making of the will the property in question did not exist; the property has emerged by the money being raised by way of fine on the making of a lease. But that is not the property dealt with, and the result appears to me to follow necessarily. I confess for myself that I have some little difficulty in understanding the distinction which it has been sought to raise between a special power of appointment and a general power of appointment. I have endeavoured in the course of the argument to see by what set of principles one is to draw any distinction between the two. I confess for myself that I have failed to do it. I do not follow it. I entirely concur in the judgment of Farwell, J., in *In re Dowsett*, that there is no distinction, and I have failed, I confess, to follow in what way a distinction is suggested. The result appears to me to be that this case is covered by authority, because I regard the case of *Gale* v. *Gale* as a very important and serious authority under the circumstances. It has now lasted for a very long time, with the commentaries made upon it. And notwithstanding the commentary made upon it by Lord St. Leonards, it appears to me that the effect of that case is conclusive.

I think that we could not decide this case in favour of these appellants without overruling that case. Under these circumstances, it appears to me that this judgment ought to be affirmed. I only wish to add one word to express my hearty concurrence with what Cozens-Hardy, L.J., says in that part of his judgment in which he says: "In each case it is a question of intention to be gathered from the words used and not from speculation as to what the testator would probably have desired. If the language used is such that a devise of his own property would have failed by reason of some subsequent act, an appointment under a special power in the same language must equally fail." It appears to me that those words are conclusive of this case, and I move accordingly.

Lord SHAND.—The judgment of Byrne, J., in this case was unanimously affirmed by the Court of Appeal, and again the judgment of their lordships in that court is now to be affirmed unanimously by your lordships. Under these circumstances, I feel that very little need now be said on my part in support of the judgment which is now to be given. It is not disputed that after the date of the appointment contained in the will of Mr. Beddington, in consideration of premiums of £1,500 in one case and £14,500 in the other, the property which was the subject of the appointment was deteriorated or burdened and changed, I might say; there was practically a conversion of the heritable estate, or a large part of it, into money. The money was no doubt invested in another way in the shape of Consols or otherwise, but still the estate was entirely changed in that respect. On the other hand, the appointment in its terms relates to the property only; it does not affect or refer to the money which has been realised from part of the property having been sold; it does not in its terms in any way deal with the proceeds that have been received from that sale. It appears to me that under those circumstances the general principle ought to receive effect that where a subject which has been given by the terms of the appointment is gone in part or in whole, the appointment cannot take effect upon the money which has been received as a substitute. The appointment does not profess to include or to refer to money which might be received if the property should be sold or converted in any way in future; and there is no deed subsequent to the appointment after the change had taken place, declaring that the moneys which the trustees had received were to go in the same way as the property appointed. In the absence of anything of this kind I cannot proceed on a conjectural view as to what may have been intended, but certainly not expressed in the terms used. I do not think that the testator can be held to have made an appointment which relates to that money. I would only say, further, that in my opinion the cases of *Gale* v *Gale* and *Blake* v. *Blake* have not only been well decided, but that the observations of the learned judges in support of those cases—namely, Lord Romilly, M.R., in the one, and Sir George Jessel, M.R., in the other—are sound in themselves. I entirely concur in those observations. The language of Sir George Jessel, M.R., in the case of *Blake* v. *Blake* expresses the view which I hold when he says: "The character of the thing given is changed by the act of the testator, and he has thereby revoked his will by destroying or preventing the continued existence of the subject-matter of the gift. . . . I do not feel myself at liberty to read this will in the manner suggested, as meaning that it gives whatever is comprised in the settlement in whatever shape it may exist." With the Lord Chancellor, I am in the position that I have been unable to follow, as I have desired to do as closely as I could, the distinction which it was attempted to draw between a general and special appointment, and I entirely concur in the observations made in *In re Dowsett* by Farwell, J., on that matter. On the whole matter, quite concurring with what the Lord Chancellor has said, I am of opinion that this appeal fails, and that we should adhere to the unanimous judgment of the court below.

Lord DAVEY.—I agree that this is a case which does not present any extraordinary difficulty, and it is satisfactory to find that the judgment which we are about to pronounce is in accordance with the views which have been expressed by all the learned judges before whom the case has been argued before it reached this House. It strikes me that the case is capable of being put upon an extremely simple and short ground, and that is the ground upon which I should prefer to put it. A gentlemen, having a power of appointment amongst his children under his father's will of certain estates in the City of London and the neighbourhood, makes his will and makes an appointment of certain of those properties. Afterwards he grants building leases for long terms of years in consideration of the payment of large sums of money by way of fine or premium. By the joint operation of section 4 of the Settled Land Act of 1884 and section 22, sub-section 5, of the Settled Land Act of 1882, those moneys received for fines and premiums became capital moneys within the meaning of the Act, and were held upon the same trusts and to go to the same persons as the lands from which they proceeded would have gone under the settlement, or, in other words, they became subject to the trusts of the settlement. I ask myself, therefore, what was the settlement to which they became subject? And the answer can only be: The settlement made by the will of the original testator, Mr. Moses. In my opinion, it cannot be suggested for one moment that the will of Mr. Beddington, who made the appointment, was part of that settlement. The will was an ambulatory document having no force or effect whatever until the death of the gentleman who made the will; and therefore, in my opinion, it cannot be said with the slightest plausibility that Mr. Beddington's will was part of the settlement upon the trusts of which these moneys were held. That being so, it appears to me that there is an end of the case, because the effect is this, that they became subject to a power of appointment by Mr. Beddington, and in default of appointment by him went in the specified and prescribed manner; and the only question which can possibly be raised is this: Is Mr. Beddington's will expressed in such language and in such large terms as to carry not only the property as it then existed, but also this property which has arisen from the particular dealings with it. Now, if I look at the will, I can find no words whatever which point to, or purport to deal in any manner whatever, with anything else than the property itself. I will take the Westminster Bridge-road property, for instance. He might have said: "And also all other capital moneys which shall at any time hereafter, by virtue of dealings with the property or otherwise, be held on the same trusts"; but there is nothing whatever in the will from which you can infer any such intention. So far as the property itself is concerned, the Westminster Bridge-road property still existed at the date of his death. I do not know whether or not at the date of the will it was under lease or in possession, but it existed at the date of his death in the shape of a freehold reversion upon a long lease, and that is what passed by the appointment made in the will, and in my opinion

nothing else passed. I will only say, with regard to the cases which have been so much controverted in the courts below and have been discussed at the bar —I mean *Gale* v. *Gale* and *Blake* v. *Blake*—that in my opinion this is not a case of ademption at all, because the property is not ademed. The property is there, only it exists in a slightly different form from that in which it existed at the date of the testator's death. This is a capital accretion from the property which is held on the same trusts, but is not the property itself. Therefore, in my opinion, those cases have really nothing to do with it; but so much has been said about them that I should like to say this, that I entirely agree in the expression of opinion by Sir George Jessel, M.R., if my individual opinion be of any value, that *Gale* v. *Gale* was rightly decided. I think the judgment of Lord Romilly, M.R., conclusive. You cannot construe a will which purports to appoint or devise a particular property as appointing or devising property which had no existence at the date when the will was made. I will only add this further observation, that I also am quite satisfied and agree in every word which was read to us from the judgment recently delivered by Farwell, J., in the case of *In re Dowsett*. I concur in the judgment which has been moved by the Lord Chancellor.

Lord ROBERTSON.—I agree. The able argument on behalf of the appellants has been answered in advance by the learned Lords Justices on every point, and their judgments seem to me to furnish sound and conclusive grounds of decision.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Montagu, Mileham, & Montagu.*

Solicitors for the respondents, *Upton, Atkey, & Co.*

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## Court of Appeal.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) } Feb. 20, 21, 24.

ATTORNEY-GENERAL AND WARWICKSHIRE COUNTY COUNCIL *v.* OXFORD CANAL NAVIGATION. (*a.*)

*Highway—Bridge over canal—Raised approaches to bridge—Liability to repair fences—10 Geo. 4, c. 48.*

*A canal company liable to repair bridges and the "wing walls, ramparts, and side banks thereof," but not liable to repair "roads approaching bridges" beyond the extremity of the wing walls thereof, is not liable to repair the fences on the raised approaches to bridges.*

*Decision of* Kekewich, J. (71 *L. J. Ch.* 660, 50 *W. R. Dig.* 64), *affirmed.*

This was an appeal from a decision of Kekewich, J., dated the 4th of June, 1902, and reported in 71 L. J. Ch. 660, 50 W. R. Dig. 64.

The question to be determined was whether the liability for the repair of fences on raised approaches to a bridge carrying a highway over a canal rested upon the canal company.

The relators were the statutory authority charged with the construction, maintenance, and repair of the high roads in the county of Warwick. The defendants were the proprietors of the Oxford Canal Navigation.

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

Under various Acts of George III. the defendants had cut through a certain highway for the purpose of making a canal, and had erected a bridge over the canal in substitution for the highway. The Acts of George III. were repealed by an Act of 10 Geo. 4, c. 48.

Section 4 of the repealing Act vests all bridges, embankments, and other works, and the ground and soil thereof, in the canal company.

Section 5 authorizes the company to collect and receive tolls for the user of the canal.

Section 9 authorizes the company to maintain and support all bridges and other works.

Section 24 provides that a good and sufficient fence be made on each side of a bridge carrying a carriage-road over the canal.

Section 26 is as follows: The canal company "shall not be liable to repair or amend any part of the road approaching to any bridge or bridges made or to be made over the said canal . . . after such roads shall have been first made and used for one year, and then put into good and sufficient repair by the said company of promoters, beyond or further than the extremity of the wing walls of any such bridge; but nothing herein contained shall be construed to exonerate the said company from the future repair of all such bridges, and of the wing walls, ramparts, and side banks thereof."

The road which crossed the canal was vested in the Warwickshire County Council, and the latter brought the present action asking for a declaration that the defendants were liable to repair the fences by the side of the approaches to the bridge, and for a mandatory injunction to compel the defendants to repair the same and abate the nuisance.

Kekewich, J., held that the defendants were not liable to repair the fences.

The plaintiffs appealed.

*Cripps, K.C., Macmorran, K.C.,* and *P. Bagnall Evans,* for the relators.—Kekewich, J., expressed an opinion that if the old Acts had been in force the defendants would have been liable, for bridge includes the approaches to the bridge: *Nottingham County Council* v. *Manchester, Sheffield, and Lincolnshire Railway,* 71 L. T. Rep. 430. When a highway has been raised by a statutory company and the local authority takes over the liability as to that highway, it does not take over any liability as to fencing the highway. When a road has been altered so as to become dangerous, the person who has made the alteration has to supply a proper fencing. By the Highway Rate Assessment and Expenditure Act, 1882 (45 & 46 Vict. c. 27), s. 6, the road authority is, for the first time, given an authority over fences, but the authority is permissive only. Persons responsible for a nuisance are by common law under an obligation to abate the nuisance: *Manley* v. *St. Helen's Canal and Railway Co*, 2 W. R. 297, 2 H. & N. 840. A local authority has only a discretionary power to place and keep in repair fences, and is not under an absolute duty to do so: *Wilson* v. *Mayor and Corporation of Halifax,* 16 W. R. 707, L. R. 3 Ex. 114. In *Whyler* v. *Bingham Rural District Council,* [1901] 1 K. B. 45, 49 W. R. Dig. 70, the defendants were held liable on the ground of misfeasance. If a public company are authorized to interfere with a public highway they are bound not only to substitute something instead, but to keep that something in repair: *Reg.* v. *Inhabitants of Isle of Ely,* 15 Q. B. 827. There is an implied right of access on the part of a person who has made a road dangerous to come and repair it: *Mayor of Birkenhead* v. *London and North-Western Railway,* 15 Q. B. D. 572, 34 W. R. Dig. 100. The relief given to the canal company by the Act of George IV. was a limited relief.

*Warrington, K.C., J. H. Etherington Smith,* and *Bittleston,* for the defendants.—The Act of George IV., distinguishes the bridge and the approaches to the bridge, and the bridge alone was vested in the canal company. Assuming that the company were originally liable to fence, it does not follow that they continued liable to keep the fence in repair. If the highway authority had built something in lieu of a fence and more troublesome to keep in repair, they could not have imposed on the canal company a liability to repair that. The case of *Manley* v. *St. Helen's Canal and Railway Co.* does not apply, for there the canal company had possession of the bridge; here neither road nor fence is in the possession of the defendants. Wherever a wall is on a highway, it is part of the highway for purposes of repair: *Reg.* v. *Inhabitants of Isle of Ely.* Where you can show that a fence is on a highway, no question arises whether it is part of a highway or not, any more than in the case of a curb-stone. In the great majority of cases where the local authority are not liable to keep fences in repair, the fences are on the land of the adjoining proprietors. It is said that a nuisance has been created by the canal company. But they are following the express and minute provisions of an Act of Parliament, and now the road has passed from their control.

*Cripps, K.C.,* in reply.—The liability to fence was in the first place on the company. It has not been taken away. The company have sufficient proprietary right to make the repairs. They have created a nuisance and are responsible for providing against it.

COLLINS, M.R.—This is an action between the Warwickshire County Council and the Oxford Canal Navigation. The Warwickshire County Council, in the name of the Attorney-General, claim that the canal company are bound to keep in repair a fence on the side of a causeway leading up to a bridge which passes over the canal. The question is really determined by the construction of one or perhaps two sections of the Act of Parliament which defines the rights and liabilities of the canal company.

The canal was originally constructed under certain Acts of George III., but these Acts have been repealed, and the rights and liabilities of the canal company are now finally ascertained by the Act of 10 Geo. 4, c. 48, of which section 26 is the governing section in the present case. As is usual in the making of bridges over canals, the persons cutting through the highway were fixed with the obligation of making an equally safe and convenient mode of passage in substitution for the highway.

Now, where the construction of a bridge over a canal involves the raising of the highway on either side of the bridge, an approach to the bridge from the old highway has to be provided by means of a causeway, and it sometimes happens that, when a question has arisen as to keeping the approach in repair, the approach has been treated as standing on the same footing as the bridge itself.

We are relieved from any question of that sort, because this Act of 10 Geo. 4 treats the bridge and the approaches to the bridge as two distinct things. The words of the 26th section are these: [His lordship read the section, and proceeded:] We have in this section, to begin with, a direct limitation of the obligation on the canal proprietors with regard to the repair of any part of the roads approaching the bridge. This is an exemption in favour of the canal company, and to make that clear the section after defining the exemption goes on to define that which was not exempted: "Nothing herein contained shall be construed to exonerate the said company from the future repairs of all such bridges, and of the wing walls, ramparts, and side banks thereof." If the Legislature had intended to include and not exempt the causeways, we should have found in the latter part of the section the word "causeways" as as well as the words "wing walls, ramparts, and side banks."

It is impossible to assert that the intention of the Legislature was to treat the causeway as part of the bridge. They treat it as part of the highway, and this *primâ facie* is the meaning, because the approaches were made, not on land which belonged to the canal company, but on land which was vested in the highway authority. The canal company had to acquire the land upon which the bridge was built, but not any part of the highway itself. In my opinion, the Legislature intended in this section to deal with two separate and distinct obligations—one as to the repair of the approaches to the bridge, the other as to the repair of the bridge itself. After the approaches had been made and used for one year, and then put into good repair by the canal company, they went back as part of the highway to the persons whose duty it is to deal with the highway.

We have listened to an interesting and ingenious argument from Mr. Cripps and Mr. Macmorran, and perhaps, if we were not bound by the express terms of the Act, there would be a great deal worthy of consideration in their argument. It is clear that if a body clothed with statutory powers interferes with a highway, it is bound impliedly to substitute an equally convenient mode of passage. It cannot be said to have discharged that obligation by substituting a public nuisance for a safe highway. It must prevent the substitute from being a nuisance. But I think that the cases they cited do not affect the question before us, because that question is regulated by the 26th section of the Act, the one point being whether an obligation to repair the fence remains in the canal company notwithstanding that section. We are not called upon to decide whether or no such obligation rests on the county council, but I think they would be well advised not to incur any risk, not to leave the road without a proper fence and so commit a public nuisance. For these reasons I think the learned judge was right, and that the appeal ought to be dismissed.

ROMER, L.J.—I am of the same opinion. It appears to me that the Act of 10 Geo 4 finally settles the rights and liabilities of the canal company in respect of the bridge and the approach to the bridge. It is not necessary to consider the previous history of the canal company, or to consider what would have been their liability if the Act of 10 Geo 4 had not been passed. Having regard to the provisions of that Act, especially sections 4, 24, and 26, I think the Legislature has drawn a clear distinction between what I may call the bridge proper and the approaches to the bridge. With regard to the bridge proper, that is vested in the canal company by section 4 Being in possession of the bridge, the company is liable to repair it; they are freed from any liability in respect of approaches not vested in them. It is said that this interpretation will result in a hardship on the local authority. The first answer to that is that the Legislature has thought fit to impose the liability on them, and must have considered that liability not to be unfair as against them. I am of opinion that there is no such hardship as should induce us to give the statute any other than its simple meaning. What the canal company did they did for the benefit of the country at large, in that they facilitated communication between different parts of the country, and decreased the wear and tear of roads by diminishing the traffic upon them. As to the fencing in

question, it lies almost in the centre of the highway, and the person liable to repair the highway would have to repair the fence if necessary. The approach must be taken to include the whole of the approach with its sides and fences.

COZENS-HARDY, L.J., read the following judgment: I agree that the decision of Kekewich, J., ought to be affirmed. It seems to me that, on the construction of the particular statute by which the rights and liabilities are defined, a clear distinction is drawn between the ascent to a bridge on the road approaching a bridge and the bridge itself. The bridge is vested in the canal company, and the ascent or approach is not. The liability to repair the bridge, as defined by section 26 of the Act of George IV., is thrown upon the company. They are expressly exempted from liability to repair the approach. The fences in question are on the highway. They divide one part of the highway from another part of the highway. I cannot follow the argument of the appellants that a portion only of the original liability of the canal company has been transferred to the road authority—viz., the repair of the road itself, as distinguished from its fences and supports. In my opinion no such liability existed on the expiration of one year from the time when the approach was made and put into good and sufficient repair by the canal company.

COLLINS, M.R.—I had intended to refer to *Reg.* v. *The Inhabitants of Lardsmere*, 15 Q. B. 689, as an authority that the approach is part of the highway.

*Appeal dismissed.*

Solicitors, *Field, Roscoe, & Co.*, for *Algernon S. Reid*, Leamington; *Stockton & Sons*, Banbury.

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 19.

BRITISH OIL AND CAKE MILLS (LIMITED) *v.* COMMISSIONERS OF INLAND REVENUE. (*a.*)

*Inland revenue—Stamp duty—Mortgage—Collateral, auxiliary, or additional security—Trust deed for securing debentures—Subsequent conveyance of property to trustees—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *Schedule I.*, "*Mortgage.*"

*By a trust deed for securing debentures in a limited company, the company acknowledged that it was indebted to the trustees in the sum of £750,000, and agreed to convey to the trustees certain freehold hereditaments, which were described in the deed as "the specifically mortgaged premises." At the date of the execution of the trust deed the hereditaments had not been conveyed to the company. After their conveyance to the company the latter conveyed them to the trustees to hold them upon the trusts contained in the trust deed. The conveyance contained no obligation by the company to pay the moneys secured by the trust deed or any part thereof. The trust deed was stamped at the rate of 2s. 6d. per £100 of the amount secured, as a primary security under the heading "Mortgage, bond, debenture, covenant" in Schedule I., clause* 1, *in the Stamp Act*, 1891.

*Held, that the conveyance was "a collateral or auxiliary, or additional security, or by way of further assurance" within clause 2 of the heading "Mortgage," &c., and was therefore liable to stamp duty at the rate of 6d. per £100 of the amount secured by the trust deed.*

Appeal by the British Oil and Cake Mills (Limited) from the judgment of Phillimore, J., upon a case stated under section 13 of the Stamp Act, 1891.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

On the 25th of November, 1899, an instrument was presented on behalf of the appellants by their solicitors to the Commissioners of Inland Revenue under section 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

The following was a copy of the instrument: "This indenture made the 21st of November, 1899, between the British Oil and Cake Mills (Limited), a company having its registered office at 29, Great St. Helen's, in the City of London (hereinafter called 'the company'), of the one part, and the Right Honourable Robert James Baron Wantage, V.C., K.C.B., of 2, Carlton-gardens, in the county of London, and Reginald Abel Smith, of 1, Lombard-street, in the City of London, banker (hereinafter called 'the present trustees'), of the other part; whereas these presents are supplemental to an indenture dated the 3rd day of October, 1899, and made between the company of the one part and the present trustees of the other part, being a trust deed to secure £750,000 debenture stock and interest, and hereinafter referred to as the trust deed; and whereas the freehold hereditaments thirdly specified or referred to in the first part of the second schedule to the trust deed have been conveyed to the company by an indenture particulars whereof are contained in the schedule hereto: now this indenture witnesseth that in pursuance of the provision in this behalf contained in the trust deed the company as beneficial owner hereby conveys unto the present trustees and their heirs all and singular the freehold hereditaments thirdly specified or referred to in the first part of the second schedule to the trust deed, and all other (if any) the freehold hereditaments comprised in the indenture particulars whereof are contained in the schedule hereto, to hold the same unto and to the use of the present trustees, their heirs and assigns, for ever, upon and for the trusts and purposes and subject to the provisions of the trust deed, nevertheless if and so far as in the first part of the second schedule to the trust deed or in the said indenture the same premises are mentioned to be subject to any covenants, exceptions, or other matters then subject thereto."

THE SCHEDULE.

| Reference to hereditaments specified or referred to in Part I. of the second schedule to the Trust Deed. | Date of Indenture. | Parties. |
|---|---|---|
| Hereditaments thirdly specified or referred to. | Nov. 20, 1899. | Edwin Robson, of the first part, John Richard Bartlett and Chadwick & Co. (Limited) of the second part, the British Oil and Cake Mills (Limited) of the third part. |

This instrument was executed in pursuance of the provisions of a mortgage dated the 3rd of October, 1899 (called the trust deed), and made between the appellants of the one part and the present trustees of the other part. The deed of the 3rd of October, 1899, was a trust deed for securing £750,000 debenture stock issued or to be issued by the company. By clause 2 of this deed the company thereby acknowledged that it was indebted to the trustees in the sum of £750,000 carrying interest at the rate of 4½ per cent. per annum. The debenture stock to be issued was limited in the first instance to £550,000, but the

company was to be at liberty to issue further stock not exceeding £200,000 ranking *pari passu* with the first issue. The premises referred to in the trust deed as "the specifically mortgaged premises" were the premises of the various firms and companies which were amalgamated in the British Oil and Cake Mills (Limited); and were defined in the trust deed as meaning the freehold, leasehold, and copyhold hereditaments, and Scotch properties by clauses 8, 9, 10, and 11 thereof covenanted to be assured respectively, and all other property thereby made a specific security for the payment of the moneys for the time being owing and intended to be secured thereunder. By clause 8, the company as beneficial owner agreed with all convenient speed to grant unto the trustees all the freehold hereditaments respectively specified or referred to in Part I. of the second schedule thereto to hold the same unto and to the use of the trustees, their heirs and assigns; by clause 9, to demise to the trustees the leasehold hereditaments therein specified for the residues of the respective terms less one day, and to stand possessed of the nominal reversions in trust for the trustees; by clause 10, to surrender the copyholds therein specified to the trustees; and by clause 11, forthwith to vest in the trustees the Scotch hereditaments therein specified; by clause 12, any mortgage or other assurance whereby any property should be vested in the trustees under the provisions of clauses 6, 22, and 42 thereof or any of them (which provided for the vesting in the trustees of further property upon the issue of any of the unissued debenture stock; for the trustees at any time before the security became enforceable doing or concurring with the company in doing certain specified things in respect of the specifically mortgaged premises; and for the company with the permission of the trustees to withdraw from trusts of the deed any of the specifically mortgaged premises upon substituting other property for the same) might provide that the property therein comprised should be a security only for the amount therein specified. By clause 13, the company charged in favour of the trustees its other assets, both present and future, except its uncalled capital, with the payment of all moneys for the time being owing on the security of the trust deed, such charge to rank as a floating charge and in no way to hinder or prevent the company from selling, alienating, mortgaging, charging leasing, paying dividends out of profits, or otherwise disposing of or dealing with such assets in the ordinary course of its business, and for the purpose of carrying on the same, provided that the principal moneys for the time being charged on the general assets and ranking in priority to or equally with the floating charge thereby created should not at any one and the same time exceed £200,000. By clause 14 the trustees were to permit the company to hold the mortgaged premises and to carry on therein the business until the security should become enforceable, when the trustees might in their discretion enter upon the mortgaged premises and sell the same. Clause 15 stated the events in which the security was to become enforceable. By clause 22, at any time before the security thereby constituted became enforceable, the trustees might upon the application and at the expense of the company, but only if in their opinion the interests of the shareholders would not be prejudiced thereby, do or concur in doing all or any of such specified things in respect of the specifically mortgaged premises (*inter alia*), (10) to call in and enforce payment by foreclosure or otherwise of the securities forming part of the specifically mortgaged premises. By clause 25, the trustees, after having entered into possession, and until the sale of the mortgaged premises, might carry on the business of the company, and might also in their discretion exercise all the powers vested in them by clause 22 as if the word "specifically" were omitted throughout that clause. By clause 28, the trustees might appoint a receiver of the mortgaged premises; and by clause 48, upon proof that the holders of all the stock had been paid off the trustees should reconvey to the company the mortgaged premises.

The instrument of the 21st of November, 1899, was one of several instruments executed in pursuance of the provisions of the above-mentioned clause 8. The mortgage of the 3rd of October, 1899, had been presented to the commissioners under section 12 of the Stamp Act, 1891, and had been adjudged by them liable to the duty of 2s. 6d. per cent. on the sum of £750,000, by reference to the heading "Mortgage" in the first schedule to the Stamp Act, 1891, and this duty was paid, and no objection made against the assessment.

The commissioners, being of opinion that the instrument of the 21st of November, 1899, was liable to the duty of 6d. per cent. on £750,000, by reference to the heading "Mortgage" in the first schedule to the Act, sub-heading 2, so assessed it, and this duty—viz., £187 10s.—was paid. The questions for the opinion of the court were whether the instrument was chargeable with this duty, and if not, with what duty.

Phillimore, J., upon the authority of *Gartsides (Brookside Brewery) (Limited)* v. *Inland Revenue Commissioners*, 82 L.T. Rep. 686, 48 W. R. Dig. 78, affirmed the decision of the commissioners.

The company appealed.

*Danckwerts, K.C.*, and *H. Erle Richards*, for the appellants.

*Sir Edward Carson, S.G.*, and *S. A. T. Rowlatt*, for the respondents, were not called upon.

VAUGHAN WILLIAMS, L J.—The question is whether the duty of 6d. per cent. is payable on the deed of the 21st of November, 1899. The ground upon which it is said that the duty is payable is that the conveyance falls within the heading "Mortgage, bond, debenture, covenant," clause 2, in Schedule I. to the Stamp Act, 1891. The words of that clause are: "Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped—for every £100, and also for any fractional part of £100, of the amount secured, 6d." It is said that this conveyance does not come within those words, because the conveyance itself contains or creates no obligation to pay or repay the money, and that there is no primary security to which the conveyance can be collateral, or auxiliary, or substituted security, or by way of further assurance. That being the argument—namely, that this conveyance is not a primary security, because it does not create any such obligation, nor a collateral, or auxiliary, or substituted security or by way of further assurance, one has to see what the original trust deed of the 3rd of October, 1899, is. It is said that the deed is not a mortgage within the definition in section 86, sub-section 1, which provides that "for the purposes of this Act the expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the

case may be." In my judgment the trust deed of the 3rd of October constitutes a "mortgage" within that definition. If I am asked what words I bring it under, I answer that it is a security by way of mortgage for the payment of a definite and certain sum of money advanced and a certain sum previously due and owing. The money is "previously due and owing," because by clause 2 of the deed the company thereby acknowledged that it was indebted to the trustees in the sum of £750,000. The trust deed therefore, being a mortgage within section 86, sub-section 1, constitutes a primary security within the heading "Mortgage," &c., clause 1, in the schedule. That being so, we have only to consider whether or not, there being this primary security, the deed of the 21st of November constitutes a "collateral, or auxiliary, or substituted security, or by way of further assurance" within clause 2.

In this particular case it seems to me, having regard to the facts, that there is no real difficulty. At the date when the trust deed was executed the company had not acquired this property, and as appears from the schedule to the deed of the 21st of November, 1899, it was conveyed to them by a deed of the 20th of November. That is more than a month later than the trust deed. On the next day the property was by the deed of the 21st of November conveyed by the company to the trustees. In these circumstances it seems to me to be impossible to say that the conveyance of the 21st of November does not come within the words of clause 2. The effect of it was to give the trustees an improved security and to place them in a new and very much better position, because they were placed in a position which made it easy for them to deal with the property comprised in the mortgage of the 3rd of October. The deed of the 21st of November is therefore either an auxiliary security or by way of further assurance. I am not disposed to go further than that. Whether, where there is an agreement which covers certain property and which involves the execution of a conveyance of that property, in every such case the duty of 6d. per cent. is payable on the conveyance, I do not say. It may be so; but I have not the materials before me for drawing the line. It is sufficient to say that in the present case the 6d. duty is payable. The appeal must therefore be dismissed.

STIRLING, L.J.—I am of the same opinion. I do not think it is necessary in this case to say under what specific provision the trust deed of the 3rd of October was stamped with *ad valorem* duty in accordance with the duties imposed by the schedule to the Stamp Act, 1891, under the head "Mortgage, bond, debenture, covenant, and warrant of attorney." It has been stamped as a primary security for the payment of money under that heading in the schedule. For myself, if it were necessary, I should come to the conclusion that it was properly stamped as a mortgage, for the reasons which have been given by Vaughan Williams, L.J. What was contemplated apparently by the parties to that deed was that it should be an instrument which would convey to the trustees the rights of mortgagees as they are ordinarily understood, because I find that by clause 22, par. 10, it is provided that the trustees may call in and enforce payment by foreclosure or otherwise of the securities forming part of the specifically mortgaged premises. It was therefore contemplated that the trust deed was one which would entitle the trustees, amongst other things, to the ordinary remedies of mortgagees by foreclosure. However this may be, it is admitted that the deed of the 3rd of October, 1899, has been properly stamped as a security in the way I have mentioned.

The only question before us relates to the document of the 21st of November, 1899, which has since been executed in accordance with the stipulation contained in clause 8 of the trust deed of the 3rd of October. It is contended on behalf of the Crown that the deed of the 21st of November is "a collateral or auxiliary security," or at all events a security "by way of further assurance for the above-mentioned purpose, where the principal or primary security is duly stamped" within the meaning of clause 2 under the heading "Mortgage," &c., in the schedule. Certainly this seems to be a security by way of further assurance for the purpose mentioned; but the main contention which has been urged before us is that this is not so, because "security," as found in the schedule to the Act, has a peculiar meaning given to it by previous decisions. I think that the inference which is sought to be drawn from those decisions, particularly the decisions in *Jones* v. *Inland Revenue Commissioners*, 43 W. R. 318, [1895] 1 Q. B. 484, and *National Telephone Co.* v. *Inland Revenue Commissioners*, 47 W. R. 247, [1899] 1 Q. B. 250, goes too far. It certainly has been decided in those cases that the word "security" includes the instrument by which the obligation to pay is originally created. I have used the very words of A. L. Smith, L.J., in the latter case, but I do not think that it has been decided or was intended to be decided by those cases that in every place in which the word "security" occurs in the Act it is limited to that meaning. That is a totally different thing from saying that it includes such instruments. It seems to me that where the context warrants it, it is used as referring to that sort of instrument which the present Master of the Rolls described in *Jones* v. *Inland Revenue Commissioners* as being something in its nature collateral, or, in other words, something that secured a right already acquired under some other instrument or document. If that be the nature of a collateral security it seems to me that this document which we have before us falls within the definition, and certainly, as I have already said, it is an instrument by way of further assurance.

The only remaining question is whether there is sufficient context in the present case to justify us in saying that it is used in that meaning. It seems to me that there is ample context for expressing that opinion. The first clause under "Mortgage," &c., deals with instruments which are described as "only or principal or primary security." The second clause deals with another set of instruments described as "collateral, or auxiliary, or additional, or substituted security, or by way of further assurance." I cannot think that the Legislature meant in this latter case to exclude from taxation those instruments which—in the words of the Master of the Rolls—secure a right already acquired, unless they contain a further obligation of some sort on the part of the borrower to pay the money to the trustees. I think also that the provisions of section 87 show that this was the view taken by the Legislature, because a very common form of security is where a mortgage is made of property which consists partly of freeholds and partly of copyholds. The common form of such a mortgage deed is to convey the freeholds in the ordinary way to the mortgagee, subject to a proviso for redemption, and to insert a covenant for the surrender of the copyholds to the mortgagee; and then, inasmuch as the legal title could not pass in copyholds to the mortgagee, to execute contemporaneously a formal conditional surrender to the mortgagee by way of additional or further security to him. Now upon the meaning which I have attached to clause 2 of the heading "Mortgages," &c., such an instrument would have to pay the *ad valorem* duty at the rate of 6d. on every £100. The Legisla-

ture has thought fit to say in section 87, sub-section 5, that where any copyholds are mortgaged together with other property for securing the same money "the *ad valorem* duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of court roll of the surrender or grant, as the case may be, is not to be charged with any higher duty than 10s." I read that as meaning that it is to be charged with an *ad valorem* duty at the rate of 6d. in the £100 where the sum falls short of 10s., but where the sum would exceed 10s. then 10s. only is to be charged. That is a provision inserted to meet a case which very commonly occurs, and it seems to me that the attempt which is now being made is substantially to obtain the same relief without any special clause like the above. For these reasons I think that the appeal fails.

MATHEW, L.J.—I am of the same opinion. The deed of the 3rd of October is unquestionably a security for the payment of money. It is said that that is not enough, and that it must be a mortgage, and that this deed is not a mortgage within the meaning of section 86. When I turn to that section it appears to me that it is perfectly clear that the deed comes within the description of mortgage as "a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing." Upon turning to this deed itself, clause 2 states that the company acknowledges that it is indebted to the trustees in the sum of £750,000. This deed is clearly a mortgage within the language of section 86; it is a security upon property to which the company could only, at the time of its execution, obtain an equitable title. The deed accordingly contains provisions dealing with that state of things, and clause 8 in the deed contains a covenant by the company to convey the specifically mortgaged freehold premises; and under that clause the conveyance was executed by the deed of the 21st of November, 1899. In the words of clause 2 of the heading "Mortgage," &c., is that an "auxiliary security" or "by way of further assurance"? There can be no doubt about it. The original deed did not place the trustees in a position to be able conveniently to deal with the different kinds of property. It was provided that they should, by a collateral or auxiliary deed, be placed in that position. This later deed is therefore a collateral or auxiliary or additional security, or by way of further assurance, and the modified duty of 6d. is payable.

I do not think it necessary to add anything to what has been said as to the argument upon the word "security." It is, to my mind, far-fetched and unreasonable. The original document is a mortgage; the subsequent document is a security. The appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the appellants, *Stow, Preston, & Lyttelton.*

Solicitor for the respondents, *Solicitor of Inland Revenue.*

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From K. B. Div.
(Earl of Halsbury, L.C., Lord Alverstone, L.C.J., and Sir F. Jeune, P.) } Feb. 4.

RANDT GOLD MINING CO (LIMITED) *v.* NEW BALKIS ERSTELING CO. (LIMITED). (*a.*)

*Company—Shares—Forfeiture for non-payment of calls—Re-sale by company—Liability for future calls—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *Table A, arts.* 20 *and* 22.

*A company forfeited shares for non-payment of calls and re-sold them on the terms that the purchasers should be held discharged from any calls then due.*

*Held, that the purchasers were liable to pay the amount unpaid on the shares, and that they were not discharged by there having been a previous call which remained unpaid.*

Semble, *that any contract which purported to release a shareholder from paying the full nominal value of the share would be* ultra vires.

Appeal from Bucknill, J.

This was an action to recover the sum of £2,581 5s. and £24 for interest, being a call made on 41,300 shares in the plaintiff company held by the defendant company.

From the admitted facts it appeared that the shares in question had formerly been the property of the African Gold Properties (Limited). Calls were made upon that company to the extent of 1s. 8d. per share, which would have made them fully paid, they being of the nominal value of 5s. per share, and having the sum of 3s. 4d. per share paid thereon.

In consequence of the non-payment of calls by the African Gold Properties (Limited) the plaintiff company, under the powers given to the directors by arts. 13 and 15 of the articles of association, forfeited the shares. That forfeiture was cancelled on the 21st of November, 1899, under the powers of another article of the articles of association. But on the 18th of April, 1900, the shares in question were re-forfeited under the articles of association, and remained forfeited as far as the African Gold Properties are concerned.

On the 17th of May, 1900, the shares in question were sold to the defendant company, and on the 17th of May, 1900, a certificate in the following terms was issued to the defendants in respect of a block of forty thousand shares, and similar certificates in respect of the remaining one thousand three hundred shares.

The terms of the certificate are as follows: "This is to certify that the New Balkis Ersteling, Co., of 2, Winchester House, Old Broad-street, London, E.C., is the holder of forty thousand shares of 5s. each [here follow the numbers] on which the sum of 3s. 4d. per share has been paid. The remaining 1s. 8d. per share has been called up, and is payable by the African Gold Properties (Limited), who were the holders of the shares prior to the same being forfeited, and the said New Balkis Ersteling Co. (Limited) is to be deemed the holder of the said shares discharged from all calls due prior to the date hereof."

Bucknill, J., gave judgment for the plaintiff company for the amount claimed.

The defendant company appealed.

*A. T. Lawrance, K.C.* (*W. Scott* with him), for the appellant company.—Our contention here is that the company's power to make calls was exhausted, and therefore they had no power to make a fresh call. When the call has been made the liability is changed from an amount due on the shares to a debt. If that be so we are protected by the language of our certificate from any call due previous to the forfeiture.

*Sir R. Reid, K.C.,* and *Clauson,* for the respondent company.—The terms of this certificate are taken from Table A, article 22, and so no question of a contract can arise here. By the terms of the Companies Act, on every share the full nominal value of each share is liable to be called: *Ooregum Gold Co.* v. *Roper,* 41 W. R. 90, [1892] A. C.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

125; *Walton* v. *Saffery*, 45 W. R. 508, [1897] A. C. 299. The object of the certificate here was to give the purchaser of the forfeited shares a good title, and to free him in respect of forfeiture from liability in respect of past calls and in respect of interests and not to relieve the purchasers from liability to future calls. If such a contract were made it would be *ultra vires*, and contrary to the intention of the Companies Act.

*A. T. Lawrance* replied.

Earl of Halsbury, L.C.—In this case I without any doubt am of opinion that the judgment of my brother Bucknill was quite right. Now, in order rightly to appreciate the question which is raised in this case one must consider the whole purview of the limited liability system introduced by the Legislature and look at the sections of the statutes dealing with that particular question in the light of what that scheme was intended to establish. It was to be a scheme of limited liability. It is a sort of partnership in which each member of the partnership is to be entitled to join a trading concern limiting his liability to the extent of an ascertained amount—an amount ascertained by what has been called the "face value" of the share. I think some confusion has arisen in some of the cases by not sufficiently observing what is imported by what we call "the share," and by the sale of the share, treating it as a mere chattel involving in it no other responsibility than the possession of the chattel, and not sufficiently recognising the fact that it makes the holder of the share a member of a trading partnership, and as such liable in respect of the trading partnership which he has joined to all those liabilities together with possessing all those privileges which the Legislature has conferred on it by what I may call the statutory deed of partnership. The statutory deed of partnership has this operation, that you cannot go outside it. The amount subscribed which is to make the shareholder a partner in the concern must be paid, and, as the Legislature has said, must be paid in cash. I will not stop to inquire whether all the decisions have been absolutely in consonance with what the expressed intention of the Legislature was in respect of that provision that the money must be paid in cash. It does not arise here, nor is it material for me to consider it; but what is material is to observe that the capital of the company constituted by the subscribed portion of the capital which is to be raised on shares shall be paid, and no expedient—no indirect arrangement—can get out of the necessity of the company, that is the trading partnership as I have described it, preserving the capital which the Legislature has enjoined shall be the capital on which it is to trade. It has provided means by which the capital shall be subscribed, and the partners compelled to subscribe what they, by taking the shares, have agreed to subscribe. It has also provided that the governing body shall be at liberty either to call up the whole of the agreed sum, or portions of the agreed sum, at such times and in such ways as they think proper by their rules to determine. It gives specimen rules of the way they may do it, but it does not bind the company to adopt these rules. Among the things they can do is this. They may say, "If you do not pay at such a time the money which you have agreed by taking the shares to subscribe, your rights in this company shall go, and you shall be charged with interest if you do not pay; and further than that, not only shall your rights go as a member of the company, but you shall cease to be a member, and your shares shall be forfeited, but you shall nevertheless be liable to pay what you have been called on to pay." When that is done the Legislature further provides that the shares in the partnership which belonged to the forfeiting shareholder shall be capable of being sold to another person, but though that other person is relieved from any liability for calls made previously to his becoming an holder of the shares, there is nothing whatever which suggests that he should be relieved from paying the balance of what still remained due on the shares. That the new holder of the shares which have been forfeited should be relieved from liabilities for calls which had been made before he became a member seems to me to be intelligible enough, but that he should be relieved from responsibility for future calls seems to me to be against the scheme and intention of the statutes. If that view is correct, this case is, as it seems to me, answered by the statement of fact I have made, and when article 22 of Table A is read by the light of these observations, then it is clear that it was intended, and apparently, upon the face of it, manifestly intended, to preserve the new shareholder, as I will call him, who has bought in the market from any liability created by the fact of previous calls, but by no means to relieve him from the necessity of paying what is still due on the share. If, therefore, what is still due on the share is called up in due course, it does not matter whether there has been a previous call or not, unless it has been paid. If it has been, the liability of the share, so to speak, is gone, and if it has been paid in full there is no further liability, and that is the whole meaning of "limited liability." But if it is only that there has been a call which has not been paid, in what way has the capital of the company been preserved in the manner which, as I have said, the Legislature has determined that the capital of the company shall be preserved and shall be subscribed by the persons responsible to subscribe to it?

Now let us see what it is that the 22nd article, upon which so much reliance has been placed, involves, and what it is intended to do. But for the article see what might happen. The new shareholder who has bought, who knows nothing about previous calls, and has nothing to do with the previous call, has a share given to him. He might be vexed by a claim by the former shareholder, who might say that the call was irregular, and therefore that the purchaser was really not the new shareholder; whereupon the 22nd article gives a whole code, so to speak, of what shall be the mode by which the title shall be absolutely assured to the new shareholder, and at the conclusion of it, after describing the code and what is to be done, it proceeds to say: "And thereupon he shall be deemed the holder of such share, discharged from all calls prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale." To my mind it is absolutely impossible to consider that that has any relation except to what it purports to have relation to—viz., title to the share of the new shareholder when he has become a new shareholder by reason of the sale to him of the forfeited share. It seems to me, therefore, that that is the whole point here. The question of the payment of the share is another thing.

I do not wish to say anything beyond the necessities of this case. There may be contracts which may have operation between the immediate parties to the sale. I doubt myself whether any contract made by the directors of the company, which should affect what I have described as the absolute necessities imposed by the statutes upon the preservation of the statutable rights, could have any operation. I do not proceed to deal with that question now, because here no contract was made. All that was done in this case was that the certificate given has followed the

language of—has written out, in fact, the 22nd article, and having done that the directors have, I think, protected the new shareholder within the language of the 22nd article, so far as he can be protected; but for the reasons I have given, have not protected him from paying that which, by becoming a shareholder, he has become liable to pay, any call for money not paid up on the share, and which still remains therefore due to the company of which he has become a shareholder. For these reasons I am of opinion that this appeal should be dismissed with costs.

Lord ALVERSTONE, L.C.J.—I entirely agree with the judgment of the Lord Chancellor for the reasons which he has given and I do not think I can usefully add anything.

JEUNE, P.—I agree with the Lord Chancellor and have nothing to add, except that I should like to express my obligation to Sir Robert Reid for his argument. I thought it singularly clear and quite conclusive.

Solicitors for the appellants, *Dale, Newman, & Hood.*

Solicitors for the defendants, *Sanderson, Adkins, & Lee.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 4.

McIVER & CO. v. TATE STEAMERS (LIMITED). (a.)

*Ship—Charter-party—Seaworthiness—Insufficiency of coal—Charterers to provide coal.*

*A charter-party for a round voyage was made subject to conditions, one of which was that the charterers should provide and pay for all coal. The vessel started on one of the stages of the voyage with an insufficient quantity of coal on board, whereby she was rendered unseaworthy. The insufficiency resulted not from any failure on the part of the charterers to supply coal required by the captain, but from failure on the part of the chief engineer to estimate correctly the quantity of coal in the ship's bunkers when she started. In an action by the charterers against the shipowners to recover damages for breach of warranty of seaworthiness,*

*Held, that the plaintiffs were entitled to recover, because the above condition did not relieve the shipowners from their obligation to take care that the vessel had sufficient coal on board by placing the question of the supply of coal in the discretion of the charterers; and, secondly, because, even if the charterers had any discretion in the matter, they were prevented from exercising it properly by the default of the defendants' servants.*

Appeal by the defendants from the judgment of Kennedy, J., at the trial of an action without a jury.

The action was brought to recover damages for an alleged breach of a contract contained in a charter-party, made between the defendants as shipowners and the plaintiffs as charterers, whereby the defendants agreed to let and the plaintiffs agreed to hire the steamship *Patapsco* for a round voyage from Liverpool to the River Plate and back to the United Kingdom.

The plaintiffs' claim was based on the ground that they incurred unnecessary expense by reason of an excessive consumption of coal on the homeward voyage, between the River Plate and St. Vincent, owing to the ship's having had to put into Pernambuco to get a fresh supply of coal, which, the plaintiffs alleged, was rendered necessary by the master's negligently leaving the River Plate with a supply of coal insufficient to enable the ship to get to St. Vincent.

The alleged cause of action was that by reason of such negligence the ship was unseaworthy for the voyage from the River Plate to St. Vincent.

The following were the material clauses in the charter-party: "Steamer to be placed at the disposal of the charterers at Liverpool in such dock, or at such wharf or place (where she may always safely lie afloat at all times of tide) as the charterers may direct, and being on her delivery ready to receive cargo, and tight, staunch, strong, and in every way fitted for the service . . . having steam winches and donkey-boiler with capacity to run all the steam winches at once and at the same time, or main boiler to be used (and with full complement of officers, seamen, engineers, and firemen for a vessel of her tonnage) and to be so maintained during the continuance of this charter-party; to be employed in carrying lawful merchandize . . . as the charterers or their agents shall direct on the following conditions—namely: (1) That the owners shall provide and pay for all provisions, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen, and crew, and shall pay for the insurance of the vessel, and also for all the cabin, deck, engine-room, and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service. (2) That the charterers shall provide and pay for all the coal, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers, or crew), and all other charges whatsoever except those before stated. (3) That the charterers shall accept and pay for all coal in the steamer's bunkers on delivery, and the owners shall, on the expiration of this charter-party pay for all coal left in the bunkers. . . . (8) That the whole reach of the vessel's holds, decks, and usual places of loading and accommodation of the ship (not more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel, including cattle and/or coal and/or cargo on deck at shipper's risk. (9) That the captain shall prosecute his voyage with the utmost despatch, and shall render all customary assistance with the ship's crew, tackle, and boats, and that, though appointed by the owners, he shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain's signing bills of lading or otherwise complying with the same. (10) That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments. . . . (12) That the master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which are to be patent to the charterers or their agents, and furnish to the charterers, their agent or supercargo, when required, a true daily copy of the log, showing the course of the steamer and distance run and the consumption of coal. . . . (17) The act of God, enemies, fire, restraint of princes, rulers, and people, and all dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation, and errors of navigation, throughout this charter-party, always mutually excepted."

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The evidence was to the effect that, when the ship started on her return from the River Plate, there was not a sufficient quantity of coal on board for the purpose of the voyage to St. Vincent, and that the insufficiency resulted not from any failure on the part of the charterers to supply coal required by the captain, but from failure on the part of the chief engineer to estimate correctly the quantity of coal in the ship's bunkers when she started.

Kennedy, J., found that the vessel left the River Plate with an insufficient quantity of coal for the voyage to St. Vincent, and that she was thereby rendered unseaworthy; and he was of opinion that the provisions of the charter-party did not release the owners from the responsibility of seeing that the vessel was in a seaworthy condition at the commencement of that stage of the voyage. He accordingly gave judgment for the plaintiffs.

The defendants appealed.

*J. A. Hamilton, K.C.*, and *Bailhache*, for the defendants.

*Pickford, K.C.*, and *Bateson*, for the plaintiffs.

VAUGHAN WILLIAMS, L.J.—In my opinion the judgment of Kennedy, J., was right. The argument on behalf of the defendants really comes to this—that if the provisions of the charter-party are looked at, it will be found that the shipowners were relieved from the obligation to see that the ship was seaworthy when she started on each of the stages of the voyage. The part of the charter-party chiefly relied on is clause 2, which says that the charterers shall provide and pay for all the coal. The suggestion is that the contract, by the use of the word "provide" as well as the words "pay for," intended that the question how much coal was required before each stage of the voyage should be a matter within the discretion of the charterers and to be determined by them, to the relief of the shipowners from their obligation to see that the ship was seaworthy in the sense of having enough coal on board for the purpose of prosecuting the particular stage of the voyage. It is said that the plaintiffs cannot recover damages in this case, because they agreed to provide the coal necessary for the voyage and it was their own default which resulted in the insufficiency of coal. I do not think that there is anything in that argument. In my opinion there is nothing in the charter-party to relieve the shipowners from their obligation with regard to the supply of coal. But even if the charterers had any discretion in determining the quantity of coal to be provided, of which I see no evidence, I think they were placed in a position in which it was impossible for them to judge rightly in the matter owing to the default of the defendants' servants. I am therefore of opinion that the appeal must be dismissed.

STIRLING and MATHEW, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Charles Russell & Co.*, for *Lightbound, Owen, & Co.*, Liverpool.

Solicitors for the defendants, *Downing & Bolam*, for *Bolam & Co.*, Sunderland.

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## High Court of Justice.

Chan. Div. Kekewich, J. — Jan. 20.

SCOTT v. COULSON. (a.)

*Contract—Setting aside on ground of common mistake—Date to which common mistake should be referred—No delay in seeking the aid of the court.*

*Although the court is, in some cases, averse to setting aside a contract after completion upon the ground of common mistake, even where there is a suggestion of fraud, yet the court will set aside such a contract after completion if the plaintiff seeks the aid of the court with promptitude, and if the parties can without difficulty be restored to the position in which they were before the contract.*

This was an action to set aside an agreement whereby the plaintiffs had agreed to sell and assign to the defendants a policy of assurance on the life of a third party upon the ground of common mistake.

The plaintiffs were the executrices of the will of James William Prior, and the policy in question formed part of his personal estate.

By an agreement dated the 19th of March, 1902, the plaintiffs, in consideration of a sum of £460, agreed to sell to the defendants a policy of assurance on the life of Alfred Death, effected with the Scottish Widows' Fund and Life Assurance Society for the sum of £500 and bonuses.

The sale was completed and the assignment executed on the 19th of April, 1902.

It subsequently appeared, however, that Mr. Death had in fact died on or about the 23rd of December, 1899, and that thereupon there became due on the policy the sum of £777 10*s.* 4*d.*

The evidence showed that although at the date of the contract neither the plaintiffs nor the defendants were aware of the assured's death, yet that in the interval between the date of the contract and the date of the assignment the defendants received information which led them to believe that Mr. Death was dead at the date of the contract, and that the defendants had not disclosed this information to the plaintiffs, notwithstanding they had undertaken to communicate to them any information they might receive as to the existence of the assured.

The plaintiffs thereupon brought this action to have the contract and assignment set aside.

*Warrington, K.C.*, and *H. Dobb*, for the plaintiffs.—This is clearly a case of common mistake, and we are entitled so have the contract set aside: *Smith* v. *Hughes*, 19 W. R. 1059, L. R. 6 Q. B. 597; *Colyer* v. *Clay*, 7 Beav. 188; *Cochrane* v. *Willis*, 14 W. R. 19, L. R. 1 Ch. App. 58.

*Stewart Smith, K.C.*, and *St. John Clerk*, for the defendants.—The contract cannot be set aside upon the ground of common mistake. Whether we were aware of the death of assured or not at the date of the assignment is immaterial, provided, as the fact is, we were not aware of the death at the date of the agreement; nor were we under any obligation to disclose the fact of such death to the plaintiffs after the date of the agreement. No cases have been cited where a contract entered into on the ground of a common mistake has been set aside after completion.

KEKEWICH, J., said that the case raised an interesting point of law. It was common ground that at the date of the contract for sale of the policy both parties to the contract supposed the assured to be

(a) Reported by CUTHBERT CAMM, Esq., Barrister-at-Law.

alive, the result being that the plaintiffs were willing to accept as the best price they could get for the policy a sum which was slightly in advance of the surrender value to be obtained from the office and very much below the sum due on the death of the assured. As a matter of fact the assured was dead. It followed, therefore, that the parties contracted under a common mistake. In *Smith* v. *Hughes* Hannen, J., defined in language which at first sight looked somewhat confused, but was not really so at all, what was the common mistake which would justify one party to a contract in refusing to perform it. In that case the plaintiff had sold oats to the defendant by sample, and the defendant refused to fulfil his bargain, on the ground that he thought he was buying old oats, whereas in fact the oats were new. Hannen, J., in that case, said that in order to relieve the defendant it was necessary that the jury should find, not merely that the plaintiff believed the defendant to believe he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats. Applying that principle to the present case, the plaintiffs here believed the defendants to believe that they were buying a policy on a life then in being, and they further believed that the defendants believed the plaintiffs to be selling a policy on a life in being. To what date should that common mistake be referred? In his lordship's opinion it ought to be referred to the date of the contract. From that date the policy belonged in equity to the purchasers, and as at present advised he did not think that any information obtained by them after that date would in the absence of special agreement affect their conscience or prevent them from accepting the policy moneys if they were otherwise entitled thereto, and he proceeded upon that footing. It did not follow that if the contract was entered into on the ground of a common mistake of fact in a material matter, therefore the completion of the contract stood. On behalf of the defendants it was said that there was no case showing that a contract of that kind could be set aside after completion. The two cases of *Colyer* v. *Clay* and *Cochrane* v. *Willis* which had been cited to him scarcely went to the length of saying that it was the practice of the court to set aside a contract after completion on that ground. But in the latter case, where an agreement was entered into by a tenant in tail on the assumption that the tenant for life was alive when in fact he was dead, Knight-Bruce, L.J., said that "it would be contrary to all the rules of equity and common law to give effect to such an agreement, or to hold that such a person ought to be bound by it." His lordship did not think that Knight-Bruce, L.J., would have used that language if he had thought that the contract would not have been set aside. No doubt the court was extremely averse, even where there had been something like fraud, to setting aside a contract after completion, but that hesitation did not apply where the plaintiff came promptly and where the parties could without difficulty be restored to the position in which they were before the contract. Both these conditions had been fulfilled in the present case. No one could say that an action to set aside a contract entered into in March, 1902, had been delayed when it was tried in January, 1903, and there was no difficulty in paying back to the defendants the money which they had paid. There was therefore nothing to prevent the court from doing what was manifestly just. His lordship accordingly gave judgment for the plaintiffs with costs.

Solicitors, *Walker, Son, & Field*, for *A. A. Walker*, Cambridge; *Dubois & Williams*, for *R. C. & S. Burrows*, Cambridge.

Chan. Div. Buckley, J. — Feb. 14, 19.

*In re* WILMER.
MOORE *v.* WINGFIELD. (*a.*)

*Perpetuity—Remoteness—Devise—Life in being—Person* en ventre sa mère—*Gestation at beginning of period—Benefit of child.*

*A testatrix devised real estate on trust to pay the income thereof to A. for life, and after her death, by way of equitable contingent remainders (in the events which happened) for the third son of A., born or to be born, for life, and after his death for his first and other sons successively in order of seniority in tail male. At the death of the testatrix, the third son of A. was* en ventre sa mère.

*Held, that the third son of A. was a life in being at the death of the testatrix, and, consequently, that the limitations subsequent to his life estate were not obnoxious to the rule against perpetuities.*

*The principle that an infant* en ventre sa mère *is a life in being is of general application, and is not restricted to cases where it is to the advantage of, or immaterial to, the infant to apply it.*

Doe *v.* Lancashire, 5 *T. R.* 49, *discussed and applied.*

Adjourned summons.

By this summons the plaintiff, Stephen Thomas Moore, claimed a declaration that, on the true construction of the will of Anne Wilmer Wilmer, and in the events which happened, he had, on attaining the age of twenty-one years, become entitled as tenant in tail male in possession to her residuary real estate, and also to certain personal estate which, under the trusts of her will, were directed to be laid out in the purchase of real estate, to be held on the same trusts as her residuary real estate.

By her will, dated the 25th of September, 1876, the testatrix devised her residuary real estate unto and to the use of trustees, their heirs and assigns, upon trust to pay the income to Anna Maria Moore (a daughter of the testatrix) during her life, and after her death, subject to a trust for accumulation during the infancy of any person who would otherwise be entitled to receive the rents and profits, to stand possessed thereof upon trust for the second and every younger son of A. M. Moore, born or to be born, successively during his life, with remainder, after the death of each such son, upon trust for his first and other sons successively in order of seniority in tail male, so that every elder (except the eldest) son of A. M. Moore, born or to be born, and his first and other sons and their issue male respectively, should take before every younger son of A. M. Moore and his first and other sons and their issue male respectively, with remainder in trust for the second and every other son (except the eldest son) of A. M. Moore successively in order of seniority in tail, with certain remainders over. She bequeathed to the trustees certain personal estate to be laid out in the purchase of real estate, to be held by them on the same trusts as were declared concerning her real estate. There was also a provision that if any person other than the eldest son of A. M. Moore should become entitled to a certain other estate, called the Barne estate, the next gift in remainder should take effect.

The testatrix died on the 28th of October, 1880. At that date the defendant, Randall Kingsmill Moore, the second son of A. M. Moore, had become entitled to the Barne estate. Therefore the limitations, so far

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

as they were good, next after the limitation in his favour, took effect.

The third son of A. M. Moore, the plaintiff, was born on the 7th of February, 1881, and was, therefore, *en ventre sa mère* at the date of the death of the testatrix.

After the death of A. M. Moore, the plaintiff on the 13th of September, 1902, acting on the assumption that the limitations subsequent to his own life estate were void for remoteness, and that, therefore, he took an estate in tail male by the operation of the doctrine of *cypres*, executed a disentailing assurance and took out the present summons against the trustees of the will. R. K. Moore was joined as a defendant in his capacity of heir-at-law and next-of-kin of the testatrix.

The only question argued was whether the limitation in tail male to the children of the plaintiff was valid.

*Buckmaster, K.C.*, and *Sargant*, for the plaintiff.—The limitation is bad as infringing the rule against perpetuities. The plaintiff being *en ventre sa mère* at the date of the testatrix's death, the limitation in tail to the children of the third son of Mrs. Moore might have failed, because it was uncertain whether that which was ultimately born would have been born alive or would have been a son. The question then arises as to how far an infant *en ventre sa mère* is deemed to be born. The doctrine was introduced into English law from the civil law. By that law it was subject to two limitations; it was applicable only to personal estate, and it was based on the principle that it is to be applied only for the benefit of the unborn child. Those limitations, or at any rate the latter, have been introduced into the English law; *Blackburn* v. *Stables*, 2 Ves. & B, 367; *Blasson* v. *Blasson*, 13 W. R. 113, 2 De G. J. & S. 665. Having regard to *In re Burrows*, 43 W. R. 683, [1895] 2 Ch. 497, we must admit that the doctrine has been extended to cover cases where it is indifferent to the person *en ventre* whether he is treated as born or not, as where he is treated as born for the purpose of defining a class. In *Doe* v. *Lancashire*, 5 T. R. 49, the rule was laid down somewhat widely, but Lord Kenyon said (at p. 59) that, the rule being borrowed from the civil law, it was necessary to resort to the civil law to examine its extent. All through the judgments in *Thellusson* v. *Woodford*, 4 Ves. 227, 11 Ves. 112, where somewhat similar limitations were held to be valid, the principle is clear that the unborn child is to be treated as born for his benefit. In no case has it been held that an unborn child is to be treated as born where it would be to his detriment. [On this point they referred to *Doe* v. *Clarke*, 2 H. Bl. 399, and *Long* v. *Blackall*, 7 T. R. 100. They also argued that the rule against limiting an estate to an unborn child of an unborn child applies both to legal and equitable estates, and cited *Humberston* v. *Humberston*, 1 P. Wms. 332; *Monypenny* v. *Dering*, 2 De G. M. & G. 145; *Whitby* v. *Mitchell*, 38 W. R. 337, 44 Ch. D. 85; and *In re Bowles*, *ante*, 124, [1902] 2 Ch. 650.]

*Austen-Cartmell*, for R. K. Moore, did not argue.

*Dickinson*, for the trustees.—The rule that a person *en ventre sa mère* is to be deemed born for the purposes of the rule against perpetuities is absolute, and has never been limited by the supposed doctrine of benefit. *Long* v. *Blackall*, *Thellusson* v. *Woodford*, and *In re Burrows* are strongly in favour of that view. When the testatrix died it was an event not known, but certain, that the infant was male and would be born alive: *Doe* v. *Lancashire*.

*Buckmaster*, in reply.—The judgments in *Thellusson* v. *Woodford* were addressed to cases where there are limitations with restrictions, whereby the estate must vest within the limits imposed by the rule. If, for example, the limitation had been to a child to be born during the lifetime of the testatrix, or within nine months after her death, it might have been good. But that is not this case. A child *en ventre sa mère* is not for all purposes treated as born: *Richards* v. *Richards*, Joh. 754, 8 W. R. Ch. Dig. 23, 41.

BUCKLEY, J., after stating the facts, continued: Before parting with the will, I will only say that it is quite plain that the limitations are of estates which are not legal but equitable, though that does not make much difference to my decision; and that the estates are limited by way of equitable contingen remainders.

Now as the first proposition, of course, for the purpose of applying the law as to remoteness, I have to look, not at the events which did happen, but at the events which might under any state of circumstances have happened; and if the limitation is such that events might have so turned out as that it would have been beyond the period allowed under the rules as to remoteness, then it would fail, although in the events which did happen, that did not in fact result. Of course, that is beyond dispute. Secondly, of course, it cannot be disputed, and it is not disputed, that the rule of law as to remoteness admits of absolute ownership being suspended for a life or lives in being and twenty-one years afterwards, and that for the purposes of the rule a child *en ventre sa mère* is treated as a life in being. That is really not the question which lies at the root of this case. What I have to look at, as it appears to me here, is this: When the testatrix died on the 28th of October, 1880, was the limitation upon trust, after a life estate to the plaintiff, in favour of his first and other sons successively in order of seniority in tail male, one which might have failed by reason of being too remote? Could events have so turned out as that there would not, within the period allowed for vesting of estates, have come into existence a person who would have been entitled to the inheritance? What is put as to that is this. In October, 1880, when Mrs. Wilmer died, it was impossible to say whether the child of which Mrs. Moore was then pregnant was of the male or of the female sex, and it was impossible to say whether that child would ever be born alive; and, therefore, the argument is advanced, and must succeed, as it appears to me, if it is well founded, that if the child had turned out to be a daughter, or if there had been no child born alive at all, the limitations would have been void, because in that case the son who would have taken would have been born beyond the period allowed. I think that is so; but if it be a correct rule of law that in February, 1881, the child was born and turned out to be a boy, and that you are to refer back that state of facts to the earlier date—namely, the 28th of October, 1880, and say retrospectively, that at the date of the testatrix's death events had so turned out as that the rule against perpetuities could not be infringed, because there was a son in existence *en ventre sa mère*, he was a male, and he was born alive, then, of course, it cannot be contested but that the limitation is perfectly good. It is quite true that the class is "the second and every younger son of Anna Maria Moore born or to be born," but if once it is established that at the testatrix's death there was a son born (in the proper sense of the word) who could take, then of course there is no objection to the limitation; because in that state of things, it could not turn out that there would not be a person entitled to take the estates within the time allowed. To my mind, the point to be decided in this case is, am I entitled, after the 7th of February, 1881, when I know that the child born was a male, and that he

was not born dead, but alive, to throw that back and say retrospectively that that was the state of facts in October, 1880, when the testatrix died, although you could not say that it was so at that date, because you did not know what was going to happen. To my mind that is the whole point of the case.

Upon that the dominant authority, as it appears to me, is the case of *Doe* v. *Lancashire*. I want to state as plainly as lies in my power what, as I understand it, that case decides. At that date, 1792, marriage did not revoke a will, but marriage and the birth of a child did revoke a will. It was a doctrine founded upon an implied intention of the testator, to whom this was attributed; that at the moment he sat down to make his will, he was presumed to say, "If my circumstances so alter as that I marry and have a child, then I do not intend these dispositions to take effect, because I shall then owe other duties to my widow and my offspring." That was attributed to the date at which he sat down to make his will. If subsequently, having made his will, he married, and then died leaving his wife pregnant, the question discussed in *Doe* v. *Lancashire* was, was his will revoked or not revoked at his death. It could not be revoked six to eight months after his death. Something must happen when he dies. The question to be determined was, what happens? The court held that that state of facts revoked the will, and upon this ground, that when the event happened of the child being born alive, a fact which nobody could predicate at the date of his death, that took effect retrospectively, so that you said, at the date that he died, we must take it that there was a child, because it turned out subsequently that there was born alive a child. If so, it appears to me, that governs this case. Now I want to read one or two passages first from Lord Kenyon, C.J., to show what was the law at that date, and to what he was applying it. I read this from the report of *Doe* v. *Lancashire*, 5 T R., at p. 58, where he says: "Without going into all those cases, it may now be taken for granted, because it has been solemnly decided, that marriage and the subsequent birth of a child amount to a revocation of a will made before marriage. Perhaps the foundation of that principle is not so much an intention to alter the will, implied from those circumstances happening afterwards, as a tacit condition annexed to the will itself at the time of making it, that the party does not then intend that it should take effect if there should be a total change in the situation of his family. If those cases were referable to the head of a subsequent intention, the principle would be considerably distressed by the argument of Mr. B. Perrot in *Christopher* v. *Christopher*, 2 Dickens 445, and by the circumstance of a conception not communicated to the husband, or of a miscarriage, subsequent to his death; the latter of which might have some influence on the intention of the devisor, and yet would not operate as a revocation; and the former would have that effect, though it could not influence the intention." I pause for the purpose of pointing out exactly what Lord Kenyon meant by that. He says the latter—a miscarriage—might have some influence on his intention. Obviously what he means is not a miscarriage which happens after his death, which he could not know anything about, but something subsequently resulting in a miscarriage—that is to say, if the man had known at the date of his death that his wife was pregnant, but that she would subsequently miscarry, it is quite probable that he would intend to alter his dispositions in some respects; but that cannot affect it, he says; that would not operate as a revocation, because if there is a miscarriage, and the child is not born alive, there is no revocation of the will. The other case is this—of conception not communicated to the husband. He says that that would have the effect of revoking, although it could not influence the intention, because he did not know of the conception, and it could not affect his mind at all; but if there was a conception, and there was a subsequent birth, it would revoke the will. In other words, it is quite plain from what Lord Kenyon says, that what revokes the will is not the event as it subsequently turns out as known to the devisor—it is not by the light of subsequent events, but it is by attributing to him an intention, that if something happens hereafter, then that shall not be his will. The point is that the thing that happens thereafter does not happen in his lifetime, but happens some few months after his death. Passing to Buller, J.'s, judgment, he says: "The only question which remains to be discussed is whether a child *en ventre sa mère* be or be not in the same situation as a child actually born. Though, when I say this, I do not forget the declarations which are stated in this verdict, to which I entirely concur with my lord that no regard is to be paid. If there be any revocation at all of this will, it is so by presumption of law, independently of express declarations." But the point comes out most plainly, and I think absolutely clearly, in what Grose, J., says. At the foot of p. 63 he says this: "The objection which has been made against this is that the will speaks from the devisor's death, and that it must be decided whether or not at that moment it be a valid will. I agree that it does speak from that time, but the instant the child is born, he is considered, by retrospect, as born during the parent's life." Now mark, directly the testator is dead, either the instrument is his will, or it is not. It is not in suspense for six months. It is his will if no child is born alive; it is not his will if a child is born alive—an event which you cannot determine till a subsequent date. The court held that, inasmuch as at the future date the child was born alive, the will ceased to be his will when he died, because it was revoked by the subsequent birth of a son, an event which no human being could predicate at the moment of his death. That case, to my mind, involves absolutely this proposition, that if the child be subsequently born, you must take it that the event must be assumed to have happened, in the sense in which one speaks of a birth as happening before it takes place, at an earlier date. The cardinal point, of course, is that the relevant event has happened at an earlier date, although you do not know that it has happened till the later date. *Doe* v. *Lancashire*, I think, decides the present case. I will go on to apply it presently, but before that, I think I ought to say something about the subsequent cases, because they have been cited and are exceedingly interesting.

The next case to which I want to refer is *Blackburn* v. *Stables* (it is not quite in order of date). Upon the question of remoteness apart altogether from another question which has been argued, as to whether the case differs according to whether it be for the benefit or disadvantage of the child, I cannot help thinking that *Blackburn* v. *Stables* governs the present case. The gift there was to trustees in trust for the son of A. at twenty-four, and if no such son, then to the son of B, and if neither of them have a son, then to the son of C.; and then there were these words: "Nor shall my executors give up their trust till a proper intail be made to the male heir by him"—words whose effect the court held to be, that the gifts so made to the son of A. and so on were gifts of estate tail to those persons. It was argued that the gift was too remote, and I cannot myself see any ground upon which it was suggested that it was too remote, except that it was at twenty-four—it was more than twenty-one. The rule as to

remoteness might have been exceeded by reason of that fact. I cannot find anything else in the case to raise it. It was argued that it was too remote. The judgment is as follows: "The Master of the Rolls, on making the decree in the first instance in the plaintiff's favour, observed that it is perfectly settled that a child *en ventre sa mère* is to be considered as in existence for his benefit; and *Thellusson's case* went further; there it was held that such a child should be so considered to his disadvantage; those who supported the will, relying upon the distinction that for his advantage he was to be so considered." Now it seems to me that on the question of remoteness *Blackburn* v. *Stables* must govern this case. It was a different ground for applying the rule of remoteness; but the question there arose whether, by reason of the child being *en ventre sa mère* instead of born, which made all the difference in the world, the rule as to remoteness applied. The Court held that, although the child was *en ventre sa mère*, the rule as to remoteness did not apply, and for the reason that it was to be considered as born.

Following now the chronological order, which I departed from to cite *Blackburn* v. *Stables*, the next case is *Doe* v. *Clarke*, which is not very close to the present case. It is only an authority for the proposition that under a gift to such children of B. as shall be living at the time of his decease, a posthumous child of B. shares equally with those born in his lifetime; which is merely that the class of persons who are to take will be so considered as to include children *en ventre sa mère* as being members of the class, because otherwise they would be cut out and would be excluded from the benefit.

The next case in order of date is *Long* v. *Blackall*, a case again which is very close to the present. I agree, but distinguishable for reasons which Mr. Buckmaster suggested are grounds for saying that it does not absolutely govern the present case; but Lord Kenyon, in concluding his judgment, says this (7 T. R., at p. 102): "It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation." Of course that observation covers the present case altogether. If I am right in saying that *Doe* v. *Lancashire* throws the event back, then that is covered It must then necessarily happen. As Lawrance, J., says, in *Long* v. *Blackall*, it "must take effect, if at all, after a life which must be in being within nine months after the devisor's death." That is the same point again. If I am right in saying that the subsequent birth of a son is referable back to the death of the testatrix, then that sentence altogether applies.

The next case is *Thellusson* v. *Woodford*. At 4 Ves. 227, Sir R. P. Arden, M.R., says this, at p. 334: "It remains then to be considered whether a child *en ventre sa mère* is a life in being. I considered the case of *Long* v. *Blackall* a complete decision upon that point." Then a little further on, at p. 335, he says: "It must be admitted that there is one case in which, to a certain extent, a child *en ventre sa mère* is not considered to all intents and purposes as in existence. That is in the case of a descent at common law. Notwithstanding the statute, and that in every other case such child is considered as born from the time the devise or limitation takes place, in that case the intermediate rents and profits, as in the case of *Bassett* v. *Bassett*, are declared to belong to the heir-at-law." Then he goes on, on p. 336—a passage which I need not read—to address himself to the case, which is not the present, no doubt, of an estate tail limited to all the sons of A. living at the death of the testator, for their lives, with remainder over. That only becomes the present case, if I am right in saying that, upon *Doe* v. *Lancashire*, this was a male life in being at the testatrix's death, and that the event is to be referred back. In the report of *Thellusson* v. *Woodford*, in 11 Ves., at p. 143, Macdonald, C.B., speaking again of *Long* v. *Blackall*, says: "The case of *Long* v. *Blackall* seems to have decided that an infant *in ventre matris* is a life in being. The established length of time, during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child."

Those are the authorities which, it seems to me, are the ground for deciding the present case. I only want to cite one or two others for the purpose of saying that they seem to me to have very much less bearing. In the first place there is the decision of Lord Westbury in *Blasson* v. *Blasson*. Now the expression there to be construed was "born and living at the time of my decease," that expression being used as a definition of a point of time. The gift was "when and so soon as the youngest of 'certain children' who shall have been born and living at the time of my decease . . . shall arrive at the age of twenty-one years," then to divide "among all such children of my nephew and nieces last named as shall be then living," and what Lord Westbury held was that the class to take was to be a class to be ascertained at a period subsequent to the death of the testatrix—a period of division, and that all children living at the period of division, whether born before or after the death of the testatrix, were entitled. So that these words, "born and living," were not relevant for the purpose of determining the persons to take, but only for the purpose of determining the point of time at which they were to take. Upon that latter point, after making various citations from the civil law, Lord Westbury came to the conclusion that, inasmuch as the words were relevant only for the purpose of ascertaining the period of time, and not the description of the persons to take, the words, "born and living at the time of my decease" might properly have and ought to have their strict meaning—that is to say, children actually born at that date to the exclusion of children *en ventre sa mère* at that date, with the consequence that the date for distribution arrived when the youngest of the children born at that date attained twenty-one, and not at the date when the youngest of the children *en ventre sa mère* at that date attained twenty-one, which, of course, was a totally different date, and had nothing to do with this matter.

Then the other point which has been argued is this: It is said, and truly said, that in many cases you will find the expression used that this rule of treating a child who is not in fact born, but is only *en ventre sa mère*, as being born, is a rule which is applied, it is suggested, only when it is for the benefit of the infant to apply it. Now, thus stated, the proposition is not correct. You must extend it to this extent, that if it is wholly immaterial to the child which view you take, whether you apply the rule or not, you still treat the child as being born which is only *en ventre sa mère*. The decision in *In re Burrows*, of Chitty, J., is to that effect. It was a gift to B. "in case she has issue living at the death of A." It is no gift to the issue at all. At A.'s death B. was pregnant, and a child was subsequently born, and it was held that she took—that is to say, the child for the purpose of being considered as born, was treated as being born, when the child did not take in either event, but somebody else took. To that you must add this, that the rule is applied when it is for the advantage of the

infant, and it is also to be applied when it is immaterial to the infant whether you apply the rule or do not apply the rule. But then it is said that the rule ought not to be applied when it is to the disadvantage of the infant, but no authority is to be found for that proposition, and I am unable to see, looking at *Doe* v. *Lancashire*, how it is possible that that can be the true principle. Because, mark you, in the case which arose in *Doe* v. *Lancashire* it did not in the least matter what were the contents of the will. The contents of the will might have been in favour of the after-born child, contemplating its possible existence, but they might have been adverse to the child, or they might have been totally immaterial to the child. For the purpose of the doctrine of *Doe* v. *Lancashire* it does not matter what the will contained. If there be, after the execution of the will, a marriage and the birth of a child, the will is revoked, utterly irrespective of what the will contains, and it is revoked, as it appears to me from the passages that I have read, not upon any doctrine of its affecting the child, but because it is contemplated that when the man originally sat down to make his will when there was not in existence a marriage and a child, he is to be taken by implication to have intended that, if the circumstances altered, he would make some other will—what other will does not matter at all—and the will would go.

In my judgment, therefore, the doctrine in question, by which a child *en ventre sa mère* is to be treated as existing for many purposes—for all purposes other than the descent at common law as regards rents during the intermediate period, is one which is applicable, not only where it is to the advantage of the child to apply it, nor merely by way of addition to that where it is immaterial to the child whether you apply it or do not apply it, but also where it is to the disadvantage of the child to apply it. It appears to me that the doctrine is a general one. To apply it to this case, what happened was this. When the testatrix died there was in existence a fœtus, which turned out when the birth resulted to be a male child. That was a living thing when the testatrix died. The limitation is perfectly good if that living thing is to be taken to have been at the date of her death that which it turned out to be. I think *Doe* v. *Lancashire* decides that I may take it to be that which it turned out to be, and, retrospectively, I ought to say that on the 28th of October, 1880, Anna Maria Moore had a third son who could take; and if so that the limitation is good, and I therefore hold it to be good.

Solicitors, *Evans, Foster, & Wadham; Tylee & Co.*

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Chan. Div.
Swinfen Eady, J. } Dec. 4.

*In re* BARLOW'S CONTRACT. (*a.*)

*Settled land—Sale—Life estate—Merger—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 50.

*Where a tenant for life has parted with his life estate in an undivided share of the property to remaindermen, and he continues to be beneficially entitled to the remaining portion, the whole property is still settled land, and he can make a title to the entirety with the consent of the assignees.*

In re Mundy and Roper's Contract, 47 *W. R.* 226, [1899] 1 *Ch.* 275, *considered.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Vendor and purchaser summons.

This was a summons by the vendor to determine whether a title could be made to settled real estate.

The vendor was a tenant for life.

The question was raised, whether, assuming that the vendor had parted with two undivided shares of her life estate to remaindermen, she could make a title to the entirety with the consent of her alleged assignees.

*R. J. Parker*, for the vendor, referred to the Settled Land Act, 1882, s. 50, and s. 2, sub-sections 1, 3, 4, 5; *Alexander* v. *Mills*, 19 W. R. 310, L. R. 6 Ch. App. 124.

*Northcote*, for the purchasers, referred to *In re Mundy and Roper's Contract*, 47 W. R. 226, [1899] 1 Ch. 275.

SWINFEN EADY, J., in giving judgment said: The object of the Settled Land Act, 1882, is to enable a life tenant to exercise the powers of the Act, notwithstanding any assignment of his life estate. He cannot release or contract not to exercise those powers, and if he assigns his life estate for value he can still exercise his powers, but not so as to prejudice the rights of the assignee without his consent. In the present case it is contended that, owing to certain alleged assignments to remaindermen, the settlement is at an end as to two-thirds of the entire estate. But in my opinion the whole property still remains subject to the limitations of the settlement, and the vendor is still life tenant thereof within the meaning of the Settled Land Acts. There is nothing in those Acts to show that when a life tenant parts with his life estate in an undivided share of the property to a remainderman his powers are to cease in respect of that share. It is contended that they cease by the operation of the law of merger, and for this contention certain observations by Chitty, L.J., in *In re Mundy and Roper's Contract* are relied on. Chitty, L.J., says: "It may be that if the settlement consists merely of a life estate in A., with remainder to B. in fee, and A. surrenders his life estate to B., the power is gone under the doctrine of merger; and that such a case is not within the section, because where the settlement is thus brought to an end and exhausted there is no reason why such a power should continue after the absolute fee simple is vested in possession. I say 'may be' because it is not necessary to consider such a case, which does not arise upon the facts before us." But those observations, which are prefaced by the words "It may be," are directed to a case where an entire life estate has merged, so that the fee simple is vested in possession, and are based on the assumption that in such a case there is no reason why the powers should continue. In the present case, where at most only a portion of the life estate is gone, and the life tenant is still beneficially entitled to the remaining portion, and where it may be to the interest of all parties that she should be able to exercise her powers, I am of opinion that her powers still continue as to the entirety, and that the whole property is still settled land. The life tenant can therefore make a title to the entirety with the consent of her alleged assignees.

Solicitors, *Richard F. & C. L. Smith*, for *Septimus Gladstone Ward*, Newcastle-on-Tyne; *Speechly, Mumford, Rodgers, & Craig*, for *J. M. Hayton*, Town Clerk, South Shields.

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K. B. Div.
(Joyce, J., an additional judge.) March 17, 18.

LYON & CO. v. LONDON CITY AND MIDLAND BANK. (a.)

*Fixtures—Mortgagor and mortgagee—Chairs in theatre screwed to floor—Hired by mortgagor—Removal by owner.*

*The rule that chattels attached to the soil are fixtures may be displaced by showing that they were not annexed for the permanent improvement of the land, but for the purpose of their temporary enjoyment as chattels.*

*Accordingly, chairs in a theatre which are complete in themselves but are screwed to the floor for their better use and enjoyment are not fixtures, and do not pass under a mortgage of the premises and fixtures.*

This was an action to recover certain chairs or seats alleged to be the property of the plaintiffs, and now placed in the Brighton Hippodrome, of which building the defendants were mortgagees.

The plaintiffs were a firm of upholsterers, and part of their business was to supply chairs and seats for theatres and other places of public entertainment on hire.

On the 7th of August, 1901, the plaintiffs entered into an agreement with a Mr. Ellis, who was the owner and occupier of the Brighton Hippodrome, to supply 689 crimson velvet armchairs for use at the Hippodrome, for the hire of which Ellis agreed to pay £20 per week for not less than twelve weeks, and in default of any one week's payment the plaintiffs were to be at liberty to remove the chairs without let or hindrance, and Ellis was to have an option to purchase the chairs within three months for £676.

The agreement was afterwards extended for a further period of twelve weeks.

On the 18th of October, 1901, Ellis mortgaged the Hippodrome to the defendant bank to secure his account, the mortgage deed containing a conveyance by Ellis to the bank of the premises "together with (in addition to any fixtures passing by reason of the conveyance hereinbefore contained) all fixtures whatsoever now or at any time hereafter affixed or attached to the said premises or to any part thereof."

The bank having entered into possession under their mortgage, refused to allow the plaintiffs to remove their chairs, and this action was brought in consequence of such refusal.

It appeared that the chairs in question were constructed on iron frames, each chair being separate, but so made as, if required, to be capable of being fastened to any other so as to form a row of seats. Each chair had two standards with holes at the feet of them for the insertion of screws. In accordance with the requirements of the Brighton Town Council the seats were fastened by means of screws to the floor, the floor itself consisting of planks nailed upon a bed of concrete.

*H. Reed, K.C.*, and *D. M. Kerly* for the plaintiffs, contended that under the circumstances the chairs were the property of the plaintiffs and could be removed by them. The test is whether the chattels were intended under the circumstances to be fixtures: *In re De Falbe, Ward* v. *Taylor*, 49 W. R. 455, [1901] 1 Ch. 523, affirmed sub-nomine *Leigh* v. *Taylor*, 50 W. R. 623, [1902] A. C. 157. Here the chairs were clearly not intended to be fixtures.

They also referred to *Norton* v. *Dashwood*, 44 W. R. 680, [1896] 2 Ch. 497.

*Muir Mackenzie* and *C. Holden*, for the defendants, relied upon *Hobson* v. *Gorringe*, 45 W. R. 356, [1897] 1 Ch. 182, which they contended covered the present case, the annexation there, by means of screws, being identical with the annexation in the present case.

They also referred to *Gough* v. *Wood*, 42 W. R. 469, [1894] 1 Q. B. 713; *Reynolds* v. *Ashby*, [1903] 1 K. B. 87.

JOYCE, J.—Whatever my own opinion might otherwise have been, of course I am bound by any decision of the Court of Appeal and by the decision of any court of co-ordinate jurisdiction if that decision is on all fours with the present case. I must confess I cannot help feeling that there is much to be said in favour of the view taken by North, J., in the case of *Cumberland Union Banking Co.* v. *Maryport Hematite Iron Co.*, 40 W. R. 280, [1892] 1 Ch. 415—namely, that a mortgagor cannot give to his mortgagee a better right or title than he has himself. Certainly no one but a lawyer would say that these chairs belonged to the mortgagees. I must, however, decide the case in accordance with the law as I understand it. It seems to me that there are important differences between this case and those relied upon by the defendant bank. The chattels in this case are chairs, and not engines, boilers, or machines, as in most of the cases cited. They are complete in themselves, and could be used without any annexation, although no doubt they could be better used and enjoyed if and when fixed down to the floor. It is also to be noticed in the present case that the agreement under which the chairs were supplied by the plaintiffs was not an ordinary hire-purchase agreement, and in some of the text-books the cases like *Hobson* v. *Gorringe* are treated as being decided on that ground. The agreement, however, here is simply for the hire of the chairs, though there is no doubt an option of purchase. At the date of the mortgage the legal ownership in these chairs was in the plaintiffs, and it never had been in the mortgagor. It is difficult, therefore, to see how the legal ownership, which was in the plaintiffs and not in the mortgagor, could have passed to the mortgagees. Where a chattel is attached to the soil *primâ facie* it is a fixture; but that inference may be displaced by showing the removability of the chattel and by showing that it was not annexed for the permanent improvement of the land, but for the purpose of its temporary enjoyment as a chattel. I think that that was the case here. The chairs were only annexed for a temporary purpose, and the mode of annexation was much more analogous to the case of a carpet than that of engines, boilers, and machinery. The chairs, in my opinion, never ceased to be chattels, and did not pass with the mortgage of the freehold. There must therefore be judgment for the plaintiff with costs.

Solicitors, *Reed & Reed; Nye, Moreton, & Co.*, for *J. K. Nye & Treacher*, Brighton.

(a.) Reported by C. B. CAMM, Esq., Barrister-at-Law.

## Court of Appeal.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 4.

JARED v. CLEMENTS. (a.)

*Vendor and purchaser—Equitable mortgage—Notice—Forged signature—Receipt—Legal estate—Title deeds.*

*A purchaser, who having notice of the existence of an equitable charge on the purchased property leaves it to the vendor to pay off such charge, is not protected against such equitable charge by possession of the legal estate and the title deeds in the event of the vendor failing to discharge it, even though there has been no negligence on his part and he has been deceived by the production of a receipt which was forged by the vendor's solicitor.*

This was an appeal from a decision of Byrne, J. (reported 50 W. R. 611, [1902] 2 Ch. 399).

On the 15th of January, 1897, a Mr. Joseph Taylor, in consideration of the sum of £450 advanced to him by the plaintiff, signed a memorandum of deposit, and deposited the title deeds and writing relating to the property with the plaintiff.

In September, 1898, a receiving order in bankruptcy was made against Taylor, who, in his amended statement of affairs, verified on oath, stated that the plaintiff was a fully secured creditor of his for £450, and that the particulars of his security were "mortgage of 3 and 4, Mornington-villas, Woodford," &c.

The said receiving order was rescinded in January, 1899.

On the 13th of July, 1899, the two houses were put up for auction by Taylor, but were bought in by him.

The defendant in the action, Mrs. Emma E. Clements, who was present at the auction, subsequently entered into negotiations with him for the purchase of the said houses, and on the 17th of July, 1899, entered into a contract to purchase them free from incumbrances for £630.

An abstract of title was furnished to the defendant's solicitors by Charles Parr, Taylor's solicitor, which did not disclose the equitable charge. The defendant's solicitors, however, inspected the record of Taylor's bankruptcy proceedings, and ascertained the existence of the said mortgage. Thereupon they wrote to Parr as follows: "We have to-day made the usual searches; but we thought it necessary to inspect the bankruptcy proceedings to see that the receiving order that had been made had been discharged. We see that in these proceedings it was stated that Nos. 3 and 4, Mornington-villas were subject to a mortgage for £450. Please let us have an abstract of this mortgage and of the discharge of it." To this letter they received from Parr on the 5th of August, 1899, the following reply: "I am in receipt of yours of yesterday, and as I informed you on the telephone this morning, the mortgage you refer is a mere memorandum of deposit of deeds, and I shall be pleased to hand you the same with receipt indorsed on completion. I trust you will be able to arrange for completion one day during next week as I want to get away by the 14th." The defendant's solicitors were satisfied with this assurance, and completion took place in due course on the 10th of August, 1899, when an assignment of the property by Taylor to the defendant passing the legal estate was duly executed. At the same time the memorandum of deposit with what purported to be an added receipt dated the 10th of August, 1899, in due form for all moneys due on the security signed by the plaintiff was handed over to the defendant's solicitors together with the title deeds and papers relating to the property.

The signature was not in fact that of the plaintiff, but was forged by Parr, who was also at that time the plaintiff's solicitor, and with whom the plaintiff had left the title deeds of the property for safe custody. Parr had, however, received no authority from him to deal with them in any way. The plaintiff knew nothing of the transaction, and on ascertaining the facts commenced this action.

Byrne, J., considered that no reasonable precaution was omitted by the defendant or her solicitors, nor was the plaintiff guilty of any negligence or misconduct, and he dismissed the action.

The plaintiff appealed.

*Rowden, K.C.*, and *Cozens-Hardy*, for the appellant.—If the purchaser was reasonably justified in accepting the title which was put forward, there is nothing to defeat the legal estate. In the present case there has been no negligence on the part of the purchaser, and the only question is whether he took the property with notice of this charge. But as a matter of fact he never had any notice of this charge as an existing charge. He was told that it had ceased to exist, and he took all reasonable steps to assure himself that this was so. The result is that at the time he paid his money he had no notice that this charge was a subsisting charge on the purchased property. Further, this memorandum does not contain a sufficient description of the property charged to satisfy the Statute of Frauds.

They referred to *Jones* v. *Smith*, 1 Ph. 244; *Jolland* v. *Stainbridge*, 3 Ves. 478; *Ratcliffe* v. *Barnard*, 19 W. R. 764, L. R. 6 Ch. App. 652; *Jones* v. *Powles*, 3 Myl. & K. 581; *Oliver* v. *Hinton*, 48 W. R. 3, [1899] 2 Ch. 264; *Hewitt* v. *Loosemore*, 9 Hare, 449; *Earl of Gainsborough* v. *Watcombe Terra Cotta Clay Co.*, 54 L. J. Ch. 991, 34 W. R. Dig. 204; and *In re Beetham, Ex parte Broderick*, 35 W. R. 613, 18 Q. B. D. 380, 766.

*Norton, K.C.*, and *T. T. Methold*, for the respondent, were not called upon.

COLLINS, M.R.—I am of opinion that this appeal must fail. The question is one between the owner of an equitable charge, who has not been paid off, and the purchaser of the property, who has got the legal estate. This is not a case of constructive notice. We have to deal with actual notice to the purchaser's solicitor of an existing equitable charge. Having received that notice under circumstances which I need not go into, the purchaser's solicitors entered into a correspondence with the vendor's solicitor and required that this equitable charge of which he had notice should be paid off. [His lordship referred to the correspondence, and continued:] Then came the date for completion, and there is produced and handed over to the purchaser the memorandum of deposit, and what purported to be a receipt dated the 10th of August, 1899, by the person in whose favour the equitable charge was made. *Primâ facie* that appears to be a receipt dated on that day, acknowledging the receipt of the money on that day. It has been argued on behalf of the appellant that the purchaser's solicitor here, having had notice of the equitable charge, had at the same time notice that it had been paid off, and therefore, unless he was unreasonably negligent in the way he conducted the business, on his ascertaining that it had been paid off, the legal title of the purchaser must prevail. That argument seems to me to involve a misconception of the true rights of the parties. This is not a case of constructive notice

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

raising the question whether all reasonable diligence was exercised to find out what might have been but was not in fact found out. It is true the learned judge in the court below found that all reasonable diligence was used, and that there was no fault on the part of the purchaser; but, on the other hand there is this broad fact underlying this case—that there was in the course of this transaction actual notice of an existing equitable charge upon the property. It seems to me that if the purchaser, having notice, chooses to complete without ascertaining for himself that the charge has been paid off, he does so at his own risk. Having found out that the charge exists, he cannot set up the legal title without getting rid of the incumbrance which he knows to exist. The result is that he takes the legal estate with the entire obligations existing under the equitable charge.

It is not necessary in this case to say whether reasonable diligence was exercised by the purchaser's solicitor, but, speaking for myself alone, if it were necessary to do so, I should hesitate, in the peculiar circumstances of this case, to say that the solicitor had taken all reasonable care to see whether this equitable charge had been satisfied. We start with the fact that, until the discovery by the purchaser's solicitor in searching the proceedings in the bankruptcy of the mortgagor, no disclosure of the equitable charge was made by the person whose duty it was to have disclosed it. He, on being informed of the existence of the charge, himself admits it, although the purchaser and the purchaser's solicitor had been allowed to remain in ignorance of it; and that is the person whose assurance the purchaser's solicitor was content to rely upon. The point, however, does not arise in this case. The result is that the actual notice, which it turns out is not notice of a satisfied charge, makes the risk fall on the purchaser. For these reasons I think that this appeal fails.

I ought to add a word on another point which was pressed upon us in argument. The learned judge in the court below found that there was such a deposit of these deeds as complied with the requirements of the Statute of Frauds, and made a good equitable charge, and the evidence is entirely consistent with that view. The present case is not at all like the case of *In re Beetham*, where a person who is already in possession of the deeds for some other purpose says he holds them as security for some other person. There you have the very thing which the Statute of Frauds was intended to prevent. That is a totally different thing from the case where the deeds are deposited at the time.

ROMER, L.J.—I am of the same opinion. This is not one of that fairly common class of case in which the court has to decide whether a legal mortgagee is or is not entitled to set up his legal estate against an equitable mortgage on the ground of negligence or fraud on the part of the legal mortgagee. Rightly understood, the present case is simply one of title and conveyance. The facts are shortly these: A person contracts to purchase certain property. Before completion he is told of an equitable mortgage created some time before by his vendor. What is the position of the completing purchaser when he has actual notice of the prior equitable interest? He knows that he cannot get a title from his vendor except subject to the outstanding equitable interest, unless it is got in or destroyed; and if he completes without that being done he can only take subject to the equitable interest. In order to get a good title, it is for him to see that the outstanding interest is got in or destroyed, unless indeed the owner of the interest has been guilty of some conduct which renders it inequitable or improper on his part to set up his outstanding interest against the purchaser. This is not the case here. The owner of the equitable charge has done nothing of that sort. The purchaser in this case might have asked that the equitable mortgagee should join in the conveyance. He might have gone himself to the equitable mortgagee and asked him how matters stood; or he might leave it to his vendor to get the outstanding interest in, which in fact is what he did here. If he takes this course—which may be a very reasonable one between him and his vendor—and the vendor does not get the outstanding interest in, all I can say is that, under the circumstances, the purchaser, having left it to the vendor to do that which the vendor has failed to do, must suffer for it. He knew of the existence of the equitable interest and has got it in, and therefore he takes the property subject to that interest unless he can prove that he has got it in, or that the owner of the interest has lost his right.

COZENS-HARDY, L.J.—I am of the same opinion. The case seems to me on the facts to be a plain one I do not rest my judgment upon any case of negligence on the part of the purchaser's solicitor or upon any fraud. One of two innocent persons has to suffer by reason of the fraud of a third person. When the facts are known the case raises a simple issue. There was clear notice to the purchaser of an equitable charge. There was no ground for presumption that that charge had ceased to exist. On the contrary, on completion two documents were handed over to the purchaser—one of them signed by Taylor, the vendor; the other purporting to be signed by Jared, the equitable mortgagee. It seems to me it was plainly the duty of the purchaser to get in or procure the discharge of that outstanding interest, of the existence of which he knew. The transaction does not in its essence differ in the least from the case which the learned judge states by way of illustration in his judgment in the court below. If the equitable mortgage to Jared had been recited in the conveyance, and Jared had been made a party, and Parr had at completion brought the deed actually signed by Taylor, and purporting to be signed but not in fact being signed by Jared, and the purchaser had accepted that on the assurance of Parr that Jared's signature was genuine, the position of the purchaser in that case would have been clear; and the present case in no wise differs from that in principle. A purchaser who knows of an outstanding equitable interest which has to be got in to perfect his title, and on completion neglects to get in that interest, takes his conveyance at his own risk.

*Appeal dismissed.*

Solicitors, *Shepheards & Walters; Watson, Dyer, & Rydon.*

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From K. B. Div. (Romer and Mathew, L.JJ.) — Jan. 19.

AUSTRIAN LLOYD STEAMSHIP CO. v. GRESHAM LIFE ASSURANCE SOCIETY (LIMITED). (a.)

*Arbitration—Staying proceedings—Submission of disputes under contract to jurisdiction of foreign courts—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 27.

*A policy of life insurance, effected on the life of a foreigner with an English company, contained a condition that for all disputes which might arise out of the*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*contract of insurance, all the parties interested expressly agreed to submit to the jurisdiction of the courts of Budapest having jurisdiction in such matters.*

*Held, that this was a submission of all disputes under the contract to the courts at Budapest within sections* 4 *and* 27 *of the Arbitration Act,* 1889, *and that an action on the policy in England would be stayed*

Appeal from an order of Darling, J., at chambers, refusing to stay the proceedings in the action.

The action was brought upon a policy of insurance for 50,000f. on the life of Hugues Rabl, a native of Trieste, who had been chief cashier of the plaintiff company at Constantinople. The policy, which was issued by the defendants, a company whose head office was in England, and who had an office at Budapest, was made in favour of the assured's wife, and was, on the death of the assured, assigned by his personal representatives to the plaintiffs. The policy was in the French language, and was made subject to certain printed conditions, by which the premiums and policy-moneys were made payable in Budapest. The policy bore an English stamp, and was sealed with the company's English seal, and was dated "Londres," though the defendants alleged that the contract was in fact made in Hungary. Conditions 23 and 24 were under the heading "Domicile," condition 24 being as follows: "Pour toutes contestations qui pourraient surgir du contrat d'assurance toutes les parties intéressées se soumettent de convention expresse à la jurisdiction des tribunaux compétents de Budapest." In the course of the hearing of the appeal the court expressed an opinion that the words "se soumettent" might have a technical meaning, and that an expert should translate the words. Accordingly the case stood over for that purpose, and the following translation of "domicile" and condition 24 was made by an expert agreed upon between the parties: "Residence-for-purposes-of-jurisdiction." "24. For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of the courts having jurisdiction in such matters of Budapest."

The plaintiffs having brought this action to recover the policy-moneys, the defendants applied, under section 4 of the Arbitration Act, 1889, for a stay of proceedings on the ground that condition 24 was a submission of all disputes arising out of the policy to the courts at Budapest.

Darling, J., refused to stay the action.

The defendants appealed.

*Haldane, K.C.*, and *G. H. Devonshire*, for the defendants.—Condition 24 is clearly a "submission" of all disputes to the courts at Budapest within sections 4 and 27 of the Arbitration Act, 1889.

They referred to *Law* v. *Garrett*, 26 W. R. 426, 8 Ch. D. 26; *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202.

*J. A. Hamilton, K.C.*, and *D. C. Leck*, for the plaintiffs.—This is an English contract entered into by an English insurance company under their seal, and with an English stamp, and the English courts must have jurisdiction over it. Condition 24 is not a submission to arbitration within the Act. It is at most a submission to the jurisdiction of the courts at Budapest. That is not enough to enable the court to stay the action. It is not an agreement to refer all disputes to those courts. The effect of it is that if the person claiming under the policy sues in Budapest the insurance company will not object to the jurisdiction. It is a condition inserted for the benefit of the policyholder, who in the present case desires to sue in the English courts. At any rate the learned judge has exercised his discretion in the matter, and this court will not interfere.

ROMER, L.J.—The point seems a very short one, though I can conceive different minds taking different views upon it. For myself I have come to the conclusion that, this being a commercial contract condition 24 has a distinct meaning, and that meaning favours of the contention of the defendants. The question is whether the condition means that if one party is sued in Budapest he will not raise any objection to the jurisdiction, or whether it means that, if any dispute arises out of the contract of insurance, this dispute shall go for determination to the courts at Budapest. Having regard to the wording of condition 24 as now before us, and considering that this is a commercial contract, in my opinion the condition means that any such dispute shall go for determination to the courts at Budapest. By the condition, as I read it, both parties have agreed to submit all disputes to those courts. It is not as if one of the parties alone had agreed merely to submit to the jurisdiction of the courts at Budapest. If the contract had been that the parties agreed to submit all disputes to a designated arbitrator, there could have been no doubt about the matter. In my opinion that is the effect of condition 24, substituting the courts at Budapest for a designated arbitrator. The appeal must therefore be allowed, and all proceedings in the action must be stayed.

MATHEW, L.J., concurred.

*Appeal allowed.*

Solicitors for the plaintiffs, *Stokes & Stokes.*

Solicitors for the defendants, *Devonshire, Monkland, & Co.*

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From Chan. Div. (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.) — Dec. 19.

*In re* ALLAN.
DOW *v.* CASSAIGNE. (*a.*)

*Will—Construction—Gift of residue in equal shares—Provision that share of legatee dying without leaving issue shall fall into residue—Accruer to survivors—Intestacy.*

*A testator gave his residuary estate upon trust as to one-fourth for each of his four daughters for life with remainder to their issue, with a provision that the share of any daughter dying without leaving issue should fall into and form part of his residuary estate, and be held and disposed of "on the same trusts as are hereinbefore declared thereof."*

*Held, that the case fell within* In re Palmer, 42 *W. R.* 151, [1893] 3 *Ch.* 369, *and that on the death of any daughter without leaving issue her share accrued to the surviving daughters, and was not divisible among all the daughters, including the deceased, with an intestacy as to one-fourth of the deceased's original fourth.*

*Decision of* Buckley, J., *reversed.*

This was an appeal from a decision of Buckley, J. The facts were as follows:

Under the will of Robert Allan, who died in 1847, his residuary realty and personalty were held upon trust for sale and investment, and the investments were to be held on trust as to one equal fourth part for each of four daughters of the testator by name for

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

life, with remainder to their children and the issue of any children dying in their lifetimes.

The will contained a provision that the share of any daughter dying without leaving issue should fall into and become part of the testator's residuary estate, and be held and disposed of on the same trusts as were thereinbefore declared thereof. Three of the daughters had died, one only of them (who survived the two others) leaving issue, and the remaining survivor had no issue.

It was now desired to divide the residuary fund, and this summons was taken out to determine the question whether the share of any daughter who died without leaving issue accrued to the survivors or became divisible among all the daughters including the deceased, with an intestacy as to the deceased's consequent fourth part of her original share or sixteenth part of the whole estate.

Buckley, J., held that the latter result followed, and that the testator's next-of-kin were therefore entitled, on the death of any daughter without leaving issue, to one sixteenth of his residuary estate.

The party entitled to the share of the daughter who had died leaving issue appealed.

*MacSwinney*, for the appellant.—There are plain indications that the testator intended none of his property to be undisposed of, and the modern tendency is to give effect to such an intention. The case closely resembles *Holgate* v. *Jennings*, 37 SOLICITORS' JOURNAL, 303. *Humble* v. *Shore*, 12 W. R. 149*n*, 7 Hare, 247, deciding that there is an intestacy in such cases, has been overruled by *In re Palmer*, 42 W. R. 151, [1893] 3 Ch. 369.

He also cited *Crawshaw* v. *Crawshaw*, 29 W. R. 68, 14 Ch. D. 817; *In re Ballance*, 37 W. R. 600, 42 Ch. D. 62; and *In re Owen*, 36 SOLICITORS' JOURNAL, 539.

*Medd*, for the next-of-kin.—There is no second carrying over of shares; if a share fails and you divide it under the accruer clause, that clause does not apply again. The trusts hereinbefore declared cannot include the accruer clause itself. In *Crawshaw* v. *Crawshaw* the intention was plain, and in *In re Ballance* was treated as a case of an executory gift, which the court could mould. This is not a case of a gift to a class, where it is much easier to give shares of residue to the survivors, but a specific gift to children. In *In re Owen* there was not only a direction that residue should go into residue, but the words "as nearly as circumstances will permit." *Holgate* v. *Jennings* was also a case of a gift to a class. Further, apart from the general law, the words of this will show that a share is to go over once only.

*Champernowne*, for other beneficiaries.

*Rashleigh*, for the trustees.

*MacSwinney*, in reply.—The testator shows a plain intention to deal with his residue as a whole, and he does not contemplate residue within residue.

[VAUGHAN WILLIAMS, L.J., referred to *Barter* v. *Lea*, 1 Turn. & Russ. 413.]

VAUGHAN WILLIAMS, L.J.—In my opinion the decision of Buckley, J., cannot be supported, and the case is really disposed of by *In re Palmer*, except for one consideration which I will presently mention. In his judgment, for what reason I do not know, Buckley, J., does not refer to *In re Palmer* at all, and the judgment might very well have been delivered at a time when it was doubtful whether or not *Humble* v. *Shore* and the cases that followed it continued to be good law. But it is no longer necessary to find distinctions enabling one to avoid following *Humble* v. *Shore*, since that case is in terms overruled by *In re Palmer*. The head-note of that case in the Law Reports is as follows: "A testator, by his will, gave his residuary real and personal estate upon trust as to two fifth parts for his daughters M. and A. and all other daughters born in his lifetime equally. By a codicil he declared that the share given to M. should be restricted to a life interest only, and that upon her death it should fall into and form part of his residuary estate. Held, that the share of M. after her death did not pass to the testator's next-of-kin as undisposed of, but was divisible between the other residuary legatees. *Humble* v. *Shore* overruled." It is only necessary to read that head-note, which is clearly applicable here and must be followed by us. The only other matter is the point made by Mr. Medd with reference to the clause in the will relating to the accruer of shares. He said that the words "hereinbefore declared" show that this clause cannot include what is included in the clause itself, and that it must refer to the part of the will antecedent to this clause. This is a possible and even a natural construction, but I think we ought not so to deal with the case. It is obvious that the intention of the testator here was to create one aggregate fund and dispose of it absolutely. I need not read the words of Sir J. Plumer in *Barker* v. *Lea*, and will only repeat that there seems to me to be here a disposition of one aggregate fund which the testator intended to remain such and not be broken into, and we must therefore dispose of the case on the principle laid down by *In re Palmer*.

STIRLING, L.J.—I agree, and I differ from the decision of Buckley, J., because it really leads to a conclusion directly opposite to that of the Court of Appeal in *In re Palmer*. [His lordship stated the facts of that case, and continued:] The Court of Appeal held in that case that there was a gift of the share to the other residuary legatees. Here Buckley, J., has held that on the death of a daughter without issue her share, which is directed to fall into and form part of the residuary estate of the testator, does not go altogether to the other residuary legatees, but is again divided, so that there is an intestacy as to one fourth. This is clearly opposed to *In re Palmer*, and the learned judge ought to have held that a share was divisible on the death of the first daughter into thirds, on that of the second into halves, and so on.

COZENS-HARDY, L.J.—I agree. Buckley, J., may have been successful in distinguishing this case from *Crawshaw* v. *Crawshaw*, but he overlooked the fact that distinctions of this kind need no longer be sought for, since the old rule has been got rid of by *In re Palmer*. We cannot give effect to Buckley, J.'s, view or do otherwise than follow *In re Palmer*, and hold that the share of a daughter who dies without issue goes to the other legatees. As to the other point raised by Mr. Medd, I am satisfied that the testator was disposing of his residue as a whole, and that no distinction can be drawn between original and accrued shares.

*Appeal allowed.*

Solicitors for all parties, *Simpson & Co.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) Nov. 20, 21.

REYNOLDS v. ASHBY & SON. (a.)

*Fixtures—Machinery affixed to freehold by bolts and screws—Presumption of law—Hire-purchase agreement—Rights of mortgagees in possession as against owner of machinery.*

*The plaintiff supplied certain machines on the hire-purchase system to the lessee of a factory, and by his workmen fixed them on concrete beds, in which were iron uprights to which the machines were fastened by screws and bolts and nuts. By the hire-purchase agreement the lessee was to make certain periodical payments, and until the whole of the payments were made the machines were to remain the property of the plaintiff; and, further, it was agreed that if the lessee made default in punctual payment of any instalment the plaintiff was to have the power to determine the hiring and remove the machines. Prior to the hiring of the machinery the lessee had mortgaged the factory. The lessee made default in payment of the instalments under the hire-purchase agreement, whereupon the plaintiff gave notice determining the hiring and demanding the return of the machinery. A few days previously, however, to this the mortgagees had entered into possession of the premises under their mortgage, and they refused to give up the machines, claiming them as fixtures.*

*In an action brought by the plaintiff against the mortgagees to recover the machines or their value,* Lawrance, J., *held, on the authority of* Hobson *v.* Gorringe, 45 *W. R.* 356, [1897] 1 *Ch.* 182, *that the machines were fixtures, and refused to leave any question to the jury.*

*Held, that the decision of the learned judge was right.*

Hobson *v.* Gorringe *followed.*

Gough *v.* Wood, 42 *W. R.* 469, [1894] 1 *Q. B.* 713, *distinguished.*

This was an application by the plaintiff for judgment or a new trial in an action tried before Lawrance, J., and a special jury.

The action was for the recovery of certain machinery or its value, and the question raised was whether the machinery, which had been hired by the mortgagor, had become fixtures which would pass to the mortgagees under a mortgage of the land.

In 1900 one Holdway, the lessee of a piece of land at Reading for ninety-nine years from the 29th of September, 1892, was building a factory on it.

On the 7th of April, 1900, he mortgaged the premises, together with the fixtures thereon, and this mortgage became vested in the defendants.

On the 30th of August, 1900, after the execution of the mortgage, and before it was assigned to the defendants, the plaintiff, who was an engineer and manufacturer of carpenters' tools, carrying on business in London as F. W. Reynolds & Co., let on hire to Holdway certain carpenters' machinery.

By the hire agreement the lessee was to make certain periodical payments for the hire, and upon the whole of the payments being made the machinery and apparatus were to vest in and become the sole property of the lessee, but until the last payment of hire was made the machinery and apparatus were to continue to be the sole and absolute property of the plaintiff.

It was further agreed that if Holdway should make default in punctual payment of any of the hire payments, then the plaintiff should be at liberty to put an end to the hiring and re-possess himself of the machinery.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The machinery was set up by the plaintiff in the factory in the following way:

A concrete bed was laid for each machine, with upright iron bolts fixed in the concrete for the purpose of securing the machine. The machine was then placed in position, there being holes in the plates to fit the bolts, and the bolts were then secured by nuts screwed on to them. The machines were worked by power conveyed to them by means of a band. The machines were bolted to prevent vibration, and could be removed by removing the nuts. Holdway having made default in his payments, the plaintiff became entitled under the terms of the agreement to resume possession of the machines, and by a notice in writing put an end to the hiring and demanded the return of the machinery and apparatus. A few days before this, however, the defendants' predecessors in title took possession of the premises and refused to deliver up the machines, contending that they had been so affixed to the freehold that they became part of the land and passed under the mortgage. At the trial Lawrance, J., held, upon the authority of *Hobson* v. *Gorringe*, 45 W. R. 356, [1897] 1 Ch. 182, that the machines were fixtures and passed to the mortgagees, and that there was no question for the jury. He accordingly directed judgment to be entered for the defendants.

From this decision the plaintiff now appealed.

*H. Reed, K.C.* (*S. A T. Rowlatt*, with him), for the appellant.—The question whether the machines were fixtures which passed to the mortgagees, or whether they were mere chattels which remained the property of the plaintiff, ought to have been left to the jury. The mode and the object of the annexation to the premises must be considered: *In re De Falbe, Ward* v. *Taylor*, 49 W. R. 455, [1901] 1 Ch., 523; *Leigh* v. *Taylor*, 50 W. R. 623, [1902] A. C. 157. The question whether the articles were affixed to the premises for their more convenient user as chattels without any intention that they should become part of the freehold, or whether they were intended to become part of the freehold is a question of fact. In *Wood* v. *Hewett*, 8 Q. B. 913; *Lancaster* v. *Eve*, 7 W. R. 260, 5 C. B. N. S. 717; *Climie* v. *Wood*, L. R. 3 Ex. 257, 16 W. R. C. L. Dig. 72, L. R. 4 Ex. 328, 17 W. R. C. L Dig. 88, the question whether a thing was a fixture or not was left to a jury. In subsequent cases the question has arisen upon special cases where the court had power to draw inferences of fact. In *Hobson* v. *Gorringe*, the question arose before a judge alone, who decided, as a fact, that the article in question became part of the freehold and passed to the mortgagee. In the present case the machines, though affixed to the freehold, were easily removable. There is no evidence that they were part of the freehold. The true inference is that they were fixed merely to steady them. At any rate the question was one for the jury and it should have been left to them: *Chidley* v. *Churchwardens of East Ham*, 32 L. T. Rep. 486, 23 W. R. Dig. 150. The mortgage was made before the machines were brought on to the factory, and as the mortgagees allowed the mortgagor to remain in possession and to carry on his business on the premises they impliedly authorized him to enter into the agreement to hire the machines and to place them on the premises as trade fixtures with an implied licence to him or to the person from whom he hired them to remove them from the premises: see *Gough* v. *Wood & Co.*, 42 W. R. 469, [1894] 1 Q. B. 713; *Sanders* v. *Davis*, 33 W. R. 655, 15 Q. B. D. 218; *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.*, 40 W. R. 280, [1892] 1 Ch. 415.

*Hamilton, K.C.* (*A. Powell, K.C.*, and *J. H. Keeling*,

with him), for the respondents.—The learned judge was right in not leaving any question to the jury. The facts here showed that the machines as a matter of law were fixtures. In any case, however, the ultimate question whether a certain thing is a fixture or not is one of law. In *Climie* v. *Wood*, Kelly, C.B., in delivering the judgment of the Court of Exchequer, said that the finding of the jury that the articles were affixed to the premises by the mortgagor for their more convenient user, and not to improve the inheritance, and that they could be removed without damage to the freehold, became immaterial. The question how the articles came upon the premises, their nature, and the mode of attachment to the premises, if there be any dispute about these matters, would be proper questions for a jury. But whether the articles so affixed are or are not fixtures which form part of the freehold was a question of law: see *Longbottom* v. *Berry*, L. R. 5 Q. B. 123, 18 W. R. C. L. Dig. 43. In *Holland* v. *Hodgson*, 20 W. R. 990, L. R. 7 C. P. 328, Blackburn, J., suggested that when an article is annexed even slightly to the land, the presumption is that it is a fixture. In *Hobson* v. *Gorringe* it was held that the existence of a hire-purchase agreement, as in this case, was not evidence to rebut the presumption. *Leigh* v. *Taylor* laid down no principle inconsistent with the decision in *Hobson* v. *Gorringe*. The decision in *Chidley* v. *Churchwardens of West Ham*, as explained in *Tyne Boiler Works Co.* v. *Overseers of Longbenton*, 35 W. R. 110, 18 Q. B. D. 81, has no bearing on the present case. *Gough* v. *Wood & Co.* shows that the principle is that a licence by the mortgagee to the mortgagor to remove the articles must be implied only so long as the mortgagor remains in possession. That case was a very exceptional case, and the principle of it ought not to be extended. The present case cannot be distinguished from *Hobson* v. *Gorringe*

Counsel also cited *Huddersfield Banking Co.* v. *Lister*, 43 W. R. 567, [1895] 2 Ch. 273.

*Reed, K.C.*, replied.

COLLINS, M.R.—This is an appeal from Lawrance, J., and the case comes before us on the point that the learned judge left no question to the jury, but decided it himself upon the authority of *Hobson* v. *Gorringe*.

Holdway was the owner of a term of ninety-nine years in certain land, upon which he built a factory, and in that factory he put machinery for the purpose of carrying on his joinery business. Before building the factory he had mortgaged the land by a deed in which was recited his intention of erecting this factory, and the mortgage expressly referred to fixtures. This mortgage was followed by several others, the last being to the defendants, by whom they were all eventually bought up. Holdway, for the purpose of putting machinery in his factory, entered into a hire-purchase agreement with the plaintiff, under which, if the instalments of the price of the machinery were not duly paid, the plaintiff should have the right of resuming possession of the machinery. The machinery consisted of machine tools, such as lathes, planes, and saws, all substantial and weighty articles. These were attached by being screwed to bolts in beds of concrete. The machinery, which was actuated by steam-power, was all connected together and formed one system of machinery for the purpose of the joinery business. Default having been made by Holdway in paying the instalments, the plaintiff demanded the return of the machinery, but, just previously to this demand being made, one of the prior mortgagees had entered into possession of the premises. That mortgagee's rights having subsequently been acquired by the defendants, they have a right to say that whatever rights that mortgagee possessed to insist on the machinery being left on the premises they now possess. Therefore the question which arises is not as to what are the rights of the person who let the machinery on hire before the mortgagee took possession to resume possession of this machinery, but whether, under the circumstances of the case, the plaintiff is entitled to resume possession of it as against the defendants. It was contended by counsel on behalf of the plaintiff that there was a question of fact which ought to have been left to the jury, and that therefore it was not for the learned judge to decide the question himself. It was said by the plaintiff's counsel that the machines never lost their character as chattels, that they never became "fixtures" in the sense in which that word is used in cases between landlord and tenant—that is, something annexed to the freehold. Unless he can carry the case as far as that and can show that the machines never became fixtures, and so were never part of the mortgage security, but remained mere furniture or chattels, he must fail, inasmuch as the mortgagees had taken possession, subject to one point, as to the conduct of the mortgagees, with which I shall deal later on. That question it is said is a question of fact, and that is the only point that gives us any difficulty. There is a long series of decisions in which the matter has apparently been treated as one of law, and these cases decided that chattels attached as these machines were are to be regarded as fixtures. In *Hobson* v. *Gorringe* the mode of attachment appears to have been identical with that employed in the present case, and the only feature of distinction between the two cases is that in that case the mortgagor was owner in fee of the premises, whereas in the present case he is the owner for a term of years. In that case an elaborate judgment was delivered in which all the authorities were reviewed, and in which it was laid down as clear law that the inference from those facts was, as a matter of law, that the mode of attachment did constitute the thing a fixture. When machinery is attached which *primâ facie* makes it a fixture the presumption is that it becomes part of the freehold, although it is possible to rebut that presumption if evidence is forthcoming of particular circumstances sufficient to take it out of that category. That was explained in *Holland* v. *Hodgson*, where Blackburn, J., in delivering the judgment of the Exchequer Chamber, said, L. R. 7 C. P., at p. 335: "Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

Therefore, we have a presumption arising from the fact of attachment that the thing is a fixture, and the onus is cast on the plaintiff of showing that it is not a fixture. If the plaintiff did not give evidence to rebut this presumption the judge was right in withdrawing the case from the jury. Is there any such evidence here? The main suggestion is that the hire-purchase agreement giving the plaintiff power to resume possession is such evidence. But that very point was considered in *Hobson* v. *Gorringe*, and it was clearly laid down there that the hire-purchase agreement could not be introduced to show with what intention the attachment was made. In that case A. L. Smith, L.J., in delivering the judgment of the court, said, [1897] 1 Ch. at p. 193: "In each of these instances

it will be seen that the circumstance to show intention is the degree and object of the annexation which is in itself apparent, and thus manifested the intention. Lord Blackburn in his proposed rule was not contemplating a hire and purchase agreement between the owner of a chattel and a hirer, or any other agreement unknown to either a vendee or mortgagee in fee of land, and the argument that such a consideration was to be entertained, in our judgment, is not well founded."

Again, in *Ward* v. *Taylor* Vaughan Williams, L.J., said, [1901] 1 Ch., at p. 535: "In dealing with the question of fixtures, it sometimes becomes material to consider the object and purpose of the annexation, by which I do not mean that there must be an inquiry into the motive of the person who annexed them, but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case." The hire-purchase agreement not being evidence to show with what intention the machines were attached, what evidence is there to rebut the presumption that these machines were attached in such a way as to make them fixtures? There is no such evidence. The person who attached the machines hired them for the purpose of using them in his factory, and there is nothing to favour the view that the attachment was only intended to be temporary or otherwise than for the purpose of the business of the factory.

Therefore it seems to me clear, considering the line of cases on the subject, that there was no evidence fit for a jury to consider to rebut the presumption arising from the mode of attachment. Therefore, on the case of *Hobson* v. *Gorringe*, which is a case on all fours with the present, the learned judge rightly withdrew the case from the jury.

There remains the second point raised—namely, as to the mortgagee's rights. It was said that the decision in *Gough* v. *Wood & Co.* gave the plaintiff a better right than the mortgagee had, that the fact that the mortgagee had allowed the mortgagor to carry on his business on the premises implied that the mortgagee had licensed the mortgagor to enter into the hire-purchase agreement, and therefore where the person who let the machines intervened and resumed possession of the goods before the mortgagee had entered into possession of the premises, the latter could not assert a title to the goods against him. That case was decided on the ground that the mortgagee had not taken possession before the removal of the fixtures. The point was left open whether the fixtures could have been removed if the mortgagee had taken possession before removal, but it seems to me that that point was decided in favour of the mortgagee in the case of *Hobson* v. *Gorringe*. There the person who let out the machines claimed to resume possession of them after the mortgagee had taken possession. *Gough* v. *Wood* is therefore distinguishable in the present case, as it was in *Hobson* v. *Gorringe*.

I should perhaps observe that it is clear law that chattels removable as between landlord and tenant or between tenant for life and remainderman, which are attached to the freehold in such a way as to show that they are fixtures in that sense only, and not as a permanent part of the freehold, nevertheless are included in a mortgage of the land and cannot be removed as against the mortgagee. That point was decided in *Climie* v. *Wood*, which was approved of in *Holland* v. *Hodgson*, where it was said, L. R. 7 C. P., at p. 333, that "since the decision of this court in *Climie* v. *Wood* it must be considered as settled law (except, perhaps, in the House of Lords) that what are commonly known as trade or tenants' fixtures form part of the land and pass by a conveyance of it; and that, though if the person who erected those fixtures was a tenant with a limited interest in the land, he has a right, as against the freeholder, to sever the fixtures from the land, yet if he be a mortgagor in fee he has no such right as against his mortgagee."

In the present case the plaintiff's counsel, feeling the difficulty of contending that this machinery came under the description of trade fixtures, argued that they were only to be regarded as chattels, and he relied upon the decision in *Leigh* v. *Taylor*. But when that case is looked at it will be seen that it does not bear out that contention. The subject-matter of discussion there was certain tapestry, and it was decided that although it was a fixture within the definition I have given it was only attached *sub modo*. In that case Rigby, L.J., put the tapestries into the category of "ornamental fixtures." The observations of Vaughan Williams and Stirling, L.JJ., are to the same effect. The House of Lords adopted the judgment of the Court of Appeal in its integrity, and Lord Halsbury's judgment clearly places the matter on the same footing. Having regard to these authorities, and the absence in this case of any evidence to rebut the presumption of law that the machines were fixtures, I think the view taken by Lawrance, J., is the right one.

*Chidley* v. *West Ham Churchwardens*, which was decided on a question of rating, has been commented on in the Court of Appeal. That case has given us some difficulty, and if it can be sustained it is on the ground on which it was distinguished by the Court of Appeal in the case of *Tyne Boiler Works Co.* v. *Longbenton Overseers*. In that case the court seem to have thought that the chattels referred to in *Chidley* v. *West Ham Churchwardens* would have unquestionably passed by a demise of the premises. That would be sufficient to carry the machines in the present case. It seems to me that *Chidley* v. *West Ham Churchwardens* is distinguishable for the reason stated in *Tyne Boiler Works Co.* v. *Longbenton Overseers*—namely, that it was decided on the ground that the tanks in question in that case had been rated as mere personal property.

I think, on the admitted facts of the case now before us, that Lawrance, J., was right in withholding the case from the jury, and that, therefore, this appeal must fail.

ROMER, L.J.—I am of the same opinion. Having regard to all the circumstances, including the fact that the mortgagor was the owner of the premises for a long term of years, I think that, as between the mortgagor and mortgagees, these machines had become fixtures, and therefore part of the mortgage security. I am also of opinion that the jury, on the facts of this case, could not have found that these machines were not fixtures as between mortgagor and mortgagee. The authorities which support the view in cases similar to the present one, between mortgagor and mortgagee, that these machines are fixtures, are, it appears to me, too strong to be now departed from.

The only case which throws any doubt on this point is *Chidley* v. *West Ham Churchwardens*, which was fully dealt with in the case of *Tyne Boiler Works Co.* v. *Longbenton Overseers*, in which it was pointed out that that case must be regarded as depending upon circumstances not material here, and not as an authority that machines fixed as those are in the case before us do not form part of the premises so as to pass by a demise or mortgage. As regards the title of the mortgagor to the machines, as between him and the plaintiff, the mortgagee is not affected by any notice of the rights of the plaintiff, and is not prevented from claiming them as fixtures, finding them, as he does, on the premises. The mortgagor,

though he knew of the plaintiff's rights, may yet have anticipated paying for the machinery and so acquiring a title to it.

It may be that until the mortgagees entered into possession a license to remove these machines might be inferred, and that such a license would, as between the plaintiff and the mortgagor, have enabled the plaintiff to assert his rights, but any such license ended when possession was taken by the mortgagee. A mortgagee allowing the mortgagor to remain in possession does not affect himself with notice of the mortgagor's contracts or title to the chattels affixed. In the present case the plaintiff had no rights which could affect the land as against the mortgagees. As far as concerns the difficulty, if any, by reason of the contract between the plaintiff and the mortgagor, the case of *Hobson* v. *Gorringe* binds us.

MATHEW, L.J.—I am of the same opinion. In this case we have to consider in the first place how the machines were attached, and in the second place the purpose for which they were attached. In the first place, they were attached as immovable, and therefore they were fixtures. Then the question arises for what purpose they were so affixed, whether for use as chattels or in order to enhance the value of the premises. It would be impossible to suggest that the machines were attached only for their more convenient use as chattels. They therefore pass, under the ordinary rule, to the defendants as mortgagees. The case of *Chidley* v. *West Ham Churchwardens*, in which the question for decision was whether movable articles could be rated and not whether they added to the rateable value of the premises, throws no light upon the case before us.

*Appeal dismissed.*

Solicitors for the appellant, *Scott, Spalding, & Bell.*

Solicitor for the respondents, *T. H. E. Foord.*

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## High Court of Justice.

Chan. Div.
Kekewich, J. } Jan. 19.

LONDON AND COUNTY CONTRACTS (LIMITED) v. TALLACK. (a)

*Bankruptcy—Undischarged bankrupt—Title of trustee in bankruptcy to after-acquired real property of bankrupt*—Bonâ fide *purchaser for value—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54.

*The principle laid down in* Cohen *v.* Mitchell, 38 *W. R.* 551, 25 Q. B. D. 262 (i e., *that until the trustee in bankruptcy intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him* bonâ fide *and for value in respect of his after-acquired property, and whether with or without knowledge of the bankruptcy, are valid as against the trustee*) *does not apply to real estate.*

In re New Land Development Association and Gray, 40 *W. R.* 295, 551, [1892] 2 *Ch.* 138, *followed.*

Witness action.

In this case the plaintiffs asked for a declaration that they were entitled to the equity of redemption in certain freehold property which they had purchased from an undischarged bankrupt, and also sought to redeem the mortgage secured thereon, under the following circumstances.

(a.) Reported by C. B. CAMM, Esq., Barrister-at-Law.

On the 22nd of August, 1900, George Carter acquired certain freehold property at Epsom. Carter had been adjudged a bankrupt in 1891, and was at the time of the transactions herein mentioned an undischarged bankrupt.

On the 15th of October, 1900, Carter mortgaged the property in question to Miss E. N. Mason, and on the 18th of December, 1900, he conveyed the equity of redemption in the property to the plaintiffs, who were unaware of Carter's bankruptcy, and they thereupon entered into possession of the property and spent a considerable sum in building thereon. The plaintiffs gave notice of the purchase to the mortgagee, who on the 20th of December, 1900, transferred her interest to the defendant.

The defendant subsequently learned that Carter was an undischarged bankrupt, and on the 21st of October, 1901, he acquired from the official receiver, as trustee of the bankrupt's property, all his interest in the land in question. The defendant disputed the plaintiffs' title on the ground that the conveyance of the 18th of December, 1900, was inoperative to confer on the plaintiffs any right or title to the equity of redemption as against the official receiver.

The plaintiffs thereupon brought this action.

*Woodfin*, for the plaintiffs.—The plaintiffs have a good title as against the official receiver: *Cohen* v. *Mitchell*, 38 W. R. 551, 25 Q. B. D. 262. Although it has been held by Chitty, J., in *In re New Land Development Association and Gray*, 40 W. R. 295, 551, [1892] 2 Ch 138, and by Farwell, J., in *Bird* v. *Philpott*, [1900] 1 Ch. 822, 48 W. R. Dig. 19, that the principle in *Cohen* v. *Mitchell* does not apply to real estate, yet the Court of Appeal in *Cohen* v. *Mitchell* had not so limited the principle. Moreover, the plaintiffs are *bonâ fide* purchasers for value without notice of the bankruptcy, and their title ought to prevail over that of the official receiver.

*Muir Mackenzie*, for the defendant, was not called upon.

KEKEWICH, J., said that the plaintiffs in this action claimed under a conveyance from George Edward Carter. At the date when Carter acquired the property he was an undischarged bankrupt, and the question was whether he could acquire it except for the benefit of the official receiver or his trustee in bankruptcy, and whether he could give a good title to the plaintiffs. The plaintiffs relied on *Cohen* v. *Mitchell*, in which case it was held that until the trustee in bankruptcy intervened all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after-acquired property, and whether with or without knowledge of the bankruptcy, were valid against the trustee. No doubt that case, standing alone would be an authority in favour of the plaintiffs, but, it had been held by Chitty, J., in *In re New Land Development Association and Gray*, that the principle laid down in *Cohen* v. *Mitchell* did not apply to real estate, and although the Court of Appeal did not decide the point, they appeared to support Chitty, J.'s, view. Moreover, the same point came before Chitty, J., in *In re Clayton and Barclay's Contract*, 43 W. R. 549, [1895] 2 Ch. 212, where the learned judge adhered to his former opinion, and treated the point as having been approved by the Court of Appeal, but held that *Cohen* v. *Mitchell* did apply to leaseholds. *In re New Land Development Association and Gray* had been followed in *Bird* v. *Philpott* by Farwell, J., who considered it to be binding on him. Under these circumstances his lordship was bound to hold that the principle laid down in *Cohen* v. *Mitchell* did not apply to freeholds,

and accordingly judgment was entered for the defendants.

Solicitors, *Mason, Son, & Co.; Yeilding, Piper, & Tallack.*

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Chan. Div. }
Buckley, J. } Feb. 21.

*In re* TELESCRIPTOR SYNDICATE (LIMITED). (*a*)

*Company—Winding up—Stay of proceedings—Discretion of court—Application of bankruptcy rule—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 89.

*In exercising its discretionary power to order a stay of proceedings in a winding up, the court (as in the analogous case of rescinding a receiving order or annulling an adjudication in bankruptcy) will not merely regard the wishes of the creditors and shareholders, but will also consider whether an exercise of that discretion is conducive or detrimental to commercial morality and the interests of the public at large.*

The Telescriptor Syndicate (Limited) was incorporated in April, 1896.

The signatories appointed Messrs R. W. Wallace, B. Hoffman, and P. Hoffman directors.

Shortly after incorporation Mr. Hayes Fisher and Sir J. Lawrence became directors; Claude Scott became secretary in July, 1897.

The company held its offices on lease from the Westminster Trust (Limited).

On the 20th of February, 1902, the secretary reported to the board that the trust had applied for the rent due, and was instructed to try to arrange for the acceptance by the trust of debentures.

On the 1st of August, 1902, the secretary reported that the trust had served a writ for rent amounting to over £350, and the directors present (Messrs. R. W. Wallace and P. Hoffman) resolved "to let the matter take its course."

On the 7th of November, 1902, the trust presented a petition for winding up the company, and on the 25th of November a winding-up order was made.

On the 27th of November the official receiver gave notice to the directors and secretary to attend him on the 3rd of December to give information as to the company's affairs, and on the following day he called upon the same persons to submit a statement of affairs.

On the 3rd of December no director attended or responded, but the secretary attended and gave some information, and stated that the directors were going to apply for a stay of proceedings in the winding up. No stay was applied for, and on the 17th of December notice was sent to the directors and secretary to attend on the 19th.

The directors failed to attend, but written explanation of this failure to attend was received from two of them, Sir J. Lawrence and P. Hoffman.

Other notices to attend were served in January, 1903.

This was an application by the secretary, with the consent of the company's creditors and a majority of the shareholders, for a stay of proceedings in the winding up.

The court has power under section 89 of the Companies Act, 1862, to stay proceedings "upon proof to the satisfaction of the court that all proceedings in relation to such winding up ought to be stayed."

The official receiver stated in his affidavit: "I have no information as to the terms upon which the claim of the petitioning creditors has been settled, or as to the terms upon which the other creditors of the company have consented to the winding up being stayed. It appears from an entry in the above-named company's minute book which was produced to me by the said Claude Scott that some of the directors received large blocks of fully paid-up shares issued to them as nominees of the vendor to the company, and I am informed by the said C. Scott that some of those shares were transferred by way of bonus to subscribers of the capital of the company. The said C. Scott informed me that he was unable to give any information as to the promotion and formation of the company, as he was not connected with the company at the time when it was formed, but was appointed secretary some months afterwards."

*J. G. Wood*, for the secretary, supported the application.

*R. J. Parker* opposed on behalf of the official receiver.

BUCKLEY, J., after stating the facts, said that when an application was made in bankruptcy to rescind a receiving order or annul an adjudication the court refused to act upon the mere assent of creditors in the matter, and considered not only whether the proposal made was for their benefit, but also whether it was conducive or detrimental to commercial morality and the interests of the public at large. The mere consent of the creditors was but an element in the case, and it was an idle notion that the court was bound by such consent: see per Fry, L.J., in *In re Hester*, 22 Q. B. D. 632, 37 W. R. Dig. 20. The court had to exercise a discretion; it had not merely to regard the interests of creditors but to perform a duty with regard to the commercial morality of the country: *In re Hester; In re Flatau*, 41 W. R. 529, [1893] 2 Q. B. 219; *In re Taylor*, 49 W. R. 510, [1901] 1 Q. B. 744. Here the court had to exercise an analogous jurisdiction, and it was, in his opinion, undesirable that the court should assume a different attitude or act upon a different principle in the bankruptcy of an individual and in the winding up of a company.

In this case his lordship stated that he was not satisfied that all proceedings in the winding up should be stayed by the mere fact that the consent of all the creditors and a large majority of the shareholders to a stay had been obtained; he was entitled to and desired to have further information. He should order the application to stand over for four weeks, and hoped that before that time the directors would have discharged their duty under the Act by furnishing a statement of affairs and enabling the official receiver to make his report.

Solicitors, *Faithfull & Owen; Solicitor to the Board of Trade.*

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Chan. Div. }
Buckley, J. } Jan. 30.

*In re* RADCLIFFE.
YOUNG *v.* BEALE. (*a.*)

*Will—Residuary gift—Named person—Lapse—Limited survivorship clause—Revocation of gift by codicil—Gift to person by wrong name—Construction.*

*A testatrix left her residuary estate to four named*

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

*persons, A., B., C., and D., "as tenants in common, and if only one of them shall survive me, then to such one absolutely." By a codicil, after referring to the death of D., the testatrix revoked whatever interest D. had in her will. A., B., and C. survived the testatrix.*

*Held, that the gift of survivorship was intended to be general and not confined to the case of only one legatee dying, and that in any event the revocation clause of the codicil must be construed as directing the residuary bequest of the will to be read as if D. was not one of the residuary legatees; and, consequently, that in the events that had happened D.'s share was not undisposed of, but went to the other legatees.*

*Two of the residuary legatees were described as "Edith Beale, daughter of E. J. Beale," and "Violet Beale, daughter of E. J. Beale." E. J. Beale had two and only two daughters, one of whom was named Violet Edith Beale, the other had different first names.*

*Held, that both daughters were residuary legatees.*

Orginating summons.

The questions in this case were whether a lady wrongly named, but otherwise described, could take under a residuary bequest in a will; and secondly, whether the share of a named residuary legatee who died in the lifetime of the testatrix lapsed, or whether it went over to the other residuary legatees either under a survivorship clause which did not in terms apply to the event which had happened, or in consequence of a clause of revocation in a codicil.

By her will, dated the 3rd of October, 1896, after appointing certain persons executors, and giving various pecuniary and specific legacies, M. J. Radcliffe gave as follows: "I give all my real and personal estate whatsoever and wheresoever, not otherwise disposed of by this my will, or any codicil hereto, subject nevertheless to the payment of my just debts, and of my funeral and testamentary expenses, equally between Edith Beale, daughter of the said Edward John Beale, Violet Beale, another daughter of the said Edward John Beale, Edward Tassel Taylor, and Eveline, the widow of my late brother-in-law, Arthur Dold Walwyn Radcliffe, share and share alike, as tenants in common, and if only one of them shall survive me, then to such one absolutely."

By a codicil to the said will, dated the 16th of December, 1901, the testatrix declared as follows: "As Adolphus T. H. Radcliffe and Mrs. Eveline C. S. Radcliffe have predeceased me, I revoke whatsoever interest they had in my will (late made in 1896)."

No other part of the codicil referred to the residuary bequest in the will, nor, except for a reference to a specific gift to Mrs. Eveline Radcliffe, to any of the residuary legatees.

The testatrix died in May, 1902. As stated in the codicil, Mrs. Eveline Radcliffe died between the date of the will and of the codicil. The other residuary legatees survived the testatrix.

Edward John Beale, mentioned in the will, had two daughters, and two only, named respectively Tookie Ethel Child Beale and Violet Edith Child Beale, the former of whom in 1899 married W. Howard.

The present action was commenced by originating summons taken out by the executors of the will, one of whom, E. T. Taylor, was one of the residuary legatees, against the two daughters of E. J. Beale, and against two of the next-of-kin (one of whom was also the heir-at-law) of the testatrix, asking for a determination of the following questions:

1. Whether each or either of the defendants, Violet Edith Child Beale and Tookie Ethel Child Howard, was entitled to a share in the residuary estate of the testatrix?

2. Whether the share in the residuary estate of the testatrix to which Eveline C. L. Radcliffe would have become entitled if she had survived the testatrix, lapsed, or whether the residuary gift in the will took effect as if she had not been named therein?

*A. J. Allen*, for the executors.

*L. Mossop*, for the next-of-kin and heir-at-law.—On the first question, Mrs. Howard is not named in the will at all. The only daughter named is Violet Edith. Mrs. Howard cannot therefore take as a residuary legatee.

*R. J. Parker*, for Miss Violet Beale and Mrs Howard, was not called upon.

BUCKLEY, J., held that both the daughters were residuary legatees.

*Mossop.*—On the second question, Mrs. Eveline Radcliffe took her residuary share as a named legatee. Upon her death, therefore, her share lapsed. The survivorship clause of the will did not operate, as it only applied to the case of only one of the four residuary legatees surviving the testatrix, whereas in fact three of them survived her. The revocation in the codicil makes no difference: *Cresswell* v. *Cheslyn*, 2 Eden. 123, affirmed by the House of Lords, 5 Bro. P. C. 246; *Ramsay* v. *Shelmerdine*, 14 W. R. 46, L. R. 1 Eq. 129.

He also referred to *Shaw* v. *M'Mahon*, 4 Dr. & War. 431.

*R. J. Parker.*—In the cases cited the legatee survived the testator. There is no case where the share of a residuary legatee who had died before the codicil and whose share had been revoked has been held to be undisposed of. The survivorship clause in the will was intended to have a general effect, and the revocation in the codicil was intended to strike the name of Mrs. Eveline Radcliffe out of the will, and consequently for both reasons the surviving legatees take the whole of the residue.

BUCKLEY, J.—I think it is clear from the cases of *Cresswell* v. *Cheslyn* and *Ramsay* v. *Shelmerdine* that where the testator gives by will a share of residue to a person by name, and subsequently revokes the gift by a codicil, without adding any further words of disposition, the court will hold that the share is undisposed of, and that as regards it there is an intestacy. That being so, the question arises whether that principle applies here, or whether there has been a gift over of the share of Mrs. Eveline Radcliffe to the other residuary legatees, they having survived the testatrix. There are four legatees, and the gift over is expressed to be if one only of them survives the testatrix. In fact three of the legatees have survived the testatrix. I do not, however, think that the gift over was intended to be confined to the case of only one surviving. I think that it was intended to apply generally, and that the testatrix meant to give the shares to the legatees as tenants in common with the benefit of survivorship between them. But whether this is so or not, the codicil revokes whatever interest Mrs. Eveline Radcliffe had under the will. I must suppose that the testatrix knew the law, and therefore knew that the share of Mrs. Eveline Radcliffe had lapsed and was undisposed of, and that she did not make the revocation in the codicil for no purpose at all. I think that the testatrix meant by that revocation that the residuary bequest was to be read as if the name of Eveline Radcliffe was struck out; and I hold, consequently, that the share which she would have taken if she had survived the testatrix is not undisposed of, but goes to the surviving residuary legatees.

Solicitors, *Allen & Son; Bircham & Co.; Corsellis, Mossop, & Berney.*

Chan. Div.
Swinfen Eady, J. } Dec. 6.

*In re* SISSON'S SETTLEMENT.
JONES *v.* TRAPPES. (*a.*)

*Trustee—Title deeds—Certificates of registered stock—Custody.*

*There is no strict rule entitling a trustee as a matter of legal or equitable right to require that trust documents, consisting of title deeds and certificates of registered stock, shall not remain in the physical possession of either trustee, and shall be placed in a bank in their joint names.*

Originating summons.

This was an application by one of the trustees of a settlement f r an order directing his co-trustee to concur with him in placing the deeds, documents of title, and securities relating to the trust in a box, accessible only to the trustees jointly, the box to be deposited at a bank approved by the court.

The facts were as follows: The documents in question consisted of certificates of railway and other stock in the joint names of the trustees, and the title deeds of a freehold house. They had been for many years under the control of the respondent. There were no securities to bearer. The position of the respondent was unimpeachable.

*Gatey*, for the applicant, contended that a trustee had a strict right to have joint custody of the trust securities.

He referred to *Mendes* v. *Guedalla*, 10 W. R. 482, 2 Jo. & H. 259; *Lewis* v. *Nobbs*, 26 W. R. 631, 8 Ch. D. 591; *Field* v. *Field*, 42 W. R. 346, [1894] 1 Ch. 425.

*Hewitt*, for the respondent.

SWINFEN EADY, J., after stating the facts, said: There is no suggestion that the documents are in any jeopardy, or that the applicant has met with any obstruction in inspecting them, or that the trust estate has been put to any costs for inspection. On the contrary, the applicant has been afforded every facility for inspecting the documents without charge.

But the applicant says there is a strict rule entitling him as a matter of legal or equitable right to have the documents kept in a box, which shall not remain in the physical possession of either trustee, but be placed at a bank in their joint names.

I am of opinion that the applicant has no such legal or equitable right, and that no rule hitherto established requires trust documents, consisting of title deeds and certificates of registered stock, to be put in such a position that no trustee can even look at them without the presence or concurrence of his co-trustees, as would be the case if they were placed at a bank in a box to which each trustee had a different lock and key. Such a rule would greatly impede the execution of trusts. The applicant's case and the respondent's opposition are based simply on their strict legal or equitable rights. The applicant has made no case whatever for removing the documents from their present custody, where they have remained for many years in perfect safety, and where, so far as I can see, they are perfectly safe.

Under these circumstances I make no order beyond giving the respondent costs out of capital.

Solicitors, *Hamlin, Grammer, & Hamlin*, for *Gamlin & Williams*, Rhyl; *Stow, Preston, & Lyttelton*, for *J. W. & T. Eastham*, Clitheroe.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Chan. Div.
Swinfen Eady, J. } Dec. 6.

*In re* BRACKEN'S SETTLEMENT. (*a.*)

*Settled land—Exchange of easements—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 5.

*An exchange of easements, apart from any exchange or partition of land, is authorized by the Settled Land Act*, 1890, *s.* 5.

Originating summons.

In this case the equitable life tenant of an estate, which was settled in trust for sale, applied for leave to grant an easement over the settled land in exchange for an easement over other settled land.

The Settled Land Act, 1890, s. 5, provides: "On an exchange or partition any easement, right, or privilege of any kind may be reserved or may be granted over or in relation to the settled land or any part thereof, or other land or an easement, right, or privilege of any kind may be given or taken in exchange or on partition for land or for any other easement, right, or privilege of any kind."

*Henry Fellows*, for the life tenant, referred to the Settled Land Act, 1890, s. 5; the Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 3, 4, 6, 17, 21, sub-section 8.

*Philbrick* and *Bowen Davies*, for the trustees, did not oppose the application.

SWINFEN EADY, J., in giving judgment, said: I think it is clear that the opening words, "on an exchange or partition," do not govern the whole section. In my opinion, the section should be read as if a comma preceded the words "or other land"; but whether it precedes or follows those words, I think the remaining words of the section are an independent clause authorising an exchange of easements apart from any exchange or partition of land. I give leave accordingly.

Solicitors, *Whitfield & Harrison*, for *Humphreys, Hirst, & Whitley*, Halifax; *Walker & Rowe*, for *F. Walker & Son*, Halifax.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) } Jan. 28.

STILES *v.* ECCLESTON. (*b.*)

*County court—Jurisdiction—Power of judge to grant injunction only—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 89—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 56.

*A county court judge has jurisdiction to grant an injunction where no damages are claimed, provided that the claim is one in which the damages would, if claimed, have been under £50.*

Appeal for his Honour Judge Wilmot, sitting at the Mildenhall County Court, granting an injunction restraining the defendant from carrying on business as a dressmaker for the period of ten years from the 18th of June, 1901. The agreement between the plaintiff and the defendant contained a clause fixing the damages at £40, but the plaintiff made no other claim than that for an injunction.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

(*b.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

For the defendant it was contended that the county court judge had no power to grant an injunction, as no damages were claimed, but this contention was overruled by the judge, who granted an injunction.

The defendant appealed.

The power of the county court to grant an injunction is conferred by the Judicature Act, 1873, s. 89. That section is as follows: "Every inferior court which now has or which may after the passing of this Act have jurisdiction in equity or at law . . . shall as regards all cases within its jurisdiction for the time being have power to grant . . . such relief, redress, or remedy or combination of remedies . . . in as full and ample a measure as might and ought to be done in the case, by a High Court of Justice."

*Hon. M. M. Macnaghten*, for the defendant.—The county court judge had no jurisdiction to hear this case, as the cause of action, not being for a sum not exceeding £50, was not within his jurisdiction. The County Courts Act of 1888, s. 56, confines the jurisdiction of county courts to personal actions where the debt, demand, or damage claimed does not exceed £50, and as the plaintiff claimed no damage, it clearly did not come within the section.

He referred to *Cairness* v. *Nesbitt*, 7 H. & N. 778, 10 W. R. C. L. Dig. 22; *Martin* v. *Bannister*, 28 W. R. 143, 4 Q. B. D. 491; and *General Accident Assurance Corporation* v. *Noel*, 50 W. R. 381, [1902] 1 K. B. 377.

*M. Talbot* (*A. H. Poyser* with him), for the plaintiff, was not called upon.

Lord ALVERSTONE, L.C.J.—This is a point which apparently has not received judicial decision. I think if Mr. Macnaghten had made good his point that there was no jurisdiction to have entertained a breach of this agreement in the county court we would be right in saying there was no jurisdiction to grant an injunction. If parties have so bound themselves that in the event of a breach the damages claimed must of necessity be in excess of county court jurisdiction, then the case cannot be brought within the jurisdiction merely because no damages are claimed. But if the terms of the agreement are such that an action for breach could be brought in the county court, then I think *Martin* v. *Bannister* clearly shows that an injunction can also be granted in the county court. In this case the damages were fixed by the parties themselves at an amount within the limit of the county court jurisdiction; the remedy by injunction is merely ancillary to the remedy by way of damages. I therefore think the county court judge was right, and this appeal must be dismissed.

WILLS, J.—I agree. The County Courts Act, 1888, came a long way after the Act of 1873, which gave to county courts all the remedies that the High Court has. I think it impossible to say that cases where an injunction only is asked for were intended to be excluded.

In cases in which if damages had been claimed judgment must have been given for a sum not exceeding £50, I think it is clear a county court has jurisdiction to entertain a claim for an injunction only.

CHANNELL, J.—I agree. This is obviously a personal action, and it is also one in which there is no claim for a debt, demand, or damages exceeding £50. I should not like to say that all personal actions in which no damages are claimed could be brought in the county court, but where the parties have themselves assessed the damages at less than £50, it is clear the county court has jurisdiction although no damages are in fact claimed.

WILLS, J.—I wish to add that I quite accept the limitation expressed by my brother Channell.

*Appeal dismissed.*

Solicitors for plaintiff, *Edgar Robins & Clark*, for *Salmon & Co.*, Bury St. Edmunds.

Solicitors for defendant, *Bridges, Sawtell, & Co.*, *Bendall & Son*, Bury St. Edmunds.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — Jan. 28.

BANKES v. JERVIS. (*a*.)

*Practice—Trustee—Claim—Plaintiff suing as trustee—Unliquidated debt—Right of set off—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24 (2) (3)—*R. S. C.*, 1883, *ord.* 19, *r.* 3.

*Where a plaintiff sues as trustee all defences which could be raised against the person on whose behalf he is suing can be set off by way of defence by the defendant to the extent of the claim.*

Appeal from his Honour Judge Martineau, sitting at the Hastings County Court, giving judgment for the plaintiff for £50, and dismissing a counterclaim by the defendant for £51 12s. 6d.

It appeared from the statement of counsel that the plaintiff had purchased a share in the defendants' business, that of a veterinary surgeon, for her son.

The business was carried on in Battle, at premises acquired in connection with the business from the defendant by the plaintiff's son.

In 1901 the plaintiff's son left for New Zealand, and left a letter authorizing his mother to sell his share of the business. The plaintiff accordingly on the 18th of May, 1901, sold to the defendant the son's share of the business for the sum of £100. The defendant paid one-half of the sum agreed upon, but refused to pay the other half, and at the trial he set up as a defence (by way of counterclaim) that he had become liable to the landlord for a sum of £51 12s. 6d. for rent and repairs. It was admitted at the trial that the son was liable to indemnify the defendant in respect of this sum, and that if the son had been the plaintiff this would have been a good defence to the action.

The county court judge gave judgment for the plaintiff on the ground that, though the plaintiff was a trustee on behalf of her son, and would be obliged to account to him for any amount received in this action, yet this defence was not one which could be set up against her suing as a trustee.

By the Judicature Act, 1873, s. 24 (2), it is provided as follows: "If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract . . . or alleges any ground of equitable defence to any claim of the plaintiff or petitioner . . . the said courts respectively and every judge thereof shall give to every equitable estate or right or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect by way of defence against the claim of such plaintiff or petitioner as the court of Chancery ought to have given if the same or the like matters had been relied upon by way of defence in any suit or proceeding instituted in that court for the same or any like purpose before the passing of this Act."

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Ord. 19, r. 3, of the R. S. C. provides: "A defendant in an action may set off or set up by way of counterclaim against the claim of the plaintiff any right or claim whether such set off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim."

*Thorn Drury*, for the defendant.—The county court judge was wrong in holding that the defendant could not set up this defence to the extent of the counterclaim. The plaintiff is a trustee and would be bound to account to her son for any sum received by her under this action. If it were an equitable assignment for value, I could have used this defence, and a bare trustee cannot be in a better position than an assignee for value.

He cited the following authorities: *Mersey Steamship Co.* v. *Shuttleworth*, 32 W. R 245, 11 Q. B. D. 531; *Young* v. *Kitchin*, 26 W. R. 403, 3 Ex. D. 127; *Westacott* v. *Bevan*, 39 W. R. 363, [1891] 1 Q. B. 774; *Stumre* v. *Campbell*, 40 W. R. 101, [1892] 1 Q. B. 314.

*E. E. Humphreys*, for the plaintiff.—This is an unliquidated counter-claim by the defendant, and he cannot set up this as a good answer to the plaintiff's claim under the agreement. The son may have a good answer to the defendant's counter-claim A counter-claim must be against the plaintiff in the same capacity in which he sues.

He cited *Macdonald* v. *Carrington*, 27 W. R. 153, 4 C. P. D. 28.

Lord ALVERSTONE, L.C.J.—I should have said that this point was covered by authority, but it now appears there is no case directly in point. The county court judge has here found that the mother has acted as agent for the son, and must account to him for any amount received by her under the agreement with the defendant. It is also not disputed that the defendant became liable to the landlord for rent and dilapidations for the sum of £51 12s. 6d., and that the defendant could have recovered that sum against the plaintiff's son.

The question is whether where an action is brought by a trustee on behalf of another person, and the defendant has a counterclaim against the person on whose behalf the action is brought, he (the defendant) can counterclaim against the plaintiff in the same way that he can set off a liquidated debt against the principal of the plaintiff. It seems to me that that point is covered by authority, and that it was intended by the Judicature Act that that defence should be open to the defendant in such cases. Sub-section 2 of section 24 of the Judicature Act, 1873, provides that where a defendant claims to be entitled to any relief upon any equitable ground, or alleges any ground of equitable defence to any claim of the plaintiff, the courts shall give to every equitable right or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect by way of defence against the claim of the plaintiff as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit instituted in that court for the same or the like purpose before the passing of the Act. Then by sub-section 3 the courts are to have power to grant to any defendant in respect of any equitable estate or right or other matter of equity all such relief against any plaintiff as such defendant shall have properly claimed by his pleading, and as the courts might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff. And ord. 19, r. 3, says that a defendant in an action may set off or set up by way of counterclaim against the claims of the plaintiff any right or claim whether such set off or counterclaim sound in damages or not, and such set off or counterclaim shall have the same effect as a cross-action so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross-claim. Now if this had been a claim by the defendant for the amount due to him there would have been a right of set off in respect of the £50 balance of the purchase-money due under the agreement. I think that the cases of *Jeffs* v. *Day*, L. R. 1 Q. B. 372, and *Agra and Masterman's Bank* v. *Leighton*, L. R. 2 Ex. 56, 15 W. R. C. L Dig. 17, are authorities to show that in an action by the trustee the defendant can set up against the trustee the debt due from the *cestui que trust*, and that it would have been a good equitable defence to show that the action was brought by the plaintiff as trustee for a third person, and that against that third person there was a set off or an equitable defence which would make it wrong for the trustee to bring the action on behalf of the *cestui que trust*. I cannot think that the plaintiff can be in a stronger position than an assignee for value suing in his own name against whom such right of set off or equitable defence could be set up. Here the judge has found as a fact that the defendant was entitled to the sum of £51 from the son, and I therefore think that judgment ought to have been given for the defendant on the ground that he had an equitable claim which was a good counter-claim against the person on whose behalf the action is brought; and that this appeal must be allowed. I may add that, though there is no authority directly in point, this matter has been frequently decided in chambers.

WILLS, J.—I agree. I confess I have some difficulty in seeing how the plaintiff was entitled to sue in this action, but, admitting she could rightly bring this suit, I cannot see how any person by suing as trustee can have superior rights than the person on whose behalf he is suing. If this lady had the right to sue as trustee, it must be subject to all rights which could have been set up against her son's claim. Now there is an admitted claim against the son for £51 12s. 6d., and I cannot see any reason or justice which prevents the defendant setting up a defence which would have been a good defence against the son if he had been suing.

CHANNELL, J.—I agree. I think the counter-claim ought to have been allowed as a set off, not to the extent of £51, but to the extent of the plaintiff's claim. Before the Judicature Act it could have been set off against the plaintiff's claim, as she was suing as a trustee, and the case of *Agra and Masterman's Bank* shows that a liquidated amount due from the person on behalf of whom the plaintiff sues can be set up by way of equitable defence to the plaintiff's claim.

The effect of the Judicature Act and the rules framed under that Act, is that unliquidated charges are put on the same footing as liquidated; and this amount may accordingly be set off, notwithstanding that it is unliquidated.

*Appeal allowed; leave to appeal granted.*

Solicitors for the plaintiff, *Kingsford, Dorman, & Co.*, for *W. Cruttenden*, Hastings.

Solicitors for the defendant, *Attree, Johnson, & Ward*, for *C. Sheppard*, Battle.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) Jan. 16.

WIRRAL DISTRICT COUNCIL *v.* CARTER. (*a.*)

*Local government—Private street works—Recovery of expenses by urban authority—Notice of provisional apportionment—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 267—*Private Street Works Act,* 1892 (55 & 56 *Vict c.* 57), *ss.* 7, 12.

*An owner whose premises are sought to be charged under the Private Street Works Act,* 1892, *is entitled to have service of the notice of the provisional apportionment, and proof that the owner has been served is a condition precedent to the recovery against him by the local authority of his share of the expenses incurred under the Act.*

This was an appeal by the plaintiff council against the decision of the county court judge holding that the defendant, Carter, was not liable to pay the proportion of certain works which had been executed by the plaintiffs to a street called Quarry-road, Heswall, on which a quarry belonging to the defendant abuts.

The facts of the case are as follows: In February, 1900, the plaintiffs resolved to do certain private street works in Quarry-road, the Private Street Works Act, 1892, having been in force in the district since 1896, and they accordingly took the necessary steps under that Act to settle the provisional apportionment. The resolution approving the provisional order was sent to the Heswall Quarry Co., D. Robinson, Manager, but no such copy was served on the defendant, nor had he any notice of the provisional apportionment. Some objections were taken to the provisional apportionment by certain of the frontagers, but no objection was taken by the defendant or by anyone as the owner of the quarry.

The final apportionment was made on the 16th of April, 1901, and the notice was served in the same way on the Heswall Quarry Co. (Limited), D. Robinson, Manager. Shortly afterwards the plaintiff council discovered that the defendant was in fact the owner of the quarry. On the 3rd of April the plaintiffs' surveyor amended the final apportionment by striking out the notice already served and substituting the defendant's name as owner.

It appeared that David Robinson, who was the defendant's uncle, had formerly traded as the Heswall Quarry Co., and had leased the property from the defendant up till the end of 1899.

The county court judge gave judgment for the defendant, holding that service, of the provisional apportionment was a condition precedent to the right of the local authority to recover, and there was no sufficient evidence that the defendant was the reputed owner.

The Private Street Works Act, 1892, contains no special directions as to service, and notices have to be served in accordance with section 267 of the Public Health Act.

That section provides as follows: "Notices, orders, and any other documents required or authorized to be served under this Act may be served by delivering the same to or at the residence of the person to whom they are respectively addressed . . . they may also be served by post or by a prepaid letter . . . in proving such notice it shall be sufficient to prove that the notice, order, or other document was properly addressed and put into the post. Any notice by this Act required to be given to the owner or occupier of any premises may be addressed by the description 'owner' or 'occupier' of the premises (naming them) in respect of which the notices is given without further description."

*Macmorran, K.C.,* and *Naldrett,* for the appellants.—The county court judge was wrong in holding that service of the provisional apportionment was a condition precedent. The defendant did not take any of the objections to the final apportionment under section 12 (2), and he is now precluded by section 8 (2) from raising any objection whatever.

*Carver, K.C.,* and *Rigby Swift,* for the defendant.—The owner of premises proposed to be charged under the Act of 1892 is just as much entitled to notice as an owner who was charged under the Public Health Act, 1875. It has been decided that under that Act service is a condition precedent. The grounds on which the owner is entitled to object under section 7 of the Act of 1892 are far wider than those under section 12 (2).

They cited *Jarrow Local Board* v. *Kennedy,* 19 W. R. 275, L. R. 6 Q. B. 128; *Farnmouth Local Board* v. *Compton,* 34 W. R, 338; and *Wallsend Local Board* v. *Murphy,* 61 L. T. Rep. 777, 38 W. R. Dig. 120.

*Naldrett,* in reply.—There is a fundamental distinction between the Act of 1875 and the Act of 1892, as under the former Act the owner had the right to do work himself.

Lord ALVERSTONE, L.C.J.—I confess I should have been glad to have decided this case in favour of the appellants, as in my opinion this is a technical objection without any merits, and that the persons who are representing the property abutting on the road did in effect have notice, but have availed themselves of this mistake in the direction to get out of their responsibility. However, we must construe the Act as it stands. Before the Act of 1892, which is an adoptive Act, was passed, where work was done under section 150 of the Public Health Act, 1875, it was held that absence of service upon an owner of land abutting upon the road prevents the apportionment of the sum charged for making it up being charged upon that owner, and that service upon a previous owner will not do. In my opinion the principle of those decisions apply to this case. The Private Street Works Act, 1892, gives some important privileges to the persons who are proposed to be charged. They can raise new objections, and they can also raise objections which could only have been raised at a later stage. Under these circumstances it seems to me that effective service is just as necessary, if not more so, than it is in the case of proceedings under section 150 of the Public Health Act, 1875. But it is said that there is a fundamental distinction between the two sections, inasmuch as under the Act of 1875 the owner had the right to do the work himself. But it has been pointed out on behalf of the defendant that this was an option of which the owners never availed themselves. They never in fact did do the work. Therefore, as I have said, notice is just as necessary under the Act of 1892 as under the original Act of 1875.

The third section of section 6 of the Act of 1892 contains provisions as to service of copies "on the owners of premises shown as liable to be charged in the provisional apportionment within seven days after the date of the first publication." And there are liberal provisions under the Act of 1875 which show there are means of effecting substituted service where the owner is not known. Then it is said that the want of notice of the provisional apportionment is cured by

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

section 12 of the Act of 1892. But, as was pointed out by my brother Wills, the rights given under section 12 are totally different from the rights given to the owner under section 7. Accordingly it cannot be said that the defendant has had the opportunity to make the objections he had a right to make under section 7 to the provisional apportionment if he had notice of it. For these reasons I have come to the conclusion that notice of the provisional apportionment is a necessary condition to the liability of the owner, and that this appeal must be dismissed.

WILLS, J.—I agree with my lord that it is indispensable that the owner should be duly served with notice of these proceedings. The owner is here given rights under section 7, and if he neglects to take the necessary steps he is afterwards precluded from making objections. Section 12 confirms that view, for it provides that after theprovisional apportionment has been fixed the owner may only object to the final apportionment on the ground that the actual expenses have been exceeded, or that the final apportionment has not been made in accordance with this section, or that there has been an unreasonable departure from the specification. That shows that the real rights of the owner are under section 7.

CHANNELL, J.—I agree, but not without difficulty, for I am of opinion that if the local authority had framed their notice somewhat differently it would certainly have been a good service on the defendant. The objection that the provision does not contain the correct name is not of itself good, for section 6 refers to the schedule of this Act, and the fourth clause of Part I. of the schedule refers to reputed owners. Notwithstanding the finding of the county court judge that the defendant was not the reputed owner, I hardly think he construed the Act as it was intended to be construed. I think reputed owner means someone reasonably believed by the local authority to be the owner; someone with whom as owner they have had recent dealings is certainly a reputed owner. Section 267 of the Public Health Act, 1875, provides that "any notice required to be given to the owner or occupier of any premises may be addressed by the description of the owner or occupier of the premises (naming them) in respect of which the notice is given without further name or description." It seems to me there is no difference between the old Act under which the service on the owner by name was not a condition precedent and this new one as to reasonable service. If the service which has been effected here would have been a good service under the old Act, it is difficult to see why it should not be good under the new Act; but as the county court judge has held that under the new Act notice of the provisional apportionment is a condition precedent, I agree the appeal should be dismissed.

Solicitors for the plaintiffs, *Cunliffes & Davenport.*

Solicitors for the defendant, *Thompson, Hughes, & Mathison,* Birkenhead.

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Prob. Div. & Adm. Div. Admiralty. } Jan. 13.

"THE ALMA." (a.)

*Ship—Admiralty—Limitation of liability—Claims for loss of life and loss of property—Lord Campbell's Act* (9 & 10 *Vict. c.* 93), *s.* 3—*Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 504.

*The usual advertisement calling on all persons who had claims in respect of loss of life or property to make them within a certain time was issued under section* 504 *of the Merchant Shipping Act,* 1894, *with an intimation that if the claimants failed to do so in time they would be excluded from sharing in the fund paid into court. The claims entered in respect of loss of property exceeded the amount paid in under the statutory liability of* £8 *per ton; but only six out of a possible eleven claims in respect of loss of life were made within the time limit on the fund paid in under the statutory liability of* £7 *per ton.*

*The Court held, that inasmuch as a time limit had been fixed for entering claims, the unappropriated balance of the life fund must be paid back to the plaintiffs in the limitation suit, notwithstanding that all possible life claims had not been entered, and that although the year had not elapsed within which, under section* 3 *of Lord Campbell's Act, an action in respect of such a claim could be commenced.*

On the 1st of April, 1902, *The Alma,* a vessel of 1,145 tons gross, and belonging to the London and South-Western Railway Co., while on a passage from Southampton to Havre, collided with and sank *The Cambrian Princess,* a sailing vessel of 1,394 tons gross, she being on a voyage from Lobos de Afuera to Antwerp with a cargo of guano.

Eleven of the crew, including two apprentices, of *The Cambrian Princess* were drowned in consequence of the disaster.

On the following day the owners of *The Cambrian Princess* instituted an action in the district registry at Liverpool, and the railway company appeared as defendants and admitted their liability.

On the 24th of April the railway company, as owners of *The Alma,* commenced proceedings in this court to limit their liability against the owners of *The Cambrian Princess* and against all persons claiming in respect of the loss of the ship or in respect of damages or loss to goods or merchandize on board the ship, and the survivors of those on board the vessel and the legal personal representatives of those who were lost, and against all persons claiming in respect of any loss of life or personal injury occasioned by the collision.

On the 23rd of June Gorrel Barnes, J., held that the plaintiffs were entitled under the provisions of the Merchant Shipping Act, 1894, to limit their liability, and that in respect of loss of life or personal injury or of loss or damage to ship, goods, merchandize, or other things caused by reason of the improper navigation of *The Alma,* her owners were answerable in damage in a sum not exceeding £16,587 9s., such sum being at the rate of £15 for each ton of registered tonnage of *The Alma* without deduction for engine room, and that in respect of claims for damage to ship, goods, or merchandize, or other things alone her owners were liable at the rate of £8 per ton, which worked out at £8,840 12s. 9d. The court directed that three advertisements should be inserted at intervals of not less than a week in the *Times,* the *Shipping and Mercantile Gazette,* and a Liverpool

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

newspaper, "intimating to all persons having any claim in respect of loss of life or personal injury or damage caused as aforesaid that, if they do not come in and enter their claims on or before the 23rd of September, 1902, they will be excluded from sharing in the aforesaid amount: the last of such advertisements to be inserted on or before the 9th of September."

On the 4th of July the owners of *The Alma* paid into court £16,758 6s. 5d., which was the sum under their statutory liability plus four per cent. from the date of the collision and this sum was invested in Consols pending the adjustment of claims. The registrar's report was dated the 15th of December, and he assessed the property claims—*i.e.*, ship, cargo, freight, and personal effects at £13,212 14s. 8d., and set out the fact that four sums—viz., £120, £100, and £60 had been awarded be juries in King's Bench actions in respect of the death of four persons, and £300 more had been paid by the owner of *The Alma* to a passenger on board her for personal injuries sustained. Two other claims, it was stated in the report, had been filed in the registry in respect of the death of the two apprentices and £20 allowed in one case, whilst the other claim had been disallowed, making a total of £400 in respect of the claims for compensation for loss of life. The report concluded as follows: "Only six claims for the loss of life have been put forward, four in the King's Bench Division and two in the Admiralty Court. In the six cases and in one other case there are claims for lost effects, so that there are four cases in which no claim has been made for loss of personal effects, and five cases in which there is no claim for loss of life. Any further claims for the loss of property are clearly out of time, and the distribution of so much of the funds (£8 per ton) as is applicable to such claims ought not, I think, to be delayed with the chance of any further claims coming in; but claimants for loss of life have under Lord Campbell's Act a year and a day for bringing actions, and although there is no reason for deferring payment of the loss of life claims (£7 per ton being far more than sufficient to pay in full any possible claims upon it), a small portion of the balance remaining after payment of the present claims ought, I think, to be retained in court until the expiration of the year and day allowed by Lord Campbell's Act for bringing such claims."

*Arland*, for the plaintiff.—Section 504 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), provides that the High Court "may proceed in such manner and subject to such regulations as to the exclusion of any claimants who do not come in within a certain time." That section applies to claims in respect of loss of life and to claims in respect of damage to property, and therefore, as the court directed that the usual notice of the proceedings should be given by advertisement to all persons interested, and no other claim having been made prior to the time which has now arrived for the fund to be distributed whether in respect of life or property are equally barred, although the period mentioned in section 3 of Lord Campbell's Act (9 & 10 Vict. c. 93) of twelve months from the death in respect of claims has not elapsed, nor the period of six years which is allowed under the Statutes of Limitation in respect of property.

*Holloway*, for the relations of two of the deceased seamen.

*Bateson*, for the owners, master, and some of the crew of *The Cambrian Princess*, in support of the motion.

JEUNE, P., in giving judgment, said: At first my feeling was against the motion made by counsel on behalf of the plaintiffs, because I thought it possible, though not probable, that there might be further claimants in the King's Bench Division, and that no great harm would be done in keeping back a certain amount to meet their claims. But, on further consideration, I do not think that is the true view to take, for the words of section 504 are, to my mind, clear, and do give this court power to do that which it has done—namely, to fix a time within which claims must come in.

It seems to me, on principle, important that this court should fix a time to prevent claims from going on for an unlimited period. It would be contravening the objects of the statute to hold that, in limitation actions, claims for loss of or damage to goods should be allowed to be brought in at any time within six years, the period allowed by the Statutes of Limitation, and it seems to me important that where there is fund to be distributed persons should come forward and make their claims within the time fixed. I am impressed by the argument that claims for loss of life and claims for loss of goods cannot be dealt with separately. On the whole I am prepared to accede to the view that as the effect of section 504 is to give the court power to fix a time after which persons shall be excluded, it is only a logical consequence that, after that period has expired, you must treat possible further claims as non-existent, and it would, therefore, be inconsistent to reserve a portion of the fund. I might perhaps arrive at a reasonable figure, but it would be highly uncertain, and in many cases it might be a mere guess to determine the amount which should be reserved for such hypothetical claims. I am therefore of opinion that this part of the report ought not to be confirmed. As regards the rest of the report I understand there is no objection, and it will be confirmed.

The result is that the Consols will be sold, the London and South-Western Railway Co. will have paid out to them the balance of the £7 per ton, after paying the loss of life and personal injury claims as found by the registrar in his report.

The rest of the fund (made up of the £8 per ton) will be paid out to the parties found to be entitled thereto in respect of the property claims. The parties appearing on the motion will be allowed in addition their costs against the plaintiffs.

Solicitors for the plaintiffs, *Clarkson, Greenwell, & Co.*

Solicitors for the owners of *The Cambrian Princess* and others, *Charles Russell & Co.*

Solicitors for relatives of two of the deceased seamen, *G. & W. Webb.*

## Court of Appeal.

From Chan. Div. (Collins, M.R. and Romer and Cozens-Hardy, L.JJ.) March 20.

DAVIS v. TOWN PROPERTIES INVESTMENT CORPORATION (LIMITED). (a.)

*Lessor and lessee—Demise—Covenant for quiet enjoyment—Assignment of reversion—Liability of assignee—Acts done on land acquired subsequently to demise from strangers to lessor—Breach of covenant—Interference with access of air to chimneys.*

*A covenant for quiet enjoyment in a lease must be construed with reference to the state of things at the date of the covenant, and cannot be extended to cover user by the lessor of land acquired by him subsequently to the date of the lease, and even if it could be so extended the obligation would not be binding on an assignee of the reversion who has acquired adjoining land under another title, and does the acts complained of under that other title.*

*Section* 11 *of the Conveyancing Act*, 1881, *in no way alters the old law as to the class of covenants the burden of which will run with the reversion. A demise of offices to the plaintiff contained a covenant for quiet enjoyment. The lessor afterwards assigned the reversion on the term to the defendants. The defendants subsequently acquired the house next door to the demised offices, and having pulled it down rebuilt it much higher, thus causing the chimneys of the demised offices to smoke.*

*Held, that there was no breach of the covenant for quiet enjoyment.*

Per Romer, L.J.—*When by an alleged breach of the ordinary covenant for quiet enjoyment neither the title to nor the possession of the land is affected, and only the lessee's enjoyment of the land is interrupted by some act of the lessor*, Quære, *whether the act complained of is a breach of the covenant unless it amounts to a direct interference with the enjoyment.*

Per Romer *and* Cozens-Hardy, L.JJ.—Quære, *whether* Tebb *v.* Cave, 48 *W. R.* 318, [1900] 1 *Ch.* 642, *was rightly decided on the ground of breach of covenant for quiet enjoyment.*

*Decision of* Byrne, J., ante, *p.* 42, [1902] 2 *Ch.* 635, *affirmed.*

This was an appeal from a decision of Byrne, J., reported, *ante*, p. 42, [1902] 2 Ch. 635.

In June, 1897, a lease was granted by one Lee to the plaintiff, David Davis, of offices on the ground floor of No. 119, Colmore-row, Birmingham, for a term of fourteen years from September, 1897, at a yearly rent of £100. The lease contained a covenant for quiet enjoyment in the form hereinafter mentioned.

In September, 1898, the reversion in the offices No. 119, Colmore-row expectant upon the determination of the lease was assigned by Lee, the lessor, to the defendant company, the Town Properties Investment Corporation (Limited).

In the year 1900 the defendant company purchased from one Barber, who had no connection with Lee, a house next door to No. 119, Colmore-row, and proceeded to pull it down and to erect upon the site new buildings of much greater height than the old buildings. This caused the chimney of the offices, No. 119, Colmore-row, of the plaintiff to smoke, so as materially to interfere with the quiet enjoyment of one of his rooms.

The covenant for quiet enjoyment was as follows: "And the lessor doth hereby covenant with the lessee that the lessee paying the rent hereby reserved, and observing the covenants and conditions herein contained, and on the part of the lessee to be observed and performed shall and may peaceably and quietly possess and enjoy the said offices during the said term without any eviction or disturbance by the lessor or any person lawfully or equitably claiming from or under him." And it was provided that the expression "the lessor" should include the executors, administrators, and assigns of the lessor where the context allowed.

The plaintiff brought the present action for a declaration that the acts of the defendant company constituted a breach of the covenant for quiet enjoyment, and for an injunction restraining the defendant company from allowing the buildings complained of to remain.

Byrne, J., dismissed the action.

The plaintiff appealed.

*Norton, K.C.*, and *Clayton*, for the plaintiff.—The company are the plaintiff's lessors, and they are the people who are disturbing his enjoyment of the demised premises. If the original lessor had bought this land from Barber he could not have interfered with the plaintiff's enjoyment of the demised premises. The liability of the assignee is exactly the same as the liability of the original lessor. The obligation imposed by the covenant for quiet enjoyment is *qua* the reversion of the land demised. If the obligation extends to the reversion it attaches to the person who owns the reversion.

They referred to the Conveyancing Act, 1881, s. 11; *Sanderson* v. *Mayor of Berwick-upon-Tweed*. 33 W. R. 67, 13 Q. B. D. 547; *Booth* v. *Alcock*, 21 W. R. 743, L. R. 8 Ch. App. 663; *Harrison, Ainslie, & Co.* v. *Lord Muncaster*, 40 W. R. 102 [1891] 2 Q. B. 680; *Tebb* v. *Cave*, 48 W. R. 318, [1900] 1 Ch. 642; *Robinson* v. *Kilvert*, 37 W. R 545, 41 Ch. D. 88; *Dennett* v. *Atherton*, 20 W. R. 442, L. R. 7 Q. B. 316; *Leech* v. *Schweder*, 22 W. R. 633, L. R. 9 Ch. App. 463.

*Levett, K.C.*, and *Austen Cartmell*, for the defendant company.—The covenant for quiet enjoyment must be construed as on the day it is granted. If the original lessor had bought this land from Barber he would not be liable under this covenant for anything done on the land bought from Barber. The covenant is given to secure what is granted, not to enlarge the grant. It the lessee here had no rights under the doctrine of implied grant, he has none under the covenant. In any case an assignee of the lessor is under no personal liability.

They referred to *Harrison, Ainslie, & Co.* v. *Lord Muncaster*.

*Norton, K.C.*, in reply, cited *Manchester, Sheffield, and Lincolnshire Railway* v. *Anderson*, [1898] 2 Ch. 394, 47 W. R. Dig. 168.

COLLINS, M.R.—This is an appeal from Byrne, J. I adopt the facts as stated in the report of the case below in, *ante*, p. 42, [1902] 2 Ch. 635.

Byrne, J., has decided in favour of the defendant, and, in my opinion, he was clearly right. It is only necessary to scrutinize the covenant on which the plaintiff sues to see that this must be so. It is the ordinary covenant against eviction or disturbance by the lessor or any person lawfully claiming under him. In other words it contains no special provision enlarging the obligation of the lessor to respect or secure any other rights than those incident to the demised premises such as they were at the time of the demise. It is quite clear that unless there are special words the covenant for quiet enjoyment does not enlarge the grant. In dealing with a similar covenant in *Leech* v. *Schweder*, Mellish, L.J., says: "It is simply a covenant for quiet enjoyment; and I am clearly of opinion that it does not enlarge the

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

right in any way. It is perfectly clear that the lessee is 'to hold and enjoy without suit, let, or hindrance.' But what is he to hold and enjoy? 'The premises.' What are the premises? The things previously demised and given. The covenant does not enlarge what is previously granted, but an additional remedy is given—namely, an action for damages if the lessee cannot get or has been deprived of that which has been previously professed to be granted." Here, then, the lessor had no interest in the adjoining premises at the time of the demise to the plaintiff. He could not and did not put any fetter on their enjoyment for the benefit of the plaintiff, and the rights of the plaintiff which the lessor undertook to respect were rights limited by the fact that the adjoining owner might if so minded build on the adjoining land so as to interfere with the draught of the plaintiff's chimney. Such an interference, therefore, by raising the wall of the adjoining house is not, by whomsoever done, an interference with any right granted by the original demise. It was on these principles that the case of *Booth* v. *Alcock* was decided. There a lessor granted a lease of a house with its appurtenances, including lights. There was the usual covenant for quiet enjoyment. At the time of the demise the lessor was tenant for a term of the adjoining house. He afterwards bought the reversion upon his term and after the expiration of the term began to build on the site of the adjoining house so as to interfere with the plaintiff's lights. It was held that the plaintiff could not complain. He had acquired no right passing over the adjoining house other than that which it was in his lessor's power to bestow, which was necessarily only during the duration of his interest therein, and consequently interferences by the lessor himself with the lights passing over the site of the adjoining house after the term was ended involved no breach of the covenant for quiet enjoyment. He had not interfered with any right granted by the demise. "General words in a grant," says Mellish, L.J., "must be restricted to that which the grantor had then power to grant and will not extend to anything which he might subsequently acquire." The case before us is a much stronger one for the defendant. He is not the original lessor, but the assignee of the reversion on the lease, and liable only in that capacity, and the right said to be interfered with is not the well-known easement of light, but something which is not the subject of grant or prescription: *Webb* v. *Bird*, 9 W. R. 899, 10 C. B. N. S. 268, 13 C. B. N. S. 841; *Bryant* v. *Lefever*, 27 W. R. 612, 4 C. P. D. 172; *Chastey* v. *Ackland*, 43 W. R. 627, [1895] 2 Ch. 389. Even if the lessor's covenant could be extended to cover user by him of land subsequently acquired, such an obligation could not pass with the assignment of the reversion to the defendant, who acquired the adjoining land under another title, and has done what he has done under that other title and not as claiming under the lessor; so far as the covenant was personal or collateral it would not run with the reversion and bind the assignee. This was decided on the Act of Henry VIII. in *Spencer's case*, 5 Rep. 16. The facts in this case take it outside *Tebb* v. *Cave*, which we are therefore relieved from considering. Neither is it necessary in this case to speculate on what must be taken to have been the intention of the parties in making the covenant since here the grant speaks for itself and the covenant is unambiguous. But if it were necessary to resort to such reasoning the particular mischief and the sequence of events was quite as unforeseen as in *Lord Muncaster's case*.

The appeal must be dismissed.

ROMER, L.J.—I agree, and only wish to add that in the case of an alleged breach of the ordinary covenant for quiet enjoyment where by the alleged breach neither the title to the land nor the possession of the land is affected, and what the lessee complains of is only an interruption of his enjoyment of the land by some act of the lessor, I doubt whether the act complained of is a breach of the covenant unless it amounts to a direct interference with the enjoyment. I doubt therefore whether *Tebb* v. *Cave* was rightly decided on the ground of breach of covenant seeing that in that case the defendant was not directly interfering with the plaintiff's house. The plaintiff in this case had no right to any easement in respect of the current of air coming over the defendants' land, and the plaintiff's chimneys smoked simply because that current of air was interfered with and not otherwise by any act of the defendants.

COZENS-HARDY, L.J.—I have read the judgment of Collins, M.R., with which I entirely agree. I share the doubt expressed by Romer, L.J., whether Buckley, J.'s, decision in *Tebb* v. *Cave* can be supported. Should the question raised in that case hereafter come before the Court of Appeal it will be necessary to consider carefully the true limits and extent of the covenant for quiet enjoyment. There is only one point which I desire to mention. Mr. Norton, in his able argument for the appellant, relied mainly upon section 11 of the Companies Act, 1881, and contended that the obligation of every covenant entered into by a lessor who is owner in fee with reference to the subject-matter of the lease is now annexed to and goes with the reversionary estate so that it may be taken advantage of and enforced against any person entitled to such reversionary estate. This covenant, he argued, has reference to the subject-matter of the lease. It binds the lessor throughout the term, and it also binds the defendants so long as the immediate reversion is vested in them. I cannot adopt this view; it seems to me that section 11 in no way alters the old law as to the class of covenants the burden of which will run with the reversion.

Solicitors, *C. P. Eaton Taylor; F. A. K. Doyle*, for *S. T. Talbot*, Birmingham.

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From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — March 19, 20.

*In re* BARONESS LLANOVER'S WILL. HERBERT *v.* FRESHFIELD. (*a.*)

*Settled land—Trustees with power to manage and to appoint and pay servants—Trust to permit A. to reside—Tenant for life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 5; *s.* 58, *sub-section* 1 (*ix.*).

*A testatrix devised certain mansion-houses to trustees, and directed them to permit A. at any time and from time to time during her life to reside therein. The trustees were directed to keep the mansion-houses in a fit state for residence, and for this purpose to appoint and pay servants, who were to be Protestants and Welsh-speaking.*

*Held, that A. had the powers of a tenant for life under the Settled Land Acts.*

*Judgment of* Swinfen Eady, J. (ante, *p.* 89, [1902] 2 *Ch.* 679), *affirmed.*

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

This was an appeal from a decision of Swinfen Eady, J. (reported in *ante*, p. 89, [1902] 2 Ch. 679).

Mrs. Herbert, the plaintiff, had taken out a summons for a declaration that she was entitled, under the will of her mother, Lady Llanover, to exercise the powers of a tenant for life within the meaning of the Settled Land Acts.

By her will, dated the 16th of August, 1889, Lady Llanover devised all her real estate to trustees. After giving them full powers of management, and directing them to pay certain annuities, she proceeded, in clause 5, to direct as follows: "I direct that . . . my trustees or trustee shall apply such annual sum or sums of money as shall be necessary for keeping up the two mansion-houses, grounds, and gardens at Llanover, and also the residence and gardens called Abercarn Uchaf, and the mansion and premises in Great Stanhope-street in a fit state for residence in accordance with such scale and rules . . . as they or he may think fit (including in such keeping up the wages of all servants and other persons employed by my trustees or trustee in or about such mansion-houses, residences, grounds, and gardens, which servants and other persons shall be Welsh and speak the Welsh language, and shall not be of the Roman Catholic religion), and my trustees or trustee shall permit my daughter Augusta Charlotte Elizabeth Herbert (wife of John Arthur Herbert, of Llanarth, Esquire) at any time and from time to time during her life to reside at the said mansion-house, gardens, and grounds at Llanover, the residence and gardens called Abercarn Uchaf, and the mansion and premises in Great Stanhope-street, and during any and every such residence at the mansion-houses, gardens, and grounds at Llanover, or at the mansion-house at Great Stanhope-street by my said daughter under such permission as aforesaid, my trustees or trustee shall out of the rents and profits (subject to the prior payments thereout hereinbefore directed) pay to my said daughter an allowance of £80 per week during such residence if the surplus rents and profits shall be sufficient for that purpose, and if not then an allowance at the rate of so much per week as my trustees or trustee may in their or his absolute and uncontrolled discretion think that such surplus rents and profits can fairly bear, and subject as aforesaid my trustees or trustee shall during the life of my said daughter, but not for a period of more than twenty years after my death, apply the ultimate surplus, if any, of the said rents and profits in the manner by the tenth paragraph of this my will directed concerning the proceeds of my residuary estate."

Similar rights of residence were given to a granddaughter, grandson, and great-granddaughter successively, and there was an ultimate devise of the said freehold hereditaments to the daughters of her great-granddaughter by a Protestant Trinitarian husband successively in tail male.

By clause 7 the testatrix directed that the heirlooms in the three mansions should be enjoyed by the person or persons for the time being entitled to the same residences respectively under the limitations thereinbefore directed.

The testatrix died on the 17th of January, 1896, and Mrs. Herbert, who had become a widow, had continuously resided in one or other of the above premises.

Swinfen Eady, J., held that the lady had the powers of a tenant for life within the meaning of the Settled Land Acts.

The trustees appealed.

*Haldane, K.C.*, and *Howard Wright*, for the trustees.—The powers of management given to the trustees are for the benefit of the settlement. Mrs. Herbert is not a life tenant but a mere licensee, although it is true that the trustees are bound to grant the licence. The trustees are the persons who pay the rates and taxes. The possession is and remains in the trustees. All the testatrix has done is to give her daughter a right to reside subject to restrictions. There is no definition of "possession" in the Act.

They referred to the definition of "possession" in Johnson's Dictionary and Wharton's Law Lexicon, and to *Smith* v. *Overseers of St. Michael, Cambridge*, 3 E. & E. 383.

*Warmington, K.C.*, and *H. Fellows*, for Mrs. Herbert.—The most extensive powers of management on the part of trustees are not incompatible with beneficial possession: *In re Jones*, 24 Ch. D. 583, 31 W. R. Dig. 208, 32 W. R. 735, 26 Ch. D. 735. Beneficial possession is equivalent (1) to personal occupation, (2) to the receipt of rents and profits: section 58, sub-section 1 (ix.). Mrs. Herbert is the only person "beneficially entitled to possession" under section 2, sub-section 5. The purpose of the powers of management given to the trustees is the benefit of the persons successively entitled. The existence of such powers of management makes the possession more beneficial than usual. It is noteworthy that in clause 7 of the will certain chattels are given as heirlooms to the person entitled to possession. The case is covered by *In re Eastman's Settled Estate*, 68 L. J. Ch. 122.

They referred also to *In re Trenchard*, 50 W. R. 266, [1902] 1 Ch. 378, and to *In re Mundy and Roper's Contract*, 47 W. R. 266, [1899] 1 Ch. 275, at p. 288.

*Haldane, K.C.*, in reply.

COLLINS, M.R.—This is an appeal from a decision of Swinfen Eady, J., who decided in favour of Mrs. Herbert's claim to be tenant for life in possession under the Settled Land Acts. The will of Lady Llanover undoubtedly gives very large powers to the trustees and shows a strong desire to give a strictly Protestant and Welsh character to the estate. But there is a provision in it which confers the beneficial occupation of three houses on her daughter, Mrs. Herbert. Now, it has been held that powers of management, however extensive, are not incompatible with a person being tenant for life within the meaning of the Act and having the beneficial possession of property. The definition of a tenant for life is that contained in section 2, sub-section 5 of the Settled Land Act, 1882. [His lordship read the sub-section.] Another section on which the learned judge decided the case is section 58, sub-section 1 (ix.) Mr. Warmington's argument has shown us that the lady is entitled under the first sub-section. Let us pass to the particular clause in the will (clause 5) which deals with the right of this lady to reside. [His lordship read the clause.] What is the meaning of this provision? Who is to reside? Clearly not the trustees, but the lady in question, and the residence contemplated is residence during her life. The words are "the trustees shall permit." It is not a question of mere discretion on the part of the trustees, for the terms of the will are peremptory. This is clearly a "beneficial" possession. The powers of management given to the trustees are calculated to make the place fit for residence, calculated to make the residence more beneficial from the point of view of this lady. They are not incompatible with beneficial possession by a tenant for life. The authority cited by Mr. Warmington—viz., *In re Jones*, is quite conclusive on this point. The only argument of the appellants having any weight was that the powers of

management were so large as to be incompatible with any independent right of possession. According to Mr. Haldane, Mrs. Herbert was at most a casual licensee. But he does not define who actually has the possession. He is obliged to say that all the trusts are for the benefit of the estate somehow or other, so that the possession is, according to him, in that abstraction—viz., the estate. It is not contemplated that the trustees are themselves to occupy any of these residences. The will is clear, the lady cannot be stopped if she chooses to reside. In my opinion the powers come to nothing more than very extensive powers of management—and powers given for the purpose of increasing the enjoyment of the property. They are for the advantage of the lady in question, and enhance the beneficial character of her possession. Under these circumstances I think that the decision of Swinfen Eady, J., was right, and the appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. In this will elaborate provisions are made for the trustees keeping certain premises in a fit state of residence The provisions as to the servants are only one part of this general scheme. Who is to enjoy the possession of the premises? The first trust is a trust to permit Mrs. Herbert "at any time and from time to time during her life to reside." It is a trust which is compulsory on the trustees and not in any way discretionary. It is in fact a trust that Mrs. Herbert shall have a right to reside during her life. It is not a trust that she alone, that she individually shall have a right to go and stay on these premises as a sort of guest or lodger. She is the person to reside, and she is to have the ordinary powers of a mistress. For instance, she can have her own personal servants, she can have her friends to stay with her, and in other respects she can exercise the ordinary rights of a mistress in her own residence during her life. In short, the trust is to permit Mrs. Herbert to use these premises as her residence. She is, to my mind, in the words of section 2, sub-section 5, the person beneficially entitled to possession. If she is not, then there is nobody beneficially entitled. Certainly the servants cannot be beneficially entitled. There is one person, and one person only, Mrs. Herbert, to whom that phrase applies, and to my mind she is clearly tenant for life. The policy of the law is to regard the Settled Land Acts as beneficial, and not to cut down the class of persons to whom the benefits of those Acts apply. No doubt the testatrix did not anticipate this result, and no doubt the powers conferred by the Act interfere with the object she had in view. But this cannot be helped, nor do I regret it.

COZENS-HARDY, L.J. — I agree. It seems impossible to doubt that Mrs Herbert, and she alone, is entitled to possession, if she does not disclaim. The powers of management, extensive as they are, are not inconsistent with the right of the person beneficially entitled. I should like to refer to clause 7 of the will, which confers on the persons entitled to the possession of the estate the right of enjoying certain chattels as heirlooms. Can it be seriously contended that Mrs. Herbert is not entitled to the enjoyment of these heirlooms? This answer is conclusive.

*Appeal dismissed.*

Solicitors, *Freshfields; Hunter & Haynes.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — March 18.

MILLER v. LAW ACCIDENT INSURANCE SOCIETY (LIMITED). (a.)

*Insurance, Marine—"Restraints of people"—Prohibition against landing cattle — "Warranted free of capture, seizure, or detention."*

*Under a Lloyd's policy cattle were insured for a voyage from Liverpool to Buenos Ayres against* (inter alia) "*arrests, restraints, and detainments of all kings, princes, and people.*" *The policy also contained the following clause:* "*Warranted free of capture, seizure, or detention.*" *Prior to the shipment the Argentine Government had issued a decree prohibiting the entry of animals suffering from contagious diseases, and providing for the slaughter of animals suspected of disease. On arrival at Buenos Ayres the cattle were found to be suffering from a contagious disease, and the authorities refused to allow them to be landed. The cattle were thereupon transhipped to another vessel outside the port and taken to another port, where they were sold at a considerable loss. In an action on the policy,*

*Held,* (1) *not agreeing with the judgment of* Bigham, J., *that the loss was a loss within the words* "*restraints of people*" *in the policy; and* (2), *agreeing with* Bigham, J., *upon this point, that the warranty against capture, seizure, or detention freed the underwriters from liability under the words* "*arrests, restraints, and detainments*" *in the earlier part of the policy.*

*Judgment of* Bigham, J. (50 *W. R.* 474, 7 Com. Cas. 151, [1902] 2 *K. B.* 694), *affirmed.*

Appeal by the plaintiff from the judgment of Bigham, J. (reported in 50 W. R. 474, 7 Com. Cas. 151, [1902] 2 K. B. 694).

The action was brought to recover the amount of a total or partial loss of cattle under a Lloyd's policy of marine insurance granted by the defendants to the plaintiff, and dated the 24th of August, 1900, for a voyage from Liverpool to Montevideo and (or) Buenos Ayres, and, so far as actual mortality was concerned, for three days after landing.

The cattle were shipped in the steamship *Bellevue*, to be carried from Liverpool to Buenos Ayres. The risks insured against included "arrests, restraints, and detainments of all kings, princes, and people . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods . . . or any part thereof." At the end of the policy there was this clause: "Warranted free of capture, seizure, or detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities, warlike operations, and all risks of riots and civil commotions, whether before or after declaration of war." Having made the shipment, the plaintiff effected the policy. Many months before the shipment was made—namely, on the 22nd of May, 1899—the Argentine Government had issued a decree forbidding the entry of animals suffering from contagious diseases or coming from countries where such diseases prevailed. The decree contained articles describing the diseases and providing how animals suspected of being affected were to be dealt with, article 5 providing that animals suspected of certain diseases would be slaughtered without delay and a very vigorous disinfection of the ship, &c., would be proceeded with. *The Bellevue* arrived at Buenos Ayres on the 10th of September, 1900,

(a.) Reported by W. F. BARRY, Esq., Barrister-Law.

and the cattle were duly inspected on board the vessel by the Argentine officials, with the result that the Ministry of Agriculture came to the conclusion that they were suffering from disease within the meaning of the decree, and ordered the vessel to leave the port. The order contained a provision that the captain, if he so wished, might transship the cattle to another vessel outside the limits of the port for carriage to some other destination, and that *The Bellevue* must be completely disinfected before the rest of her cargo could be landed.

On the next day (the 11th of September) the President of the Republic and the Minister of Agriculture issued a general order forbidding until further notice the discharge of any cattle arriving from the United Kingdom. Bigham, J., found as a fact that the animals were suffering from disease within the meaning of the decree and that the order forbidding the landing was lawfully made by the Argentine authorities. In obedience to the order *The Bellevue* left the dock in Buenos Ayres, and on the 14th of September the cattle were transhipped into lighters at a place called Santiago, which was outside the limits of the port. On this day notice of abandonment was given. The cattle remained in the lighters for some days, when a ship called *The Sallust* was found to take them on to Montevideo, at which place, after being forty days in quarantine, they were landed and sold at a considerable loss. Bigham, J., held that this was not a loss within the policy, as the mere operation of an ordinary municipal law affecting or preventing the delivery of the insured goods at their destination was not a "restraint of people" within the meaning of the policy, those words referring to something violent and out of the ordinary course of things. The learned judge was also of opinion that the warranty against capture, seizure, or detention operated to release the underwriters from liability in respect of arrests or restraints of all kings, princes, or people. He accordingly gave judgment for the defendants.

The plaintiff appealed.

March 16, 17.—*J. A. Hamilton, K.C.*, and *Maurice Hill*, for the plaintiff.

*Scrutton, K.C.*, and *Loehnis*, for the defendants.

The following authorities were referred to in addition to those referred to in the court below: *Havelock* v. *Hancill*, 3 T. R. 277; *Rotch* v. *Edie*, 6 T. R. 413; *Lubbock* v. *Rowcroft*, 5 Esp. 50; *Forster* v. *Christie*, 11 East. 205; *Geipel* v. *Smith*, 20 W. R. 332, L. R. 7 Q. B. 404; *Crew, Widgery, & Co.* v. *Great Western Steamship Co.*, 4 Times L. R. 148; *Nickels* v. *London and Provincial Marine and General Insurance Co.*, 6 Com. Cas. 15, 49 W. R. Dig. 85; *Cunard Steamship Co.* v. *Marten*, 8 Com. Cas. 17; Arnould on Marine Insurance (7th ed.), ss. 804, 1142, 1150; and Phillips on Insurance (3rd ed.), s. 1114.

March 18.—VAUGHAN WILLIAMS, L.J.—I agree with the judgments about to be delivered, and I will only add a few words of my own. In my opinion, so far as the words in the body of the policy are concerned, the events which occurred in the present case would bring it within the word "restraints," and, therefore, but for the warranty, which I will deal with presently, the underwriters would be liable for the loss. The insurance was upon cattle shipped to Buenos Ayres, the port of destination, which was the only place at which it was commercially worth while to sell them. At Buenos Ayres the adventure was altogether defeated, so far as the cattle were concerned, and the underwriters became liable for the loss. In my judgment the issuing of the decree by the Argentine Government was an act of state and comes within the words "arrests, restraints, and detainments" in the body of the policy. There seems to me to be no analogy between this case and the case of the arrest or detention of a ship at the suit of a private individual for the purpose of instituting proceedings against the ship. But when I come to the warranty, I should be inclined to say, if we were dealing with a document other than a policy of marine insurance, that a restraint of this sort, which was only in the nature of an injunction forbidding the landing of the cattle but allowing the other cargo to be landed under certain conditions if the master thought fit to do so, would not in the ordinary meaning of the English language come within the words "capture, seizure, or detention." It seems to me to be clear that it was not a "capture," and I should have thought that it was not "a seizure or detention" according to the ordinary meaning of those words. But I accept the suggestion that we must not construe policies of insurance as we should other documents, and in this respect Bigham, J., said, "It was said that this exception ought not to be interpreted to include 'restraint.' I think, however, that the very object of this exception is to free the underwriters from liability under the words 'arrests, restraints, and detainments' in the body of the policy. It is true that the same words are not used, but the exception must be taken to refer to something which has gone before, and to what, if not to the words I have mentioned?" It is true that Parsons, in his treatise on Marine Insurance, vol. 1, p. 585, does not speak with any great certainty about the matter, because he says that "detention" is a taking with intent to return the thing taken, as where a ship is arrested by an embargo, or stopped for search, or detained in a port by an actual blockade, "or, perhaps, by being lawfully restrained from entering her port of destination by a blockading force." I cannot see for this purpose much difference between the case of a restraint by a blockading force and the case of a restraint by the enforcement of a sanitary law. In these circumstances, in view of the meaning which, according to the authorities, seems to have been placed upon the words of the warranty, I have not sufficient confidence in the natural meaning of the words to justify me in differing from the interpretation placed upon them by the learned judge. The result is that Mr. Justice Bigham's judgment must be affirmed, for the reasons given in the second part—namely, the reasons based on the warranty clause—but not for those given in the first part of that judgment.

STIRLING, L.J.—I am of the same opinion. In the first place I think that the proceedings at Buenos Ayres in September, 1900, amounted to an exercise of force by the Government of the Argentine Republic so as to bring the case within the perils insured against. What took place was this. The ship, having arrived at Buenos Ayres, was inspected by an official, when it was discovered that certain of the cattle were or might be suffering from an infectious disease. Thereupon the Ministry of Agriculture intervened and served a resolution upon the captain directing him to take the ship out of the port, with leave to transship the cattle on to another vessel outside the port, and ordering that the ship should be disinfected before the rest of the goods were landed. On the following day an order was made by the President of the Republic and the Minister of Agriculture forbidding until further notice the discharge of any cattle arriving from the United Kingdom. The captain, having been served with the resolution, took the ship out of port, and, in order to minimize the loss, he transshipped the cattle on to another vessel; and they were taken to Montevideo and sold there.

It seems to me that the loss was occasioned by the active intervention of the Government of the Argentine Republic, and that intervention was none the less an exercise of superior force because neither the army nor the police force actually intervened. The natural inference is that, if the captain had not obeyed the order, the government officials would have taken possession of the ship and slaughtered the cattle in accordance with article 5 of the decree of the 22nd of May, 1899. The captain, therefore, seems to me to have been justified in taking the ship outside the port and transshipping the cattle in order to minimize the loss, and in doing so he acted in compliance with superior force. It was none the less the act of the Argentine Government because it was done in accordance with the laws in force in that country. It has been decided that it is a peril covered by a policy of insurance in similar terms to those in the present case where there has been a loss caused by the intervention of a government in enforcing the revenue laws. I can see no distinction between enforcing the revenue laws and enforcing the sanitary laws. The principle as to the enforcement of the revenue laws was recognized in *Cory* v. *Burr*, 31 W. R. 894, 8 App. Cas. 393, where the seizure was the result of smuggling, and in *Robinson Gold Mining Co.* v. *Alliance Insurance Co.*, 50 W. R. 109, [1902] 2 K. B. 489. On behalf of the defendants it was argued that a long line of authorities, of which *Hadkinson* v. *Robinson*, 3 Bos. & P. 388, is a leading example, apply. The effect of those cases was summed up by Brett, J., in *Rodocanachi* v. *Elliott*, 21 W. R. 810, L. R. 8 C. P. 649, at p. 670, thus: "If the master of the ship, of his own accord, or in obedience to the orders of the officers of the Queen, abstains from entering a blockaded port, the *causa proxima* is not the blockade, but the voluntary act of the master." It seems to me that the present case goes far beyond what was laid down there. In the view which I take of the facts the master did not act voluntarily. If on entering the port the master had been informed that there was a law against his landing the goods and that it was likely to be put into force, and he had gone on his voyage and not entered the port, the case would have been like *Hadkinson* v. *Robinson*. But here he went as far as he could, and only desisted when the government intervened. Those cases therefore do not apply. Upon this question, therefore, I differ from the decision of Bigham, J.

Upon the second question I feel unable to differ from the opinion expressed by the learned judge. The words of the warranty are, no doubt, somewhat difficult to construe; but, having regard to the judgment which is about to be delivered by Mathew, L.J., I do not differ from the conclusion at which he has arrived.

MATHEW, L.J., read the following judgment: The material facts may be stated in a few words. By the order of the administration, the executive authority at Buenos Ayres, the vessel, *The Bellevue*, was stopped before she reached her berth. The discharge of the cattle was prohibited, and the animals were detained on board the vessel. The master was directed to leave Buenos Ayres and land the cattle at some other port. He obeyed. The animals were transshipped outside the port and sent to Montevideo. It was not disputed that the object of the assured in shipping the cattle to Buenos Ayres in consequence was altogether defeated. It was argued for the defendants that the loss thus occasioned was not due to "arrest, restraint, or detainment" within the meaning of the policy. The words, it was contended, implied the use of direct force, and none had in fact been employed. The case of *Finlay* v. *Liverpool and Great Western Steamship Co.*, 23 L. T. Rep. 251, upon which reliance was placed by the defendants' counsel, afforded no grounds for this position, and no other satisfactory authority was referred to. If actual force was not used it was because there was no opposition. The master submitted to the orders of the administration. The result to the assured was the same as if force had been used, and even if the defendants were right in their interpretation of the words in question, the loss was *ejusdem generis* with the peril described in the policy, and was covered by the general words, "other losses and misfortunes," which end the enumeration of the perils insured against. It was further argued for the defendants that the loss was not within the policy because the acts of the administration were illegal—that is to say, were out of the ordinary course of the law. There was no reason for saying that what was done by the administration was out of the ordinary course of the law of the port of destination. Even if it were, I do not see how it would help the underwriters. I am of opinion that but for the warranty the underwriters would be responsible for the loss in question. This conclusion is in accordance with the decisions referred to in the argument with respect to the meaning of similar words in charter-parties where shipowners and charterers have been exonerated from the performance of their obligations by a blockade which rendered access to a port commercially impracticable. No reason was given with respect to this insurance why the words "arrest of princes" in this policy and in an ordinary charter-party should have different meanings. But the policy contains the warranty against "capture, seizure, or detention," commonly called at Lloyd's the f.c.s. clause; and it was argued for the defendants that their liability under the earlier part of the policy was cancelled. The warranty goes beyond the words "arrest" and "restraint." "Capture" and "seizure" are stronger expressions. It was suggested that what was meant were acts of warfare, but it is clearly settled that the words have no such restricted meaning: *Cory* v. *Burr*. It is not, in my opinion, intended by the alteration of terms to describe a different class of perils from those previously mentioned. Counsel for the plaintiff failed to suggest any practical difference for the present purpose between the two sets of phrases. It seems to me sufficient to point out that the word "detention" in the warranty cannot be distinguished from the word "detainment" in the earlier part of the policy. The loss, in my judgment, is within the warranty, and the underwriters are not liable in this action. For these reasons I agree that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the plaintiff, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, Dickinson, Hill, & Roberts*, Liverpool.

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

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From Registrar in Bankruptcy. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — March 13.

*In re* BEER.
*Ex parte* BEER. (*a.*)

*Bankruptcy—Discharge—Subsequent scheme of composition involving annulment of bankruptcy—Discretion of*

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

*court as to annulment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 23, 32—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *ss.* 8, 9.

*The court, in exercising its discretion as to the annulment of a bankruptcy, will take into consideration not only the interest of creditors but also and primarily the interests of the public and commercial morality.*

*A., who had been adjudicated a bankrupt and obtained a discharge, entered into a scheme of composition with his creditors, one of the conditions of which scheme was that the bankruptcy should be annulled. A. had been guilty of certain offences under section* 8 *of the Bankruptcy Act*, 1890.

*Held, that, in the interests of public and commercial morality, the court was precluded from ordering the bankruptcy to be annulled.*

This was an appeal by the bankrupt from the refusal of Mr. Registrar Giffard to approve of a scheme of composition under section 23 of the Bankruptcy Act, 1883.

The facts were as follows:

In 1896 Mr. Beer commenced business as a whisky blender. On the 10th of April, 1899, a receiving order was made against him, and on the 27th of the same month he was adjudicated a bankrupt. In May, 1899, a first dividend of 2s. 1d. in the pound was paid, and in July the bankrupt applied for his discharge. On proof (1) that the assets were not equal to 10s. in the pound on the amount of unsecured debts; (2) that the debtor had continued to trade after knowing himself to be insolvent; (3) that the debtor had been guilty of misconduct in having, without his wife's knowledge and consent, appropriated and employed in his business money deposited with him by her, it was ordered by the registrar that the discharge should be suspended for two years and six months, and that the discharge should take effect as from the 12th of January, 1902.

On the 9th of January, 1903, a meeting of creditors was held at which the debtor proposed to pay an additional dividend of 7s. 11d. in the pound (making in all 10s. in the pound), but subject to the condition that his bankruptcy should be altogether annulled. This proposal was accepted by the majority of creditors, and accordingly on the 28th of January, 1903, application was made to the court for its approval of the scheme. One of the creditors—viz, the debtor's wife, had withdrawn her claims against the estate and executed a release under seal.

On the 4th of February, 1903, the application was heard. It was supported by nine creditors, and opposed by one. The official receiver reported in favour of the proposal. The learned registrar refused to approve of the scheme. He was of opinion that section 23 did not apply after the bankrupt's discharge had taken effect. It was in effect an application to remove disqualifications to which the bankrupt was subject by reason of the fact that five years had not elapsed since the date of his discharge.

The bankrupt, who had been elected a councillor of a borough council, appealed.

Section 23 of the Bankruptcy Act, 1883, is as follows: (1) "Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication." (2) "If the court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the court may appoint, on such terms and subject to such conditions, if any, as the court may declare."

Section 32, sub-section 1 (*d*), of the Act is as follows: "When a bankrupt is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for being elected to or holding or exercising the office of mayor, alderman, or councillor."

*Muir Mackenzie*, for the debtor.

*Danckwerts, K.C.*, and *Carrington*, for the creditors supporting the appeal.—The position is different to what it would have been if the scheme had been made before the discharge. The first offence of the bankrupt—viz., assets of a value below 10s. in the £, compelled the registrar to suspend the discharge for two years. For the two other offences he added six months. From the point of view of the creditors, if the court accede to our request, we get 10s. in the £. If the court does not accede we are punished. Is it worth while to punish the creditors for the purpose of imposing a slight inconvenience on the bankrupt. The Bankruptcy Act was passed as much for the benefit of creditors as for the punishment of the bankrupt.

*Herbert Reed, K.C.*, and *E. Clayton*, for the opposing creditor, were not called upon.

COLLINS, M.R.—This is an appeal from a decision of Mr. Registrar Giffard, who has refused to approve of a scheme of composition under section 23 of the Bankruptcy Act, 1883, of a scheme which involves the annulment of the bankruptcy. The debtor got an order of discharge subject to a suspension of two and a-half years, but he wishes now to get his bankruptcy altogether annulled. Now at one time it was thought that there could be no annulment of bankruptcy except under section 35 of the Act of 1883. That view was not adopted in the Court of Appeal. Here it has been held that the court has a discretion to permit the annulment. But the circumstances must be special, and there is, to start with, a vehement presumption against the debtor's right to have the bankruptcy annulled. In the present case the debtor's conduct is open to grave suspicion. The learned registrar has reported that he knowingly appropriated and employed in his business and without his wife's knowledge and consent money deposited by her with him. This is a fraudulent breach of trust, and as such one of the offences mentioned in section 8 of the Bankruptcy Act, 1890. The annulment of a bankruptcy is a matter in the discretion of the court; it is a matter of duty on the part of the court. The court is under a duty to consider the character of the bankrupt, how it is that he came to be bankrupt, and how he has gone through the ordeal of bankruptcy. It is said that the court ought to consider the interests of the creditors rather than the interests of the public. But it has been held that, even where the bankrupt has paid his creditors in full, the court will, in the interests of the public, disallow an annulment. The primary matter for consideration is the conduct of the debtor. I cannot consider the special grounds on which the learned registrar refused the application. But he was of opinion on the facts that the debtor's conduct was not such as to entitle him to an annulment. For these reasons I am of opinion that the appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. In applications of this kind, made for the annulment of a bankruptcy, the court is bound, in exercising its discretion, to look at many things, amongst others at the state of affairs in the bankruptcy, and in particular the conduct of the bankrupt. The court, no

doubt, is not absolutely precluded from allowing an annulment of the bankruptcy when such annulment is in the interests of the creditors merely because the bankrupt has been guilty of some offence. But it is the duty of the court to seriously consider the position of affairs when the bankrupt is proved to have been guilty of misconduct. It is important to see whether in the interest of the public there should be an annulment. The court has to look at the public interests and the requirements of commercial morality. Even if it were to the interest of creditors that there should be an annulment, yet that is no consideration if the court has come to the conclusion that an annulment would not be in the interests of public and commercial morality. I have already in the course of the argument referred to *Ex parte Kearsley*, 18 Q. B. D. 168, 35 W. R. Dig. 15. Lindley, L.J., at p. 174 of the report, says this: "What, then, is the duty of the court in dealing with a matter of this kind? It is laid down in sub-section 6 of section 18. It is the duty of the court to look, not only at the interest of the creditors, but also at the conduct of the debtor. Under some of the circumstances mentioned in sub-section 6, however beneficial the composition or scheme may be to the creditors, it is the duty of the court by reason of the conduct of the debtor to refuse to sanction it." Lopes, L.J., at p. 175 of the same report, says: "The circumstances differ in almost every case. It would be impossible to lay down any general rule applicable to all cases. But I understand it to be left to the discretion of the court, when a composition appears reasonable, to determine whether the conduct of the debtor is such as to make it more expedient in the interest of the public to punish him than to consult only the interest of the creditors."

It must not be forgotten that what the bankrupt desired was to be able to go into the world and say "Oh, my bankruptcy was annulled and reversed by order of the court. My conduct cannot have been very bad." Ought we to allow the debtor to go about and say this? It appears from the records of the court that he started in 1896 with £100, that he carried on business for three years, that throughout his business was unsuccessful, that he owed debts amounting to several thousand pounds, that he paid only two shillings in the pound, that he continued to trade after knowing himself insolvent, that he appropriated money of his wife without her knowledge and consent. Is that conduct such as should justify the court in annulling the bankruptcy? The interests of the public and commercial morality are against an annulment. For these reasons the appeal, in my opinion, fails.

COZENS-HARDY, L.J.—I agree. I protest against the notion that the bankrupt purged his offence when the period of his discharge elapsed, or that he could make a bargain with his creditors that his bankruptcy should be annulled. On the ground of public policy I disallow the appeal.

*Appeal dismissed.*

Solicitors, *Harrison & Powell*; *C. W. & H. B. Taylor*; *Foy & Co.*

## High Court of Justice.

Chan. Div. } Farwell, J. } March 12.

BOYCE v. EDBROOKE. (a.)

*Powers—Lease to donee of power and others—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38)—*Covenant to pay rent—Validity of lease—Lease to trustee for donee.*

*A lease granted by a donee of a power of leasing to himself or to himself and others is* ipso facto *void.*

Semble, *except in the case of certain powers of ancient creation, where uniform practice since their creation has been held to show that a special construction must be put on the power, a lease by a donee of a power to a trustee for himself is void.*

Bevan *v.* Habgood, 8 *W. R.* 703, 1 *Joh. & H.* 222, *discussed.*

*A tenant for life purported to grant a lease under the Settled Estates Act*, 1877, *to a firm in which he was himself a partner; the lease contained covenants for payment of rent, &c., by the "lessees," who were defined as being the donee and his partners and their executors, administrators, and assigns.*

*Held, that the lease was void; first, because in fact the rent received was not the best obtainable; secondly, because there was during the life of the tenant for life no enforceable covenant; thirdly, because the lease was to the donee himself with others.*

Witness action.

In and prior to 1892 Frederick Boyce was tenant for life, under the will of his father, of a house in which he lived and carried on business.

The house was mortgaged to a building society, and the annual payments under the mortgage amounted to £60 10s.

In 1892 he entered into partnership with his son and W. M. Goldsworthy. It was agreed that the partnership business should be carried on in the house, and that Frederick Boyce should grant a lease of the house to the firm, but should himself continue to live in his house. Frederick Boyce accordingly purported in the exercise of the powers given to him by the Settled Estates Act, 1877, and of any other powers thereto enabling him, to grant a lease to himself, his son, and Goldsworthy, thereinafter called "the lessees." The expression "the lessees" was therein defined as including Frederick Boyce, his son, Goldsworthy, "and their executors, administrators, and assigns." The lease contained covenants by "the lessees" with Frederick Boyce for (*inter alia*) the payment of rent. The rent reserved was £60 10s.—*i.e.*, the annual sum payable to the building society.

It was subsequently agreed that when Frederick Boyce ceased to manage the business he should leave the house and one of his partners should live there, and that the firm should pay Frederick Boyce £16 a year in lieu of his right to live in the house.

Frederick Boyce died in 1902. In the meantime the lease had been assigned by the lessees to a purchaser, who in turn assigned it to the defendant.

This action was brought by the persons entitled to the freehold, after the death of Frederick Boyce, under the will of his father, to recover possession of the house on the ground that the lease was void.

Both the Settled Estates Act, 1877, and the Settled Land Act, 1882, require that leases made under them shall reserve the best rent reasonably obtainable.

(a.) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

*Upjohn, K.C.*, and *F. Thompson*, for the plaintiffs.—A donee of a power may not lease to himself. The opinion of Page-Wood, V C., in *Bevan* v. *Habgood*, 8 W. R. 703, 1 Joh. & H. 222, and of Lord St. Leonards (Sugden on Powers (8th ed.), 717), that he may lease to a trustee for himself, is contrary to general principle and is not really supported by the cases to which they refer. The only case when anything similar was decided was that of *Wilson* v. *Sewell*, 4 Burr. 1975, 1 Wm. Bl. 616, where a lease had been granted by a Master of the Rolls to himself; and that lease was supported, not on a ground of general principle but because the established custom of the Rolls Office was admitted as *contemporanea expositio* of the Act under which the lease was granted. In any case this lease is bad because there is no enforceable covenant, and further because the evidence shows that the best rent was not reserved.

*Butcher, K.C.*, and *Clay* (*R. Holman Gregory* with them, for the defendant, relied on *Bevan* v. *Habgood*, and the opinion of Lord St. Leonards, and argued that the covenants in the lease were joint and several and therefore enforceable.

FARWELL, J.—This is a lease purporting to be granted under a statutory power, which requires that the best rent obtainable shall be reserved. I find that the best rent obtainable was not reserved, and therefore the requirements of the Act giving the power have not been complied with and there is no lease. But there is a further ground on which the lease cannot be supported. The Act requires that the lease shall contain covenants for payment of the rent, &c. Now here the lease is made by the tenant for life to himself and others. It follows that during his lifetime there are no covenants that could be sued upon—that is, assuming that the covenants are joint. It is argued that they are joint and several, and I have done my best to spell out such a covenant; but the court, though in the case of ambiguous words it may adopt a construction which would support the lease, must not alter the plain meaning of words, and I find here no words of severance. Treating this, therefore, as a joint covenant, it is clear that no action at law could be brought, and the Act, when it requires a covenant, means a legal covenant enforceable at law and not some right which might or might not be enforceable in equity. There remains, however, the question whether in any case a lease by a tenant for life to himself and others could be upheld. Fortunately I am not bound to decide this question in a manner which would contravene any previous judgment. If there is one doctrine better settled than another, it is that a man in a fiduciary position should not enter into a transaction in which his interest conflicts with his duty. It is said that the one exception to this is the case of a donee of a power of leasing, who, it is said, may grant a lease to a trustee for himself. If it is so it is a great anomaly. But assuming that this anomaly exists in the case of a lease by a tenant for life to a trustee for himself, in which case the lease could contain valid covenants, yet there is no authority that he can grant such a lease to himself, and I should decline to extend this exception, if it exists at all, by holding that he can do so.

However, after the full discussion of this question that has taken place, I ought to say further that I much doubt whether there is such an exception to the general rule of equity as the text-books state, and as Page-Wood, V.C., in *Bevan* v. *Habgood* thought. In that case the Vice-Chancellor was clearly much guided by the circumstances of the particular case. I do not think his proposition is proved by the cases of *Wilson* v. *Sewell* and *Cardigan* v. *Montague* to which he refers. As to *Cardigan* v. *Montague*, which is only reported in an appendix to Sugden on Powers, p. 918, I cannot find that this question was ever raised in that case. There was a reference to the master to report as to certain leases whether they were valid as reserving the best rents and containing the proper covenants, and the master's certificate was afterwards varied as to certain of these leases, but from beginning to end of the report there is no suggestion that this particular objection to the leases was ever raised. That being so, I cannot treat this decision of the Lord Chancellor in 1754 as having established such an important exception to what is now, and I suppose was then, a well-settled rule. Of the cases referred to by Lord St. Leonards as showing the existence of this exemption, the earliest is *Taylor* v. *Horde*, 1 Burr. 60. I cannot find that in the argument in that case, which was reported very fully, this point was ever raised, and it was a case before a court of common law, which in those day did not regard rules of equity. There is, however, a *dictum* by Lord Mansfield at p. 124 to the effect stated by Lord St. Leonards. But all that was decided in that case was that a lease which had been granted by a tenant for life to a trustee for himself was a valid lease at law as against a purchaser of the freehold, and I do not see why it was not, nor do I see that the decision affects the rights of the remaindermen in this case.

*Wilson* v. *Sewell* is usually cited as reported in 4 Burr. 1975, but it is also reported in 1 Wm. Bl. 616, and as there reported does not appear to be an authority for the proposition contended for. The case was that of a lease granted under a private Act of 12 Charles II. by a Master of the Rolls to a trustee for himself. Lord Mansfield, as reported in 1 Wm. Blackstone, gave his decision on the practice of the office for a hundred years, and the real meaning of the case is that the uniform practice of the Masters of the Rolls since the passing of the Act, which conferred the power of leasing, are admissible as *contemporanea expositio* to show the meaning of that Act. The case is therefore no authority for the general principle; and the same explanation applies to what is said by Mr. Chance (2 Chance on Powers 2091) on leases granted by bishops.

Solicitors, *S. F. Sutton*, for *Page & Thompson*, Bristol; *C. Bisgood*, for *C. Pillers*, Bristol.

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Chan. Div. } March 27.
Buckley, J. }

*In re* JENNINGS (A SOLICITOR). (*a.*)

*Manor—Steward—Custody of court rolls.*

*A steward of a manor has, for the purpose of performing the duties of his office, a right to the custody of the court rolls, and, in the absence of misconduct, he possesses this right, even as against the lord.*

Windham *v.* Giubilei, 40 *L. J. Ch.* 505, 19 *W. R. Dig.* 66, *followed.*

Rawes *v.* Rawes, 7 *Sim.* 624, 5 *L. J. Ch.* 114, *explained and distinguished.*

Adjourned summons.

This was an application on the part of Arthur John Wise, as lord of the manor of Beverley Water Towns, to compel William Edward Henry Jennings, the steward of the manor, to deliver up to him the court

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

rolls, to the custody of which the applicant claimed to be entitled.

The respondent had been appointed by the predecessor in title of the applicant by a deed-poll to be steward during the life of the respondent, provided "he should so long well and faithfully demean and behave himself in his said office."

There was no allegation of misconduct on the part of the steward, but each party contended that the balance of convenience was in favour of his having the custody, and, in addition, the lord claimed the custody as a matter of right. The respondent said that there was no such right.

*T. L. Wilkinson*, for the applicant.—The lord has, as of right, the custody of the court rolls; and though they ordinarily remain in the custody of the steward, he holds them only as servant or agent of the lord: *Rawes* v. *Rawes*. *Hughes* v. *Mayre*, 3 T. R 275, and *Ex parte Grubb*, 5 Taunt. 206, which were cited in the argument in that case are, authorities, not for the proposition of law there laid down, but to show that the court had jurisdiction to make the order. *Windham* v. *Giubilei* is diametrically opposed to *Rawes* v. *Rawes*, was decided on its own facts, and ought not to be followed.

He also referred to *Cocks* v. *Harman*, 6 East 404.

*Austen-Cartmell*, for the respondent.—I do not claim an actual title in the court rolls, but need to have their custody for the purposes of my business as a steward. Although a steward is a servant or agent of the lord, he is not a mere servant, but has duties to the tenants. Elton on Copyhold (2nd ed.), p. 314, and Scriven on Copyhold (7th ed.), p. 431, treat *Windham* v. *Giubilei* as an authority for saying that a steward cannot be deprived of the rolls except for misconduct. I do not quarrel with the actual decision in *Rawes* v. *Rawes*, for there the steward had been guilty of misconduct, but neither *Hughes* v. *Mayre* nor *Ex parte Grubb* warrant the statement that the lord has an absolute right to the custody of the rolls.

He also referred to *North-Western Railway* v. *Sharp*, 3 W. R. 12, 10 Exch. 451, and *Ex parte Corpus Christi College*, 6 Taunt. 105.

*T. L. Wilkinson* replied.

BUCKLEY, J., stated the facts, and continued: The question I have to decide is whether the lord, as against the steward, is as of right entitled to have possession of the court rolls. Looking at the matter on principle, what strikes me in the first instance is that the lord is the person who unquestionably is entitled to their possession, but not as his own property. *R.* v. *Tower*, 4 M. & Sel. 162, shows that as regards the court rolls he is a trustee and guardian of the tenants' rights. Again, the steward in a sense is a servant of the lord; but he is not a mere servant. He holds a judicial office and is unquestionably entitled to the possession of the rolls for the purpose of executing the duties of his office. The lord cannot refuse to let him have them for those purposes; his rights are qualified rights. The rights of the lord are, in a certain sense, paramount, but they are subject to the steward's claim to the use of the rolls; and the steward thus has rights which in a sense are paramount to those of the lord; but both the lord and the steward are trustees for the tenants of the manor. In that state of rights, where the steward is properly exercising the duties of his office, and for the purposes of those duties needs the possession of the court rolls, has the lord any right to come to him and say, "Deliver them up to me"? In my opinion he has no such right. I must refer to the authorities, and, in particular to the case of *Rawes* v. *Rawes*, before Shadwell, V.C., in which the decision, if his language is to be understood in the wide sense in which it is reported in Simon, covers this case. I do not think it can be so understood.

The first case bearing on the subject is that of *Hughes* v. *Mayre* in 1789. What I get out of that case is that the lord of the manor, who was going abroad, and wanted to see the court rolls and deeds belonging to the estate, called on Mayre to show cause why he should not deliver them up to him; it appears that Mayre had been concerned for the original proprietor of the manor, and had been continued in the employment of Hughes. It does not appear that Mayre had any tenure of the office. I gather that he had not, but that Hughes, the lord, was minded to appoint his own steward, and for that purpose had asked for the court rolls. Mayre did not deny the right of the lord to the custody of the rolls, but said, first, that he had a lien on the muniments; and, secondly, that a third person was interested in them. It was ordered that the lord should pay £300 into court, and that thereupon the steward, or as I read it, the late steward, should deliver up the rolls. That is the whole case. No general proposition was laid down to the effect that the lord has an absolute right to an order that the steward should hand over the rolls.

In *Ex parte Grubb*, in 1813, the lord had dismissed one steward and appointed another in his place. The application was that the late steward should deliver up to the lord or the present steward the rolls and all other deeds relating to the manors. No cause being shown, the rule was made absolute.

The next case, in 1815, *Ex parte Corpus Christi College*, is similar. A Mr. Fry had employed a steward. The application was that he should deliver over the court rolls. The court, after some hesitation on a question of jurisdiction, granted a rule *nisi* to the whole extent prayed. It was simply a case of a lord enforcing his rights as against a former steward.

That being the position of the authorities, the case of *Rawes* v. *Rawes* in 1836 came before Shadwell, V.C. There are two reports, and from that in the Law Journal it appears that the suit was instituted to execute the trusts of a will under which the infant plaintiffs were lords of a manor. They alleged that a solicitor, who had been employed as steward of the the manor, had been negligent, had been adjudicated a bankrupt, and had been in gaol. In other words, it was a case of a steward who had been guilty of misconduct, and was not to be trusted with the documents. The cases cited in support of the application were *Hughes* v. *Mayre* and *Ex parte Grubb*. According to the report in Simon. Shadwell, V.C., said: "Nothing in the nature of decision has been cited to me to show that the right to hold the court rolls is in the steward as against the lord. In the cases referred to in support of the petition the only doubt that the judges entertained was whether they had jurisdiction to order, in a summary way, an attorney to deliver deeds to his client, and finding that they had that jurisdiction, they take it for granted that they had authority to compel the steward, as an attorney, to deliver up the court rolls to the lord." Then follows this sentence, which is not so strongly expressed in the Law Journal: "The lord has, as of right, the custody of the court rolls, and though they ordinarily remain in the custody of the steward, he holds them only as servant or agent of the lord." In the Law Journal the Vice-Chancellor is reported to have said: "I have heard nothing which can lead me to a decision that the right to hold the court rolls of a manor is in the steward as against the lord. I was very much struck with the boldness of this proposition; it struck me as something new."

He is considering the case of a steward who has misconducted himself, and is trying to keep the rolls as against the lord. Later on he says: "In *Hughes* v. *Mayre*, Lord Kenyon and the Court of Common Pleas took it for granted that the lord of the manor had a right to compel the steward to give up the court rolls: and my opinion is that the lord of the manor has himself a right to the custody of the court rolls, and though they frequently remain in the hands of the steward, that is only a matter of convenience, and he holds them as the servant of the lord. I am bound by the cases, and I must make the order as prayed." If he really said that, and thought that *Hughes* v. *Mayre* was an authority for holding that the lord could, as of right, call on the steward to hand over the rolls, I can only say that he was wrongly applying that decision. But I do not think that he intended to lay down so broad a principle. I think that what the Vice-Chancellor meant to decide was that, although a steward has for the purposes of his office a right to the custody of the rolls, if he has committed misconduct, the lord has a right as against him to say that he shall keep them no longer, but shall hand them over to himself.

The next decision is that of *Windham* v. *Giubilei*, by Bacon, V.C., and unless the judgment of Shadwell, V.C., in *Rawes* v. *Rawes* is understood as I have read it, these two cases appear to me to be irreconcilable the one with the other. In that case the lord was an infant, and the summons was by his guardian *ad litem* for an order to compel the steward to deliver up the court rolls of the manor to the receiver appointed in the suit. If there had been any such right in the lord as the broadness of the language of Shadwell, V.C., suggests, that order must have been made. The Vice-Chancellor says: "I think that this application is misconceived altogether. There is a steward of the manor validly appointed (as appears by the evidence which is uncontradicted), though not appointed by deed, and although his last appointment was made by General Windham, who, as is said, had only a limited estate, Sir William Forster is *de facto* the steward of the manor. Certain duties have to be discharged by him, for the neglect of which duties he is responsible to this court beyond a doubt, and perhaps to others. He cannot discharge those duties without the possession of the books, the court rolls, and so on mentioned in the first part of this summons, and no case has been suggested why he should be removed from his office. If any such case exists, or if it is thought expedient to remove him, that application must also contain a suggestion of who ought to be steward, because the court will not displace one steward without seeing that there is another to perform his functions. I do not agree with Mr. Everitt at all when he says that the receiver is the man who is to be steward of the manor or hold the manor courts. If there is a case to remove Sir William Forster from his office of steward, let that be properly brought forward in the proper way, and the court will know what to do with it; in the meantime the court rolls seem to be in the proper custody." That is, as against the lord who is seeking to have them delivered to him. "It is not suggested that any improper use will be made of them. The case does not bear the slightest resemblance to the case cited from the 7th of Simon's Reports, where the misconduct of the steward, or the qualification of the steward, formed a principal feature, though perhaps not the only reason for the decision there pronounced."

Having gone through the authorities, I desire to read a passage from Elton (p. 314): "With regard to the custody of the court rolls, the general rule seems to be that the steward is entitled to the possession of the court rolls, as he has certain duties to perform which he cannot properly discharge without possession of the rolls, and for the neglect of which he would be responsible. But as the lord is, in respect of the court rolls, 'a trustee and guardian of the evidence of the tenants' rights,' it seems that the steward is not entitled to hold the rolls as against the lord, and if there is proof of any misconduct on the part of the steward, the court will order the rolls to be delivered to the lord, but if there is no suggestion of misconduct, the courts will not deprive the steward of the custody."

I think that the steward has, for the purpose of the discharge of the duties of his office, a certain right to the court rolls—that is, to have possession of them for that purpose. He can be dispossessed of them if the lord shows that he is improperly using them. There is no suggestion in this case of any kind of misconduct on the part of the steward. I have no doubt that it is necessary for the purposes of the steward that the rolls should remain where they are.

The application fails, and I dismiss it with costs.

Solicitors, *Long & Gardiner*, for *Crust, Todd, Mills, & Co.*, Beverley; *Ullithorne, Currey, & Jennings.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — Jan. 16.

DUNN *v.* SOUTH-EASTERN RAILWAY CO. (*a.*)

*County court—Practice—Costs—Money paid into court—Plaintiff recovering no more than amount paid in—Costs of particular issues—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 113.

*Where money has been paid into court, and the plaintiff recovers no more than the amount paid in, the defendant is entitled to the general costs of the action, but the county court judge has the same power as a judge of the High Court to give the plaintiff the costs of any issue on which he has succeeded.*

Appeal from his Honour Judge Lumley Smith, sitting at the Westminster County Court.

The appellant in this case had brought an action against the respondents for damages for negligence. At the original trial he was non-suited, as the judge held there was no evidence of negligence, but the Divisional Court ordered a new trial, and at the second trial he recovered the sum of £25. That being the sum paid into court, judgment was therefore entered for the defendants with costs.

The plaintiff then applied that he should have the costs of the issue of negligence, but the county court judge refused, on the ground that he had no jurisdiction to do so, though he would have exercised his discretion in favour of the plaintiff had it been in his power to do so.

By section 113 of the County Courts Act, 1888, it is provided as follows: "All the costs of any action or matter in the court not herein provided for shall be paid by or apportioned between the parties in such manner as the court shall think just, and in default of any special direction shall abide the event of the action or matter, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said court."

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

*Woodfin*, for the appellant.—There is clear authority for saying that if this had been an action in the High Court the judge would have had power to award my client costs of the issue on which he succeeded (*Wagstaffe* v. *Bentley*, [1902] 1 K. B. 124, 50 W. R. Dig 135; *Wheeler* v. *United Telephone Co.*, 33 W. R. 295, 13 Q. B. D. 597); and I submit there is no difference between the county court and the High Court in this respect. Section 113 of the County Courts Act, 1888, gives authority to the judge to deal with costs, and section 164 of the same Act shows that the High Court practice is to be followed where possible.

*Mellor*, for the respondent.—I admit that if this case had been a High Court case the judge would have had power to give the plaintiff the costs of the issue, but in the county court there are no pleadings, and therefore there are no issues to be tried separately.

Counsel referred to *Wood* v. *Leetham*, 61 L. J. Q. B. 215, 40 W. R. Dig. 64, and *Bernard* v. *Greenwood*, reported in note to *Wheeler* v. *United Telephone Co.*

Lord ALVERSTONE, L.C.J.—This is a case of some importance. That the county court judge has a general discretion over costs is shown by section 113 of the County Courts Act, 1888. That section provides as follows: [His lordship here read the section.] Dealing with the defendant paying money into court, section 107 of the Act directs as follows: "It shall be lawful for the defendant in any action or matter within such time as shall be prescribed to pay into court such sum of money as he shall think fit . . . but if the plaintiff shall recover no further sum in the action or matter than shall have been so paid in . . . he shall pay to the defendant the costs incurred by him in the said action or matter after such payment." It is clear, therefore, that the County Court Acts, and the rules framed under those Acts, contemplate the apportionment of costs by the judge, and it is also laid down by the County Courts Act, section 164, that the county court practice should as far as possible follow the High Court practice. Now it has been settled by a harmoniously consistent series of cases that, where the defendant has paid money into court, and the plaintiff recovers no more than the amount paid in, the defendant is entitled to the general costs of the action. I need only cite as an authority for that proposition the case of *Wheeler* v. *United Telephone Co.* But that the judge has also a discretion and can apportion the costs of particular issues is shown by the case of *Wagstaffe* v. *Bentley*. In the present case the learned county court judge said: "I should have awarded the costs of the issue of negligence to be paid by the defendant if in my opinion I had the power." In awarding the plaintiff those costs we are therefore only doing what the learned judge would have himself done. There is one other matter I wish to mention. When we on a former occasion sent back the case for a new trial we ordered the costs of the new trial to abide the event, but we did not make provision for the present contingency, and we did not intend to withdraw from the learned judge his discretion as to costs. That is, in my opinion, equally part of the event. The result is that, while the defendants get the general costs of the action, the plaintiff is entitled to have the costs of the issue on which he succeeded, that is to say—the issue of negligence.

WILLS, J., concurred.

CHANNELL, J.—I also concur in the judgment of my lord, and I only wish to add two observations—first, that in making the order that the defendants should pay the plaintiff's costs we are only exercising the judge's discretion in the way in which he himself would have exercised it; secondly, that the absence of pleadings does not prevent there being specific issues is shown by the case of *Forster* v. *Farquhar*, [1893] 1 Q. B. 564.

*Appeal allowed.*

Solicitor for the plaintiff, *H. C. Curtis*.

Solicitor for the defendants, *J. F. Watkin*.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) } Nov. 8; Dec. 18.

COVINGTON v. METROPOLITAN DISTRICT RAILWAY CO. (*a*.)

*Practice—Costs—Taxation—Compensation under Lands Clauses Act—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 52—*Lands Clauses* (*Taxation of Costs*) *Act* (58 & 59 *Vict. c.* 11), 1895—*Supreme Court of Judicature* (*Officers*) *Act*, 1879 (42 & 43 *Vict. c.* 78)—*Ord.* 65, *r.* 27 (25).

*The Chancery taxing-masters have now, by virtue of their being amalgamated with the Central Taxing Office, under rules made in January*, 1902, *and passed pursuant to the Supreme Court of Judicature* (*Officers*) *Act*, 1879, *all the powers previously possessed by masters of the Supreme Court.*

*Held, therefore, that a Chancery taxing-master was entitled to tax the costs of a compensation case under the Lands Clauses Act*, 1845.

*Owen* v. London and North-Western Railway, 16 *W. R.* 125, *L. R.* 3 *Q. B.* 54, *considered.*

This was an appeal from the decision of Ridley, J., ordering a fresh taxation of costs on the ground that Master Spofforth, a Chancery taxing-master, had no power to tax the bill.

The facts of the case are set out in the judgment of Lord Alverstone, L.C.J.

*Clayton*, for the appellant.—The effect of the rules of January, 1902, was to give all masters jurisdiction over every class of business transacted in the Central Taxing Office. Master Spofforth was clearly entitled to tax the bill.

*Courthope Munroe*, for the respondent.—The Chancery masters have not been made masters of the Supreme Court, and the rules of January, 1902, do not overrule the express provisions of the Lands Clauses (Taxation of Costs) Act, 1895, which provide that costs in these cases shall be taxed before a master of the Supreme Court. The case of *Owen* v. *London and North-Western Railway Co.*, 16 W. R. 125, L. R. 3 Q. B. 54, shows that the master in this case is a *persona designata*.

*Cur. adv. vult.*

Dec. 18.—Lord ALVERSTONE, L.C.J.—This is an appeal from an order of Ridley, J., of the 24th of June, 1902, setting aside a taxation of costs by Master Spofforth and ordering that a new taxation should take place before a master of the King's Bench Division, upon the ground that Master Spofforth had no power to tax the bill.

The costs were incurred in an ordinary compensation case in respect of land taken by the Metropolitan District Railway from a person of the name of Covington.

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

By section 52 of the Lands Clauses Act, 1845, it was provided that the costs of any inquiry as to compensation before a jury should in the case of difference be settled by one of the masters of the Court of Queen's Bench.

By the Lands Clauses (Taxation of Costs) Act, 1895, it was provided that where under the Lands Clauses Act, 1845, any question of disputed compensation has to be determined by the verdict of a jury or by arbitration the costs of and incidental to the inquiry or arbitration award shall, if either party so require, be taxed and settled as between the parties by one of the Masters of the Supreme Court.

The questions for our decision are whether under the authority of the Judicature Acts rules can be made empowering the old Chancery taxing-masters to tax costs in proceedings such as the present, and whether the rules made in January, 1902, are sufficient for that purpose. The Supreme Court of Judicature (Officers) Act, 1879, established the Central Office.

Section 5 of that Act concentrated in and amalgamated with the Central Office, among others, the offices of the masters of the Queen's Bench, Common Pleas, and Exchequer Divisions, and such other offices of the Supreme Court as might from time to time be amalgamated with the Central Office by the rules of court.

By section 6 (*a*) the existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions were transferred to the Central Office, which was by section 7 placed under the control and superintendence of officers to be called masters of the Supreme Court of Judicature.

By section 6, sub-section 1 (*b*). the existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions were to be among the first masters of the Supreme Court, and by section 9 provisions were made for the future appointments of such masters.

Sub-section (*c*) of section 6 provided that there should be transferred to the Central Office such other officers of and persons employed in the Supreme Court or the offices thereof as should be from time to time transferred to the Central Office by rules of court.

Sub-section 1 of section 12 provides that the business to be performed in the Central Office shall, subject to rules of court, comprise all the business performed in the offices by or in pursuance of that Act, amalgamated with the Central Office.

By sub-section 2 of the same section it was provided that the officers of the Central Office should be interchangeable and should be capable of performing and liable to perform the duties of each other in any department of the office, and generally should perform such duties and have such powers in relation to the business of the Supreme Court as might be directed by rules of court subject to the qualification that the duties required to be performed by any officer transferred to the Central Office by or in pursuance of the Act should, except so far as they were modified with his consent, be the same or analogous to those which he performed before being so transferred.

It is in our opinion clear that the provisions to which we have referred authorize the making of rules for the amalgamation with the Central Office of the office of the Chancery taxing-masters, and the transfer to the Central Office of the Chancery taxing-masters, they being undoubtedly officers of the Supreme Court within the meaning of sub-section (*c*) of section 6 of the Act of 1879.

The only remaining point requiring consideration is whether the new rules made in January, 1902, have empowered the old Chancery taxing-masters to perform the duties up to that time performed by the masters of the Supreme Court. That a rule which in terms said that the officers of the taxing department of the Central Office should tax those costs would be *ultra vires*, is, in our opinion, clear for the reasons we have given. It remains, therefore, only to consider whether the language of the present rules is sufficient to effect the same purpose.

Prior to the making of the rules of January, 1902, the proper person to tax costs under the Lands Clauses Act was, subsequent to the year 1879, a master of the Supreme Court, but his power to tax such costs did not depend upon section 52 of the Lands Clauses Act alone, but upon the rules of court made under the Judicature Acts, and particularly of those made under the Act of 1879 which established the Central Office: see ord. 60, r. 3, made in 1879, as it existed prior to the new rules of 1902. The authority for the masters of the Supreme Court to tax costs under the Lands Clauses Act was derived from the scheme which forms part of rule 1 of order 61, also made in 1879, under which the taxing department of the Central Office was charged with the duty of the taxation of costs in the Queen's Bench Division, except such costs as had theretofore been taxed in the Queen's Remembrancer's Office or the Crown Office.

Prior to the rules of 1902 the Chancery taxing-masters, who were undoubtedly officers of the Supreme Court, were not amalgamated with the Central Office, and it is for this reason that the language of paragraph 4 of the scheme in rule 1 of order 61 under the head "Taxing," which we have already quoted, was used until the amendment made by the rules of January, 1902. One of the objects of the new rules, 1902, was to meet the complaint of want of uniformity in taxations, and for this purpose it was determined to establish an amalgamated taxing department of the Central Office which should perform all the duties hitherto performed by the Chancery taxing-masters on the one hand and the masters of the Supreme Court on the other, and this object had to be effected, not by the preparation of a new and complete set of rules, but by alteration and amendment of the existing rules and orders under the powers of the Act of 1879. Accordingly rule 1 of January, 1902, was made, which provided that from the 11th of January, 1902, the Chancery taxing office should be amalgamated with and the Chancery taxing-masters transferred to the Central Office.

In order to give the officers of the new taxing office full power to deal with all taxations, paragraph 4 of the scheme contained in rule 1 of order 61 was amended by omitting the words which we have quoted, which limited the class of cases which should be dealt with in the taxing department. The scheme thus amended imposed upon the officers of the new department the taxation of all costs which had previously been taxed either by the Chancery taxing-masters or the masters of the Supreme Court. By rule 7, rule 18 of order 65, was amended in a way which shows that all the taxing officers of the amalgamated taxing department were to have powers to deal with all the business of that department.

By rule 10, regulation 29 of rule 27 of order 65 was repealed, and a new and very important rule as to taxing provided, and by rule 11 a very important addition was made to regulation 37 of rule 27 of order 65. Finally, by rule 14, rule 1 of order 71 was amended so as to make it appropriate to the newly-established taxing department.

We would also point out that the effect of these rules was to make all the taxing officers of the taxing department subject to the provisions of regulation 25 of rule 27 of order 65, and, in our opinion, to establish under the name of the Supreme Court Taxing Office one taxing department of the Central Office for

the King's Bench and Chancery Divisions, and to make the Chancery taxing-masters and the masters of the Supreme Court officers of that taxing department, having each power to discharge the duties of taxations in all matters which had previously been performed by the Chancery taxing-masters and the masters of the Supreme Court respectively.

Rule 3 of order 60, relied upon by Mr. Courthope Munroe, has no bearing upon the point; it was consequential upon the provisions of the Act of 1879 and in no way inconsistent with the new rules.

It was contended before us that the case of *Owen* v. *London and North-Western Railway Co.*, 16 W. R. 145, L. R. 3 Q. B. 54, was inconsistent with this view; we are clearly of opinion that that case has no bearing upon the point raised before us. All that it decided was that a master of the Queen's Bench was to be the final authority to settle the costs as between the parties, and has no bearing upon the question of power to make rules under the Judicature Acts imposing the duties previously performed by masters of the Queen's Bench upon other officers.

We are therefore of opinion that the rules as they now stand do confer upon old Chancery taxing-masters now transferred to the taxing department of the Central Office the power and the duty in common with the other taxing-masters of the taxing department of the Central Office of taxing costs in the proceedings in question.

For these reasons we are of opinion that the order of Ridley, J., of the 24th of June should be set aside, and the taxation by Master Spofforth should stand.

WILLS, J.—After the elaborate discussion contained in the judgment of the Lord Chief Justice I have little to add, but I wish to express shortly in my own way how I have been led independently to the same conclusion.

Originally, under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 52, such costs as there were in question were to be taxed by one of the masters of the Court of Queen's Bench. Under the provisions of the Judicature Act, 1873, the masters of the Court of Queen's Bench, Common Pleas, and Exchequer became masters of the respective divisions of the High Court named after their courts.

By the Supreme Court of Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), s. 14, and the first part of the first schedule thereto the officers and masters in each of the three divisions were abolished and instead thereof the office of master of the Supreme Court was created and the then existing masters of the three divisions were made masters of the Supreme Court.

It is unnecessary to go through the ample provisions contained in that Act for the transfer to the masters of the Supreme Court of all the functions vested in and performed by the masters of the three divisions or to discuss the question whether the taxation of costs under the Lands Clauses Act, 1845, was, by the force of that Act alone, transferred to the masters of the Supreme Court, because, by the Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11), it was expressly provided that such costs shall be taxed by one of the masters of the Supreme Court.

The office of the Chancery taxing-masters was not by the Act of 1879 amalgamated, as were the offices of the masters of the common law division, with the Central Office, but by section 5 power was given to amalgamate by rules of court with the Central Office of the Supreme Court, and by rules of court of January, 1902, amongst other taxing offices of the Supreme Court amalgamated with the Central Office was the Chancery taxing office.

By section 12, sub-section 1, the business to be performed in the Central Office shall, subject to the rules of court, comprise all the business performed in the office by or in pursuance of this Act amalgamated with the Central Office, and shall be distributed among the several officers of the Central Office in such manner as may be directed by rules of court.

It seems to me quite impossible to deny that after the Act of 1895, at all events, the taxation of costs under the Lands Clauses Act, 1845, was to be performed in the Central Office. I should have thought it pretty clear without the Act of 1895, but with it there can be no doubt. Such taxation prior to the Act of 1879 was business which was *de facto* performed in the office of the masters of the Queen's Bench Division, and nowhere else—and until the order of January, 1902, it was performed by one of the masters of the Supreme Court.

Section 12, sub-section 2, of the Act of 1879 provided that the several officers of the Central Office shall be interchangeable one with another, and shall be capable of performing and liable to perform the duties of each other in any department of the office, and generally shall perform such duties and have such powers in relation to the business of the Supreme Court as may be directed by rules of court, subject to this qualification, that without his consent no officer transferred to the Central Office shall be called upon to perform duties not either identical with or analogous to those which he performed before the transfer.

The first rule of January, 1902, which has been already alluded to in general terms, is as follows: "There shall be amalgamated with the Central Office the following offices—viz., the Chancery taxing office," and three other taxing offices unnecessary to enumerate.

The second rule provides that there shall be transferred to the Central Office the existing Chancery taxing-masters and others also unnecessary to enumerate.

Both of these rules are expected to be made in pursuance of the Supreme Court of Judicature (Officers) Act, 1879.

The first rule is made under the powers of section 5, and the second under section 6, sub-section (c), of that Act. It is, I think, perfectly clear that after these two rules were made the taxation of such costs as now in question was amongst the different kinds of business capable of distribution by orders of court amongst the several officers of the Central Office (section 12, sub-section 1), and equally clear that the Chancery taxing-masters were amongst the officers made by sub-section 2 interchangeable with the masters of the Supreme Court, and capable of performing and liable to perform their duties, and I think that if nothing had been done there would be very strong ground for saying that the Chancery taxing-masters had jurisdiction (which is all that is in question here) to tax costs under the Lands Clauses Act, 1845.

But the matter did not rest here. It was felt obviously that it was desirable to bring the orders already cited into harmony with the Rules of the Supreme Court, and accordingly the second part of the rules of January, 1902, is headed Rules of the Supreme Court, January, 1902.

Up to that time the distributing of business in the Central Office had been regulated by order 61, rule 1, which established a department called Taxing Department, and the business assigned to it was "the taxation of costs in the Queen's Bench Division, except" certain costs unnecessary to enumerate (see clause 4 of the schedule), which forms part of the rule. By the new rule of January, 1902, for this limited description of the business assigned to the taxing department is substituted the taxation of costs, which I cannot

doubt means all costs which could be dealt with in the Central Office, and provision is made in a subsequent rule (7) for the convenient arrangement of various clauses of taxation and giving power to the taxing-masters subsequent to any orders of a particular kind which might be made by the Lord Chancellor to regulate and distribute the business of the taxing department of the Central Office in such manner and order as they may deem expedient. There are two enactments under which, as it seems to me these orders are valid, one is sub-section 2 of section 12 of the Act of 1879, which empowers and requires the various officers of the Central Office to perform (interchangeably) such duties and gives them such powers in relation to the business of the Supreme Court as may be directed by rules of court. It seems to me the merest pedantry to say that the under the large words "the business of the Supreme Court" this class of taxation which could only be performed by one of the masters of that court and which was (when it had to be done) as much a part of his day's work as the hearing of summonses or anything else that he had to do as a master was not comprehended. It is true that it has been held that under section 52 of the Lands Clauses Act, 1845, it was held that he was what has been called a *persona designata*, and that that being so he and he alone could tax, and there was therefore no appeal from him as in the case of an ordinary taxation in one of the Supreme Courts. But he was the *persona designata* only because he was a master of the court and the taxation was undoubtedly performed in his office, and therefore after the Act of 1879 it was to be performed in the Central Office (section 12 sub-section 1). The Central Office was the "Central Office of the Supreme Court" (section 4), and how any part of the business to be performed in it can be excluded from the description of "business of the Supreme Court" I fail to understand. The general object and purview of the Act is to facilitate and improve the arrangement for the business transacted in the various offices of the court and, as it seems to me, requires that the widest meaning be given to such words of which they are reasonably capable, and surely it is no unreasonable latitude of interpretation to say that business which must be transacted by one and might be transacted by any one of the masters of the Supreme Court which was confided to him by the Lands Clauses Act only because he is a master of the court falls within the description of business of the Supreme Court.

It is perhaps worth while to note in passing that the expression in the Lands Clauses Act, 1845, that the costs shall be settled by a master of the Court of Queen's Bench is altered in the Lands Clauses (Taxation of Costs) Act, 1895, to "shall be taxed and settled" by a master of the Supreme Court; "taxation" has a definite legal meaning and was probably used in this Act with reference to the phrase in ord. 61, r. 1, as it then stood, "taxation" of costs in the Queen's Bench Division.

But the second part of the rules of January, 1902, so far as they touch the matter in question, have another sanction which as to the matter now in hand seems to me to be absolutely beyond doubt. The Judicature Act, 1875, s. 17, sub-section 3, gives power to make rules for regulating any matters relating to the duties of the officers of the Supreme Court. The conjoint effect of ord. 61, r. 1, and of the rule of January, 1902, is to direct that costs of every description shall be taxed in the taxing department of the Central Office and that the Chancery taxing-masters shall belong to that department, a perfectly valid regulation under section 17, sub-section 3, of the Act of 1875.

The process appears to me to be clear by which the power of taxing originally vested in a master of the Queen's Bench became vested in a master of Supreme Court and performed in the Central Office, by which the Chancery taxing-masters, if their office should become amalgamated with the Central Office, became themselves capable of being interchanged with the masters of the Supreme Court for all purposes of taxation, and by which they were in January, 1902, so amalgamated, and thenceforth capable of performing and liable to perform all the taxing business which was in fact performed in the Central Office, and in my opinion Mr. Spofforth, as one of the Chancery taxing-masters, had jurisdiction to tax in the present instance.

CHANNELL, J.—In this case I have had the opportunity of reading the judgments of the Lord Chief Justice and of my brother Wills, and I agree with them, but I wish to say that I have been more pressed than they appear to be with the difficulties arising from the decision in *Owen* v. *London and North Western Railway*. That case appears to me to decide that the settlement of costs under the Lands Clauses Act, 1845, s. 52, were not made business of the Queen's Bench Court, which the masters transacted as officers of the court, but were entrusted to them outside their office, although so entrusted because they held that office. Whether we agree with that decision or not, it would, after it has stood for so many years, be wrong not to follow it now, and I think it would be equally wrong not to apply the same rule to the Act of 1895. It seems to me, therefore, that what we have to find is who are the persons who now come within the description of "masters of the Supreme Court" used in the Act of 1895. This expression cannot mean merely the persons who in 1895 filled the office, nor can it depend upon the title, for the title might be changed from time to time, and in fact officers performing any dissimilar duties have at various times in the history of our courts held the title of master. The expression "masters of the Supreme Court" in an Act of 1895 must therefore, I think, be construed to mean "the persons from time to time filling the office now known and described as master of the Supreme Court."

I think that although the Chancery taxing-masters have not had formally conferred on them the title of "masters of the Supreme Court," yet that the statutes and rules quoted in the judgments of my lord and my learned brother show that a Chancery taxing-master is now a person who fills the same office and performs the same duties as at the time of the passing of the Act of 1895 were filled and performed by the persons then known as masters of the Supreme Court, and consequently they must now be considered as a *persona designata* directed by the Act of 1895 to tax and settle these costs. I agree, therefore, with the judgments which have been delivered.

*Appeal allowed.*

Solicitors for the appellant, *Stanley Evans & Co.*

Solicitors for the respondent, *Baxter & Co.*

## IN BANKRUPTCY.

K. B. Div. (Wright, J.) March 2, 9.

*In re* POLLARD.
*Ex parte* THE TRUSTEE. (*a.*)

*Bankruptcy—Power of court to restrain proceedings in Chancery—Sequestration—Completion of execution—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 10, *sub-section* 2; *s.* 45.

*The Court of Bankruptcy has power to restrain sequestration proceedings against a bankrupt in an action in the Chancery Division to which he is a party. Payment of a sum of money into court to the credit of the sequestrators' account in such proceedings is not equivalent to completion of an execution by the sequestrators within section* 45 *of the Bankruptcy Act*, 1883.

In re Hastings, Ex parte Brown, 9 *Morr.* 234, 41 *W. R. Dig.* 18, *followed.*

Motion by the trustee in the bankruptcy for a declaration that the sum of £98 9s. 9d. standing in the books of the Paymaster-General to the credit of the sequestrators' account in the action of *In re Pollard, Pollard* v. *Pollard*, in the Chancery Division, formed part of the property of the bankrupt divisible among his creditors; and for an order that the respondents B. Pollard and S R. Pollard be restrained from proceeding further under a writ of sequestration obtained by them in the said action, and dated the 20th of May, 1902, or from dealing with the said sum of £98 9s. 9d. otherwise than by procuring the same to be paid to the trustee; and for an order directing the respondents to take all steps necessary to procure the payment of the said sum to the trustee.

The bankrupt and his brothers, the respondents, were the executors of their mother's will. In 1900 the respondents began an administration action in the Chancery Division in which the bankrupt was the sole defendant.

On the 10th of March, 1902, an order was made in the action that the bankrupt was to bear two-thirds of the plaintiff's costs and to bring into court within seven days the sum of £136 13s. to meet such costs.

On the 18th of April, 1902, the bankrupt committed an act of bankruptcy by failure to comply with the terms of a bankruptcy notice.

On the 20th of May the respondents issued their writ of sequestration, and on the 5th of July an order was made thereon directing the London and County Bank to pay into court in the action to the ledger credit of the sequestrators' account, the sum of £137 7s. 5d. due from them to the bankrupt.

A petition was presented against the bankrupt on the 16th of July, and a receiving order was made thereon on the 6th of August. Upon that same day the London and County Bank complied with the order of the court by paying into court the sum of £98 9s. 9d., which was all the money of the bankrupt then in their possession.

The trustee claimed that sum from the respondents, and requested them to take out a summons in the Chancery action to determine the matter, but they refused to do so, and the trustee consequently brought the present motion.

*E. W. Hansell*, for the trustee.—The Court of Bankruptcy has the power, under section 10, sub-section 2, of the Bankruptcy Act, 1883, to restrain proceedings pending against the bankrupt in other courts. The trustee here is entitled to the money in court, as his title relates back to the 18th of April, and the sequestration proceedings were not begun until the 20th of May. The proceedings are not a protected transaction within section 49, as they are proceedings *in invitum*: *Courage* v *O'Shea*, 43 W. R. 232, [1895] 1 Ch. 325; *Wild* v. *Southwood*, 45 W. R. 224, [1897] 1 Q. B. 317. Nor is the order for payment of the money into court in the sequestration proceedings a completion of execution within section 45: *In re Hastings, Ex parte Brown*, 9 Morr. 234, 41 W. R. Dig. 18; *Butler* v. *Wearing*, 17 Q B. D. 182, 34 W. R. Dig. 17; *In re Trehearne, Ex parte Ealing Local Board*, 39 W. R. 116, 7 Morr. 261. Even if the payment of the money into court were equivalent to the receipt of the debt by the sequestrators, the execution was not complete before the date of the receiving order, because the money was only paid into court upon the day when the receiving order was made.

*Muir Mackenzie*, for the respondents.—The Court of Bankruptcy has no jurisdiction to restrain these proceedings in the Court of Chancery. That court has made the order for the payment of the money, and that court alone can deal with the money: *Pelham* v. *Duchess of Newcastle*, 3 Swans. 293. Further, the sequestration was completed upon the payment of the money into court: see Edwards on Execution, p. 268; *Miller* v. *Huddleston*, 31 W. R. 138, 22 Ch. D. 233.

*Hansell*, in reply.—It is quite clear from the cases of *In re Hastings, Ex parte Brown*, and *Ex parte Hughes, In re Browne*, 19 W. R. 771, L. R. 12 Eq. 137, that the Court of Bankruptcy has power to restrain sequestration proceedings in the Chancery Division.

WRIGHT, J.—In my view I cannot get over the decision in *In re Hastings, Ex parte Brown*, and it is not necessary for me to repeat what is said there. I will merely add that on the facts of this case, if there was an execution, it was not completed before the date of the receiving order. The receiving order was made on the 6th of August, and the money was paid into court on the same day; therefore the payment was not before the date of the receiving order. Taking the view which I do of the effect of *In re Hastings, Ex parte Brown*, I should be doing wrong to send this case to the Chancery Division. Moreover, in this case the trustee has a higher title than the bankrupt, which is an additional reason for keeping the matter in the Court of Bankruptcy, which clearly has jurisdiction to deal with it. There must be an order in the terms of the notice of motion.

*Application allowed.*

Solicitors for the trustee, *Hicks, Arnold, & Mozley.*

Solicitor for the respondents, *S. R. Pollard.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

CORRECTION.—In the report of *Jared* v. *Clements*, *ante*, at p. 401, 2nd column, lines 16 and 17, instead of the words "and he dismissed the action. The plaintiff appealed," read "and he gave judgment for the plaintiff. The defendant appealed."

## Court of Appeal.

From Chan. Div.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) March 12, 13.

WATTS *v.* BUCKNALL. (*a.*)

*Company—Prospectus—Omission of material contracts—"Knowingly issue"—Waiver clause—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

*The defendant, who was a director of a company, took part in issuing a prospectus inviting persons to subscribe for shares in the company. The prospectus did not disclose certain material contracts which had been entered into, as required by section* 38 *of the Companies Act*, 1867. *It, however, contained a clause stating that contracts relating to the formation and promotion of the company had been entered into, and that these "are or may be" contracts within the* 38*th section of the Act, and that applicants for shares were to be deemed to have waived all claims against directors and others for the section not being more fully complied with. The defendant had actual knowledge of the existence of the undisclosed contracts, but not of their nature and effect, and was content to leave the statements of the prospectus to others without further inquiry. The plaintiff took shares upon the faith of the prospectus, but upon hearing of the undisclosed contracts brought an action against the defendant for compensati n.*

*Held, that the defendant had "knowingly issued" the prospectus, and that, under the circumstances, his ignorance of the nature and effect of the undisclosed contracts was no answer to the action.*

*Held, also, that the waiver clause did not fairly disclose to an intending investor what it was that he should waive, and therefore did not protect the defendant from liability for non-disclosure of the contracts.*

*Judgment of* Byrne, J. (ante, *p.* 44, [1902] 2 *Ch.* 628) *affirmed.*

This was an appeal from the judgment of Byrne, J. (reported *ante*, p. 44, [1902] 2 Ch. 628), in an action brought by a shareholder against a director for damages for noncompliance with section 38 of the Companies Act, 1867.

The facts were as follows:

In December, 1896, the Worcestershire Brewery and Malting Co. (Limited) was incorporated for the purpose of acquiring certain breweries, one of which breweries—viz., "Bucknall's Brewery," had belonged to the defendant Bucknall.

The defendant was one of the directors of the company, and took part in the preparation of the prospectus, which was issued in the same month—viz., December, 1896.

The prospectus gave (*inter alia*) particulars of the property to be purchased and the purchase price, and stated that the vendors ("who promote the company and have acquired the properties to resell at a profit") were to pay the whole of the expenses of formation and registration of the company, except certain stamp duties and legal charges, and that a contract for purchase had been entered into, being an agreement dated the 1st day of December, 1896, between E. S. Claremont (who represented the vendors) of the one part and H. Broadbridge as a trustee on behalf of the company of the other part, and that copies of the contract could be inspected at the office of the company by applicants for shares until allotment. It also contained the following clause:

"During the negotiations for the purchase of the properties and the formation of the company contracts have been entered into between various parties with reference to the formation and promotion of the company, and the subscription of its capital, but to none of which the company is a party. . . . The contracts referred to in this paragraph are, or may be, contracts within the meaning of the 38th section of the Companies Act, 1867, and accordingly applicants for shares are to be deemed to have notice of the said contracts, and to have agreed with the company (as trustee for the directors and other persons liable) to waive all claims, if any, against them for not more fully complying with the requirements of the said sections, and allotments will only be made upon this express condition."

The plaintiff, on the faith of this prospectus, applied for certain shares, which were duly allotted to him, and for which he paid £200. He subsequently discovered that prior to the issue of the prospectus there had been other contracts connected with the formation of the company, and which were material to intending shareholders, inasmuch as they showed that the value of the properties to be purchased by the company had been much exaggerated and so forth. Accordingly, in January, 1902, he commenced this action, alleging that the shares he had taken were of no value, and claiming a declaration that the defendant was liable to pay him compensation for his loss.

Byrne, J., decided in favour of the plaintiff, and the defendant appealed.

*Levett, K.C.*, and *Bremner*, for the defendant, used the same arguments as in the court below.

*Norton, K.C.*, and *J. Ricardo*, for the plaintiff, were not called upon.

COLLINS, M.R.—This is an appeal from a decision of Byrne, J., in an action brought by a shareholder against a director under section 38 of the Companies Act, 1867, and the question is whether there was before the learned judge evidence which justified him in holding, as a matter of fact, that all the provisions of section 38 were applicable to the case. Now, unless the learned judge has misconceived as a matter of law the operation of that section, this court will not readily differ from him, for he had certain advantages which we have not, in that he actually saw and heard the defendant as a witness, and was thus able to ascertain his knowledge and state of mind at the critical occasion—viz., the special meeting of the directors at which the prospectus was settled in the form in which it was issued to the public On that prospectus appeared these words: [His lordship read the clauses above quoted from the prospectus.] The defendant had himself been the owner of one of the three breweries which had been acquired and were to be taken over by the company, and subscriptions were asked for the purpose of carrying out the adventure of working the breweries. He knew that the company had somehow or other acquired these breweries. He knew that he himself had been the owner of one of them, and therefore it is fair to suppose that he must have known that the other two had been acquired by a contract or contracts. In addition to that, it is admitted that there were six

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

other contracts dealing with the promotion and formation of the company. One of them has been produced to us and it may be taken as a sample of the others. It shows the amount at which the promoter had acquired one of the properties, and it also shows that he proposed to sell it at a large additional profit and to divide a portion of that profit with the vendor. This is a sample of the six contracts which, it is admitted, were not disclosed, contracts which unquestionably ought to have been disclosed in the prospectus, and which would render a director who did not disclose them liable under section 38 if he had knowledge of their existence.

Now, the defendant, as I have said, attended a meeting of directors for the purpose of signing the prospectus. In that prospectus these contracts were not disclosed, neither those by which the breweries were acquired nor the other contracts, although they contained facts most material for subscribers to know. Are the conditions of section 38 applicable to the case? It is said that the defendant did not in fact know of the existence of the contracts, and, therefore, did not "knowingly issue" the prospectus within the meaning of the section. Now, what is the evidence as to the condition of his mind? He must have known, quite apart from the prospectus, and indeed he admits that he knew that these breweries were about to be sold. Then comes the information given to him by the prospectus itself in the waiver clause. It is important to observe that the words of that clause are not qualified, but in the indicative mood: "During the negotiations for the purchase of the properties contracts have been entered into between various parties with reference to the formation and promotion of the company and for the subscription of its capital." The defendant's own evidence is that he read the prospectus, but did not ask what the contracts were. He did know of the fact that contracts other than those disclosed did exist. This is the conclusion to which the learned judge, who heard and saw the defendant, came to, and in my opinion there is abundant evidence to justify this conclusion, and if such a finding had been arrived at by a jury it would have been perfectly hopeless to question it. I do not say that we stand in exactly the same position with reference to a finding of fact by the learned judge as we should in reference to a finding of fact by a jury, still no one can, by means of a shorthand note of evidence, be placed in exactly the same position as the judge who heard it given. That the defendant was ignorant of the legal aspect of the case, and that he knew nothing about section 38, is not improbable, but it is clear that ignorance of law does not shelter a director or any other person. If a person chooses to become the director of a company, he becomes liable to certain statutory obligations. He may be liable for a statutory fraud without any moral obliquity whatever. That is his misfortune. The Legislature deemed it right that this should be so, and though that section is now repealed it still governs the present case. It is idle to say that the defendant was honest. We are not imputing any dishonesty except statutory dishonesty. He cannot shelter himself under ignorance of law, or even by saying that he invited the opinion of someone else as to the law, and did not act for himself. It is enough to refer to the words of Cockburn, C.J., in *Twycross* v. *Grant*, 25 W. R. 701, 2 C. P. D. 469, at p. 541: "Next, was the prospectus issued by the defendants 'knowingly' within the meaning of the section. It was contended that the term 'knowingly' must be taken to mean with a knowledge that the contracts were such as the statute required to be referred to; consequently that, the jury having found that the mention of the contract was omitted from the prospectus from a *bonâ fide* belief that such mention was unnecessary, the contracts had not been knowingly omitted. But this is to misconceive the meaning of the term. 'Knowingly issuing' means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus. Ignorance or mistake of the law cannot be admitted as an excuse for disobeying an Act of Parliament."

Then it is contended on the defendant's behalf that if the statement in the waiver clause is sufficient to show knowledge by the director, it must also be a sufficient notice to the intending shareholder. In my opinion this argument cannot be maintained. The director's position is different from that of the would-be purchaser of shares. He is under an absolute statutory obligation to disclose material contracts. The shareholder is under no statutory disability. If all the material contracts have not been brought home to him, the director who does not apprize him of those contracts must take the risk. The question is, whether the contracts have been set before him in such a way that a reasonable man would have understood the nature of them. The standard which must be applied to a would-be purchaser is not the same as that which regulates the duty of a director, but is quite different. In this prospectus the whole thing—[Here his lordship read the waiver clause]—is put forward in such a tentative way that an intending shareholder might be led to suppose that the persons who should best know about the matter thought that the contracts might be such as need not be set out in the prospectus. It is not a frank and fair avowal of the true nature of the contracts. In *Cackett* v. *Keswick* (*ante*, p. 69), [1902] 2 Ch. 456, at p. 477, Stirling, L.J., said: "When persons who issue a prospectus make statements in that prospectus with reference to the contracts in respect of which the benefit of the statute is to be excluded, they must be such as to be in all respects well founded in fact, and fairly to convey to the mind of the intending shareholder the nature of the contracts which have been excluded." And, in the same case in the court below, Farwell, J., said, 50 W. R., at p. 14, [1902] 2 Ch., at p. 468: "As I read the judgments in *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421, 48 W. R. Dig. 35, the decision, and the reasons given for it, involve the proposition that the statutory rights under the 38th section can be waived; that any waiver obtained by unfair dealing or trickery is void; that the person said to have waived must have sufficient information of what he was waiving; and that, apart from fraud, the same principles apply to waiver clauses as are applicable to ambiguous or misleading statements in conditions of sale or releases." I adopt those judgments. There is no logical fallacy whatever in saying that an intending purchaser of shares is not affected with the notice with which a director is affected. In the one case the bare knowledge of the fact is enough; in the other case there must be something more—there must be a fair explanation by the persons who do know to the persons who do not know of the nature of the contracts which are not disclosed. In my opinion, the decision of the learned judge was perfectly right and he has given a very clear statement of the law as to the operation of the waiver clause.

ROMER, L.J.—I agree. The defendant when he issued the prospectus knew that there were in existence contracts between various parties "with reference to the formation and promotion of the company and the subscription of its capital." He

knew that they were contracts which were or might be contracts within the meaning of section 38 of the Companies Act, 1867. He had actual and not merely constructive knowledge of the existence of those contracts. They were, in fact, contracts most material to be set forth for the guidance of intending subscribers. Can the defendant, a director, be heard to say that he did not know of the existence of contracts which ought to have been specified under the provisions of section 38, merely because, knowing of their existence, he did not choose to look into and ascertain the contents of each document? In my opinion, clearly not. He cannot say he had no knowledge, but he chose to refrain from making any investigation. In my opinion he knowingly issued a prospectus within the meaning of section 38 which did not specify the dates of and the names of the parties to certain material contracts

But a second question arises. Had the plaintiff, who subscribed for shares on the faith of this prospectus, also notice of those contracts? In my view the notice of contracts which has to be given to an intending subscriber or which has to be possessed by an intending subscriber means notice not of the existence of contracts, but of their contents. Such notice the plaintiff clearly did not have. It follows that, in my opinion, the defendant falls under the liability imposed by section 38, and that the plaintiff must succeed in this action unless the defendant can avail himself of the waiver clause. In my opinion he cannot do that. The words in that clause, in a prospectus of this kind, amount to a representation by those who issue it that those who are in a position to know are so doubtful as to whether the contracts are material that they do not even know whether they can come within the provisions of section 38. This is clearly misleading and tricky, as regards the defendant. So far from his being able in good faith to make such a representation as was in substance made by this prospectus, his only excuse is that he did not take the trouble to investigate these contracts at all, or to see whether they were or were not material and ought to have been set forth in the interests and for the information of intending subscribers. It appears to me, therefore, that the defendant cannot rely upon this waiver clause, and, that being so, there is no other defence open to him, and accordingly he has, in my opinion, rightly been made liable at the suit of the plaintiff.

COZENS-HARDY, L.J.—I agree, and I have very little to add. On looking at the prospectus it is apparent that the company was formed to purchase two distinct breweries and to amalgamate them. The company was also formed to acquire certain maltings and other houses not forming part of either of the breweries. Of the breweries one bore the name of Bucknall's Brewery, and had until shortly before the issue of the prospectus been the defendant's own brewery. He had sold it for between £40,000 and £50,000. This company was formed, as the prospectus states, to amalgamate all the breweries as going concerns, and to pay £440,000 for the whole. The prospectus, after stating, as the defendant must certainly have known, that the vendors who promoted the company had acquired these properties to resell at a profit, set forth one contract of purchase and one only—viz., the contract of the 1st of December, 1896.

Pausing there, it seems to me not to be open to doubt that the defendant must have known that contracts had been entered into by the promoters with the owners of the several properties. Not one of those contracts was disclosed in the prospectus. Moreover, there had been other contracts entered into with reference to the formation and promotion of the company and the underwriting of shares, and I am not at all clear that that paragraph in the prospectus really covers the preliminary contracts by the promoters for the purchase of the several properties, or whether, according to its true construction, it ought not to be limited to contracts with reference to the formation and promotion of the company as distinguished from contracts for the purchase by the promoters of the properties which they proposed to sell to the company at an enormous profit. At all events, I think we are entitled to read this clause very carefully and rather stringently as against those who put it in the prospectus. It seems to me that, quite apart from the waiver clause, the defendant must have known of the contracts for sale to the promoters, whether he did or did not know of the underwriting contracts and promoting contracts, and there is, I think, no fair statement that they are contracts which are intended to be excluded by the waiver clause. If, however, I am wrong, and those contracts do fall within the waiver clause, then for the reasons which have been stated by the Master of the Rolls and Romer, L.J., it seems to me impossible for the defendant to rely upon that clause. I desire to adopt entirely the language used by Farwell, J., and Romer and Stirling, L.JJ., in *Cackett* v. *Keswick*, and I doubt whether a waiver clause of this nature ought ever to be allowed to operate except upon such conditions as would enable the defendant to rely upon a release in general terms. I do not desire to repeat what has been said by the Master of the Rolls as to the different bearing and effect of statements in a waiver clause upon the director who issues the prospectus and on the person who applies for shares on the faith of the prospectus. But I think there is in this case ample evidence to justify the finding of the learned judge that the defendant did as a fact know that there were contracts which would come within section 38. He knew of the existence of contracts which, according to law, came within section 38, and he is in no way protected by the waiver clause.

*Appeal dismissed.*

Solicitors, *Ashurst, Morris, Crisp, & Co.*, for *W. H Talbot*, Kidderminster; *Joseph Davis*.

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — March 3.

WREN v. HOLT. (a.)

*Sale of goods—Warranty—Implied warranty—Purchase by description—Merchantable quality—Sale of beer by retail in public-house—Purchase in reliance on good name of particular beer—Beer containing arsenic—Sale of Goods Act,* 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-section* 2.

*The plaintiff was in the habit of drinking beer in the defendant's public-house, where H.'s beer was sold exclusively. Having been poisoned by arsenic contained in the beer, he brought an action for breach of an implied warranty on the sale of the beer that it was fit to drink. The jury found that the plaintiff did not buy the beer in reliance on the skill or judgment of the defendant, but because he preferred that particular beer and in reliance on the good name of H.'s beer.*

*Held, that, though there was no implied warranty*

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

*under sub-section* 1 *of section* 14 *of the Sale of Goods Act*, 1893, *there was an implied warranty under sub-section* 2 *that the beer was of merchantable quality; for on the finding of the jury the sale of the beer must be taken to have been a sale by description.*

Appeal from the judgment of Wills, J., at the trial of an action with a jury at Manchester Assizes.

The action was brought to recover damages for breach of an implied warranty, on the sale of beer by the keeper of a public-house, that it was fit to drink.

The plaintiff was a builder's labourer residing at Blackburn.

The defendant was the keeper of a public-house at Blackburn, which belonged to the owners of a brewery called Holden's Brewery, and at which no beer was sold except beer brewed at Holden's Brewery.

The plaintiff had been in the habit of drinking beer daily at the defendant's public-house for twelve months before December, 1900, and in that month he was discovered to be suffering from the effects of arsenical poisoning.

The plaintiff alleged that the beer which he had bought from the defendant contained arsenic, and that his illness had resulted therefrom.

At the trial the plaintiff said that he knew that the defendant's public-house belonged to Holden's Brewery, and that he went there because he liked Holden's beer. It appeared from the evidence that, a number of cases of poisoning having occurred in the neighbourhood, an investigation was instituted, which resulted in the conclusion that the poisoning was caused by the presence of arsenic in beer, due to the use by several Lancashire brewers of invert sugar in the process of brewing. The arsenic could not have been discovered except by an examination by a skilled chemist specially directed to ascertaining whether or not arsenic was present in the beer.

Wills, J., left two questions to the jury—(1) Was the plaintiff made ill by arsenic in the beer? (2) Did the plaintiff buy the beer in reliance, for the good quality of the beer, on the skill or judgment of the defendant? The jury answered the first question in the affirmative. They also, in the first instance, answered the second question in the affirmative; but, after hearing observations from the learned judge, they gave the following answer to the second question: "No; because the evidence shows that he preferred that particular beer; he relied on the good name of Holden's beer." They assessed the damages at £50.

Wills, J., held that as the buyer did not rely on the seller's skill or judgment there was no implied warranty under section 14, sub-section 1, of the Sale of Goods Act, 1893, as to the quality or fitness for any particular purpose of the goods supplied. But he held that, apart from that sub-section, there was an implied warranty that the beer was fit to drink. He accordingly gave judgment for the plaintiff for £50.

The defendant appealed.

*E. Sutton*, for the defendant.—There is no implied warranty on the sale of a specific article of food: *Emmerton* v. *Matthews*, 10 W. R. 346, 31 L. J. Ex. 139; *Smith* v. *Baker, Son, & Death*, 40 L. T. Rep 261, 27 W. R. Dig. 228. No distinction is to be drawn with regard to the rule of *caveat emptor* between the sale of an article of food and the sale of any other article. If the sale is of a specific article there is no implied warranty. This was established in *Burnby* v. *Bollett*, 16 M. & W. 644. Here the sale was of a specific article; the plaintiff in substance asked for a specific thing—viz., a glass of beer brewed at Holden's Brewery—and he was supplied with it. The case of a contract for a continuous supply of food of a particular quality—as, *e.g.*, Ostend rabbits—is different: *Beer* v. *Walker*, 25 W. R. 880, 46 L. J. Q. B. 677. The law on the subject is now governed by section 14 of the Sale of Goods Act, 1893. No distinction is made in that section between articles of food and other articles. By sub-section 1 there is an implied warranty where the buyer relies on the seller's skill or judgment. The finding of the jury takes this case out of that sub-section. By sub-section 2, where goods are sold by description, there is an implied warranty that they are of merchantable quality. But that sub-section does not apply, for this was not a sale by description, neither was the beer unmerchantable within the meaning of the sub-section.

*Bailhache*, for the plaintiff.—According to the old law, there was an absolute liability on victuallers to sell sound victuals. This liability was undoubted, though it is not quite clear whether it depended on warranty or on the ground of "common nuisance": see *per* Lord Coke, 4 Inst. 261, and other authorities referred to in *Burnby* v. *Bollett*. Section 61 of the Sale of Goods Act, 1893, says that the rules of the common law, except so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts for the sale of goods. At any rate there was a warranty in this case under section 14. Even if the finding of the jury prevents the case from coming within sub-section 1, it comes within sub-section 2. This was a sale by description, and the seller was therefore entitled to have a sound article. In *Goulder* v. *Rook*, 49 W. R 701, [1901] 2 K. B. 290, a case under the Sale of Food and Drugs Act, 1875, the facts were similar to the facts in this case, and the public-house keeper was held liable.

*E. Sutton*, in reply.—*Goulder* v. *Rook* shows that the defendant was liable to a fine, but not that he is liable to an action for breach of warranty.

VAUGHAN WILLIAMS, L.J.—In this case Wills, J., directed judgment to be entered for the plaintiff. The question is whether on the findings of the jury he was right in so doing. In my opinion he was right; but the case requires careful consideration, and is not easy to deal with. The difficulty here is the difficulty which always arises when an attempt is made to enact an exhaustive code. However able the lawyers may be who drafted the code, when it comes to be applied to the innumerable variety of cases which must arise, we are sure to find cases which it is impossible to suppose were intended to be governed by the code—I mean, impossible to suppose so in fact. At the same time the code does purport to be exhaustive, and the court ought to try to deal with every case in accordance with the code.

The particular enactment which we have to deal with in this case is section 14 of the Sale of Goods Act, 1893, which is as follows: "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows." *Primâ facie*, in order to establish an implied warranty, you must have a case which falls within one or other of sub-sections 1, 2, or 3, which purport to set out the cases in which a warranty is to be implied. Sub-section 1 is as follows: "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods

shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or trade name there is no implied condition as to its fitness for any particular purpose."

It seems to me to be difficult for us in the present case to find that there was any warranty within the terms of sub-section 1, because we have the finding of the jury, which they appear to have arrived at very reluctantly, that the buyer did not rely on the seller's skill or judgment. It would be an easy way out of the difficulty to say that there was no evidence on which the jury could properly arrive at that conclusion. But, speaking for myself, I am not prepared to say that. I will not state what conclusion I should have been inclined to have come to on the matter; but, so long as the answer of the jury to the second question stands, I think it is impossible to find that there was a warranty within the terms of sub-section 1.

Then comes sub-section 2: "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

This sub-section cannot apply unless goods are bought by description from a seller who deals in goods of that description. Speaking generally, I do not think that, according to the meaning of the expression "sale by description," as it is ordinarily used by lawyers and men of business, a sale of goods over the counter to a customer who asks for a commodity is a sale of goods by description.

But there is a peculiarity about this case because of the reason which the jury themselves gave for answering the second question in the negative. They were at first prepared to find, and said they found, that the plaintiff did rely on the skill and judgment of the defendant. But subsequently they abandoned that finding and substituted another, adopting a suggestion of Wills, J., which was that the plaintiff went to this house as a beerhouse kept for the purpose of the sale of this particular article—viz., Holden's beer, and that he asked the publican to supply him with beer of that description. It seems to me to be clear that the jury's reason for ultimately finding that the plaintiff did not rely on the skill or judgment of the defendant was this—they thought he did not rely on that because he asked for beer of a specified description. Therefore it seems to me that in this particular case the sale, though it was an ordinary sale of beer in a beerhouse, was, on the finding of the jury, a sale of beer by description. If so, it follows that, under sub-section 2, there was an implied condition that the goods should be of merchantable quality. This beer, by reason of the presence of arsenic in it, was, in my opinion, not of merchantable quality. The result is that, though the plaintiff fails to make out that there was any implied warranty or condition under sub-section 1, he is entitled to say that, in this particular case, beer was bought by description from a seller who dealt in goods of that description, and that—though the expression is not an apt one to use with regard to a sale of beer—the beer was not of a merchantable quality. He therefore succeeds under sub-section 2. I think judgment was rightly entered for the plaintiff, and the appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion. I agree that the case does not come within sub-section 1. I also agree that it is brought within sub-section 2. This beer, which was suffering from a defect which could not have been detected by examination, was sold by description—viz., as Holden's beer. It was therefore, under sub-section 2, impliedly warranted to be of merchantable quality, but by reason of the presence of arsenic in it it was not of merchantable quality.

MATHEW, L.J.—I am also of the same opinion. It is not necessary in this case to have recourse to section 61 of the Act, sub-section 2 of which says that "The rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act . . . shall continue to apply to contracts for the sale of goods." For it seems to be quite plain that this case comes within section 14, sub-section 2. There certainly does appear to be a difficulty in saying that there was any implied warranty or condition under sub-section 1, owing to the finding of the jury on the second question put to them. I cannot help thinking that the jury felt themselves bound, after hearing the observations of the learned judge, to answer that question as they ultimately answered it.

However, I will assume that sub-section 1 does not apply. But when we come to sub-section 2, it seems to me to be impossible to get away from the plain language there used. I therefore agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitor for the plaintiff, *H. A. Sims*, for *John W. Shaw*, Blackburn.

Solicitors for the defendant, *Hindle & Son*, Darwen.

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From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 25.

*In re* CALCOT PARK SETTLED ESTATES. (*a.*)

*Settled land—Capital money—Improvement—Additions with a view to letting—Structural additions—Electric light installation—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13 (ii.).

*The word "additions" in section* 13 (ii.) *of the Settled Land Act*, 1890, *means structural additions.*

*The installation of electric light in a mansion-house, though necessary to enable the place to be let, is not an addition to the house within the meaning of the section, and therefore cannot be paid for out of capital moneys.*

In re Freake's Settlement, 50 *W. R.* 237, [1902] 1 *Ch.* 97, *overruled.*

In re Gaskell's Settled Estates, 42 *W. R.* 219, [1894] 1 *Ch.* 485, *and* In re Clarke's Settlement Trusts, 50 *W. R.* 585, [1902] 2 *Ch.* 327, *approved.*

This was an appeal from a decision of Joyce, J.

A summons was taken out under the Settled Land Acts, 1882 to 1890, by Mr. Henry Barry Blagrave, the tenant for life of the Calcot Park and other estates in the county of Berks, settled by the will of the late Mr. John Henry Blagrave, asking that the sum of £1,307 10s. 2d. might be allowed to the applicant for the expenses incurred by him in providing electric light installation, including an engine or dynamo-house, for the mansion-house of Calcot Park.

Joyce, J., allowed the cost of the engine or dynamo-house, which stood at some distance from the mansion-house, but he held that by virtue of Buckley,

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

J.'s, decision in *In re Clarke*, 50 W. R. 585, [1902] 2 Ch. 327, electric lighting plant could not be considered an "improvement" which could be paid for out of capital moneys under the Settled Land Acts.

From this decision the tenant for life appealed.

The Settled Land Act, 1890, s. 13 (ii.) provides that "improvements authorized by the Act of 1882 shall include making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let."

Section 25 of the Act of 1882 states that the "improvements" authorized by the Act are "the making or execution on, or in connection with, and for the benefit of settled land" of any of the works mentioned in the section, "and any operation . . . necessary or proper for carrying into effect any of those purposes, and for securing the full benefit of any of those works or purposes."

*Dibdin, K.C.*, and *Errington*, for the appellant.—Joyce, J., in an earlier case of *In re Freake's Settlement*, 50 W. R. 237, [1902] 1 Ch. 97, decided this point in our favour. In the present instance, however, he has followed the decision of Buckley, J., in *In re Clarke*, and refused our application. Buckley, J., in *In re Clarke* purported to follow the decision of Chitty, J., in *In re Gaskell's Settled Estates*, 42 W. R. 219, [1894] 1 Ch. 485. That decision, however, did not involve that an "addition" to be within section 13 (ii.) of the Act of 1890 must necessarily be structural. The learned judge there held that a heating apparatus was not necessary, but merely convenient, and accordingly declined to allow it. We submit that the installation of some system of lighting is necessary. Further, in that case the learned judge was influenced by section 25 (xiii.) of the Act of 1882, because he found there nothing analogous to a heating apparatus. That section, however, assists us, because, the engine-house having been allowed under section 13 (ii.) of the Act of 1890, we are entitled to the expenses of the installation under section 25 of the Act of 1882 as being necessary for securing the full benefit of the improvement which has been allowed.

*Garnett*, for the trustees.

COLLINS, M.R.—This is an appeal from a decision of Joyce, J. Although Mr. Dibdin does not admit it, it is virtually an appeal from a decision of Buckley, J., in the case of *In re Clarke's Settlement*. The question is whether a tenant for life is entitled out of the capital moneys to have paid for him the expense of an electric installation. His rights depend upon the Settled Land Acts, and if he has them they are, upon his admission, to be found only in section 13, clause (ii.) of the Act of 1890, coupled with section 25 of the principal Act of 1882. The words of clause (ii.) of section 13 of the Act of 1890 which come under the head of improvements are these, "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." That is supplemented by the last words of section 25 of the principal Act of 1882, "necessary or proper for carrying into effect any of those purposes or for securing the full benefit of any of those works or purposes," namely, those mentioned in the subsequent sub-sections. Mr. Dibdin's first argument is this. He says, "I have obtained from the learned judge the right to have built out of capital money a house for holding electric plant." Then he says, "Now that I have got that house I am entitled to say I cannot secure the full benefit of that house unless you allow me to put electric plant into it." In other words, he says that not only the electric plant for generating electricity, but also all that is necessary for the installation—that is to say, the wires, apart from the ornamental fittings, are accessories to the house in which they are put. That seems to be rather a reversal of the ordinary procedure on the part of the appellant, that having got leave to build the engine-house he is therefore entitled, at the expense of the capital, to fix the plant for an electric installation in the mansion-house. That argument cannot, in my opinion, be supported. If he has any case he might come in on the main argument that the electric plant is an addition to the building under the words of the Act which I have read. It really comes to this: Is an electric plant an addition to a building within the meaning of that section? Buckley, J., has decided that it is not. Joyce, J., in an earlier case, without giving any reason, allowed the expenditure out of capital, but in a subsequent case, having Buckley, J.'s, decision before him, he elected to follow Buckley, J. So that, so far as the courts below go, there is a decision of two judges that the addition of electric plant is not an addition to the building. For my own part I have great difficulty in differing from Buckley, J.'s, view, which was based not merely upon his own opinion, but upon an earlier decision of Chitty, J., in *In re Gaskell's Settled Estates*, where, although the words "structural addition" are not used, the learned judge seems to have considered that an addition to a building must be in its terms something in the nature of a structural addition. This view Buckley, J., adopted, although he says perfectly truly that the word "structural" is not used in the Act, and that the word "addition" is capable of a good many meanings But when you have an addition to a building it is difficult to imagine what addition there can be within this Act which does not involve a structural addition. Mr. Dibdin does not and cannot contend that something added to the building which is not attached to it, such as furniture and loose chattels, can be said to be additions to the building. But why not if his main argument is correct? If "addition" means something that adds to the amenities of the building, into what category are you to divide them? You can only get three gradations—namely, loose chattels which are not attached at all, fixtures which are attached in a certain sense, and actual structural additions. Which of those is meant? It seems to me that it would be very difficult to divide off any possible alternative short of an actual structural addition. *Primâ facie* "addition" seems to me to mean a structural addition to the building, and that is not satisfied by putting wires into a building or putting an engine into an engine-house. These do not seem to me to come within the sort of addition that is meant in this Act. I agree entirely with the observations of Buckley, J., as to electric plant, and of Chitty, J., as to heating apparatus. They completely cover this case, as it seems to me, and therefore this appeal fails.

ROMER, L.J.—I also agree with the reasoning and the decision of Chitty, J., in *In re Gaskell's Settled Estates*, and of Buckley, J., in *In re Clarke's Settlement*, and I think the principle of the decisions in those cases governs the present. The appellants are obliged to admit there is nothing in the Settled Land Acts which deals specifically with lighting either by electricity or by gas, and they are obliged to try to bring the installation of the electric lighting within section 13, clause (ii.) of the Act of 1890. Now, as to that, it certainly appears to me that when the Legislature in that clause speaks of an addition or an alteration in buildings, it is speaking of something which is in itself of the nature of a building. That being so, it appears to me

clearly in the present case that even if the building itself, the dynamo-house, which may be described as additional, the cost of which has been allowed by the court below, comes within the clause, it cannot be said that the installation for the electric lighting also falls within the clause. I am bound to say that I cannot quite see how the learned judge in the court below came to allow the expense of the erection of the dynamo-house, seeing that, as far as I am aware, that house was some distance from the mansion-house. It is difficult to see at first sight how it could be said to be an addition to or an alteration in the mansion-house or any previously existing buildings, but that point is fortunately not before us.

COZENS-HARDY, L.J.—I entirely agree. Like Romer, L.J., I at present entertain great doubt whether the expenditure of capital money in the construction of the dynamo-house, situate as I understand it is, can be brought within any head of the Settled Land Act, 1890, s. 13, clause (ii.). Certainly addition does not mean making any additional building to an estate, but is an addition to or alteration in existing buildings. However that may be, I think it is impossible to escape from the cogency of the reasoning of Buckley, J., in the case of *In re Clarke*. It may well be that it might be desirable to extend section 25, clause (xiii.) of the Act of 1882 so as to authorize the provision of electric light or gas, whether for lighting or power, on the same footing as the water supply, but that is a matter for the Legislature and not for us. We have in the Settled Land Acts a code which is exhaustive and complete, and it is idle simply to argue that an improvement will be beneficial, unless in the first instance you can bring it within one or more of the sub-sections of the Act. I think, therefore, the decision of the learned judge is quite right.

Solicitors, *Bridges, Sawtell, & Co.*

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From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 10, 11.

JARRAH TIMBER AND WOOD PAVING CORPORATION (LIMITED) v. SAMUEL. (a.)

*Mortgage — Redemption action — Security for loan — Stipulation that mortgagee may purchase mortgaged security at fixed price within definite time—Clog on equity of redemption.*

*A stipulation in a mortgage that the mortgagee shall have the option to purchase the whole or any part of the mortgaged security at a fixed price within a definite time is invalid as a clog on the equity of redemption. The rule against clogging an equity of redemption, applies as much to a mortgage by a company of its debenture stock, as to other mortgages.*

*Decision of* Kekewich, J. (50 *W. R.* 601, [1902] 2 *Ch.* 479), *affirmed.*

This was an appeal from a decision of Kekewich, J. (reported 50 W. R. 601, [1902] 2 Ch. 479).

The plaintiffs were a limited company incorporated under the Companies Acts, 1862 to 1900.

In the year 1901 the plaintiffs entered into negotiations with the defendant for a loan of £5,000.

On the 11th of June, 1901, the defendant wrote a letter to the secretary of the plaintiffs which, so far as material, was as follows: "With reference to various conversations I have recently had with Mr. Bateman, one of your directors, who is, I understand, authorized to negotiate a loan to your company upon the security of £30,000 of its first mortgage debenture stock, I request that you will be good enough to inform your board that I am willing to advance the company at 6 per cent. per annum the sum of £5,000 sterling forthwith against transfer to me of such stock as collateral security, subject to your directors electing my nominee upon the board, to my having the option to purchase the whole or any part of such stock at 40 per cent. at any time within twelve months, and, in the event of the company at any time hereafter electing to raise any further capital or to sell its undertaking by way of amalgamation or in any other manner, for shares or stocks in another company, to my having the refusal of underwriting, by way of guaranteeing the taking up of such new capital, shares, or stock at a commission of 10 per cent. thereon; the advances to become due and payable on thirty days' notice on either side."

On the 14th of June, 1901, the secretary to the plaintiff company wrote to the defendant accepting his offer.

The certificate for £30,000 first mortgage debenture stock was duly handed to the defendant, in exchange for the sum of £5,000, on the 15th of July, 1901, and the sum of £30,000 first mortgage debenture stock was duly transferred to the defendant.

On the 27th of February, 1902, the plaintiffs tendered the money due, together with interest for thirty days in lieu of notice.

The defendant insisted on having notice, and by a letter dated the same day he gave the plaintiffs notice of his intention to exercise his option to purchase the stock.

The plaintiffs thereupon commenced the present action, asking for a declaration that the option was void, and that they were entitled to redeem upon payment of £5,000 with interest at 6 per cent. per annum and thirty days' interest at the like rate in lieu of notice and costs, or alternatively were entitled to redeem the said debenture stock upon giving thirty days' notice.

The defendant, by way of counterclaim, asked for specific performance of the option to purchase.

Kekewich, J., held that the stipulation giving the defendant the option to purchase was void as being a clog upon the equity of redemption, and gave judgment in favour of the plaintiffs.

The defendant appealed.

*P. O. Lawrence, K.C.*, and *Manning*, for the appellant.—This company could issue irredeemable debentures; it follows, therefore, that they could issue these debentures to the defendant subject to a clog on the equity of redemption in his favour.

They also relied on the arguments used in the court below, and referred to *Carritt* v. *Bradley*, 49 W. R. 593, [1901] 2 K. B. 550; *Biggs* v. *Hoddinott*, 47 W. R. 84, [1898] 2 Ch. 307; *Browne* v. *Ryan*, [1901] 2 Ir. R. 653; *Noakes* v. *Rice*, 50 W. R. 305, [1902] A. C. 24.

*Warrington, K.C.*, and *Martelli*, for the respondents, were not called upon to argue.

COLLINS, M.R.—This is an appeal from a decision of Kekewich, J., by which it has been held that a certain stipulation between a mortgagor and mortgagee of certain debentures was a clog on the equity of redemption. The contract is set out in the report of the case before Kekewich, J. (50 W. R. 601, [1902] 2 Ch. 479), and I will read that part of it which raises the question. [His lordship read the defendant's letter of the 11th of June, 1901, and continued:] The question arises whether the clause giving the mortgagee an option to purchase the stock at 40 per

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

cent. at any time within twelve months does or does not constitute a clog on the equity of redemption. The plaintiff company say that it is a clog on the equity of redemption and therefore void, and that they are not bound. The learned judge in the court below has upheld that view. Now, we have had a very elaborate argument on behalf of the appellant, in which all the cases have been discussed, and it has been contended that that stipulation does not come within the meaning, as interpreted by the courts up to the House of Lords, of a clog upon the equity of redemption. In my opinion the learned judge was perfectly right in his decision, and it seems also to me to be, as he himself says, a clear case—that is to say, clearly on one side of the line. Whether it is an easy line to determine exactly or not, it seems to me that this case is clearly on that side of the line where a stipulation is held to constitute a clog on the equity of redemption. What is the effect of the present stipulation? It is that the plaintiff company on repaying the £5,000 debt will get back, not the thing which they mortgaged, unimpaired, unfettered, and free from conditions, but they will get it back with the superadded condition binding upon them, at all events to the extent of making them liable in damages if unperformed. It may also be—I do not decide the point—subject to other remedies against them if they do not perform the conditions. The plaintiff company will get back the mortgaged property subject to the condition of handing it back to the mortgagee if he carries out his engagement with them; or, if they do not hand it back to the mortgagee, paying damages to him for not doing so. On the authorities, aye or no is that a clog on the equity of redemption? I think clearly this case comes within the latest decision of the House of Lords upon this point (*Noakes & Co: (Limited)* v. *Rice*), and I simply refer to one passage from the speech of Lord Macnaghten, who states the principle thus (at p. 30 of [1902] A. C.): "Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself, and the owner of the land in the use and enjoyment of it, must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security." That is the statement of Lord Macnaghten of the principle which has been a good deal discussed, and which has been always accepted, though there has been some difficulty in some cases in applying it. Those cases have been discussed before us, and were also discussed in the House of Lords, and among the cases discussed is a very recent one decided in Ireland—viz., *Browne* v. *Ryan*, to which they gave special attention, and which received, certainly from a large majority of their Lordships, distinct expressions of assent. Therefore I look upon it as a help in forming an opinion on this matter, because what was there stated to be a clog on the equity of redemption was a personal contract by the mortgagor. I refer to a passage in the judgment of Andrews, J. ([1902] 2 I R, at p. 667), which seems to me to express most exactly what the nature of the fetter is where it is a contract imposing something upon the mortgagor himself not necessarily inhering in and being annexed to the *res* or thing itself offered as security. He says: "It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage, to get back the subject of the mortgage (in the present case the mortgaged lands) to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled to on redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he is so prevented in fact the equity of redemption is affected by what, whether very aptly or not, has been always termed 'a clog.'" Then he proceeds to deal with the particular facts of that case, and says: "Now, how was Ryan's right of redemption affected under the agreement of the 21st of June, 1898? According to that agreement, if the mortgage debt should remain outstanding for twelve months, though the mortgage would be still a mortgage, his right on redemption to get back the mortgaged lands would be gone. It would be both prevented and annihilated; he was bound by the agreement to sell by auction within twelve months. If he redeemed within twelve months he would not get back the land to hold and enjoy it as he was entitled to do before the mortgage. He would get it back with a superadded obligation to sell it by auction within the twelve months, and in either case the agreement purported to bind him, in addition to paying the principal and interest of the mortgage debt, to pay Browne a further sum equal to £5 per cent. on what the land should be sold for, whether it was sold through Browne or not. This sum it now appears would be equal to more than 30 per cent. on his advance. Although it may be admitted that these obligations cannot be properly regarded as charges on the land, they would nevertheless directly and seriously affect the mortgagor with respect to the land and his rights in relation to it." That appears to me to be a very exact summary of the principle itself, and of the application of the principle to that case. If that is right, it seems to me to be on all fours with this case, because the effect here is that the plaintiff company find themselves under a contract in respect of the *res* which obliges them either to annihilate their equity of redemption by parting with it absolutely, or, at all events, obliges them to pay damages if they do not. If that is the true view of the present case, it seems to me to fall exactly within the principle which I have stated.

Mr. Lawrence has addressed a very ingenious argument to us; he said, assuming that this stipulation would be a clog on the equity of redemption in ordinary cases, yet, having regard to the special circumstances of the present case, this being a loan on the security of debenture stock, the rule of equity as to clogging the equity of redemption does not apply at all. This argument, as I understand it, comes to this: companies have a right to issue irredeemable debenture stock. It is true that the plaintiff company have not done so in this case. But, assuming that they have that right, they have also a right—if they choose to raise money on the security of that stock—to raise it on the terms that it shall be irredeemable. If they have that right, that involves the right to impose any clog on the equity of redemption—to impose any slighter fetter on the right to redeem—to impose any obligation slighter than the entire obligation which they have a right to impose—viz., that the debenture security shall never be redeemed at all. Without going into the question of whether it is competent or not for a company to issue irredeemable debenture stock, which is not, in my judgment, involved in the decision of this case at all, it seems to me that in this particular case it really cannot affect, and does not affect, the rights of the parties, whether or not such a power exists, because the subject-matter of this con-

tract, the security offered, was not irredeemable debenture stock at all. It was debenture stock issued by the plaintiff company, which is redeemable under certain special conditions. That is the security itself. But the contract was really not the issue of debenture stock to a debenture stockholder, but was a mortgage of certain debenture stock as the consideration of an advance. It is a loan on security, and the security is the debenture stock. If it is a loan on security, it seems to me that there is nothing whatever to take it out of the ordinary rule of equity that that loan or security must be subject to the right to exercise the equity of redemption, and to get back the *res* unfettered, as I have already described. Therefore it seems to me that Mr. Lawrence's argument on that point fails. Whether the plaintiff company have a right to issue irredeemable securities or not, the particular security in this case was, I repeat, not irredeemable, and did not purport to be irredeemable. Therefore, whether the plaintiff company have the right to make it irredeemable or not, or to issue irredeemable debenture stock, does not affect the matter. We were also pressed with a judgment of Stirling, L.J., giving the considered judgment of the other division of the Court of Appeal in the case of *Carritt* v. *Bradley*. It was pointed out by Mr. Manning that in that case, as he contended, there remained a fetter analogous to the fetter in the present case, that that fetter remained upon the mortgage after redemption, but that the transaction was nevertheless treated as valid by the Court of Appeal. When, however, that case is examined, I do not think that the learned judge found anything of the sort. There a certain gentleman having a considerable interest in a company borrowed from a person who desired to act as the broker of the company and borrowed from him on the security of certain shares. He stipulated that he would do his best to secure the business of the company for that particular broker. But it was no part of the contract that he should not, if he redeemed, dispose of the shares at any time, and though the contract to do his best to employ the broker was held to extend beyond the period for redemption, there was also a stipulation that if the broker was not employed he should pay him the same commission that he would have got from the company if he was employed as broker. The learned judge, in giving the judgment of the court, held that the obligation did not affect the shares. He said it would have been just the same whether the loan was obtained on personal security or on the security of shares. The shares after redemption were precisely in the same condition as they were before redemption; there was no obligation whatever undertaken in respect of them. The mortgagor after redemption was at liberty to part with them, and, in fact, his rights in respect of them were absolutely unfettered after redemption. That was the ground of his decision. He pointed out that this particular obligation was not a clog, because, in his judgment, it did not affect the shares, and did not affect the mortgagor in his right to the shares. If the learned judge was right in that view, it is certainly not an authority against the decision which I am giving in the present case. It seems to me that it is not necessary to go through the authorities, which were all dealt with in the final decision of the House of Lords in *Noakes & Co. (Limited)* v. *Rice*. On these grounds I think the judgment of the learned judge in the court below was perfectly right and must be affirmed.

ROMER, L.J.—I am of the same opinion. The appellant's counsel discussed the question as to what was the true legal character, if I may venture so to describe it, of debenture stock issued by a company when the stock is irredeemable except on terms by the company. But it appears to me that any such question as that does not fall for our decision on the present appeal. Whatever the character of the debenture stock really is, treating it not as constituting a mortgage but as creating only a liability on the part of the plaintiff company to pay an annual sum which the plaintiff company is entitled to redeem on terms, yet, undoubtedly, in any point of view it creates a liability to pay money on the part of the plaintiff company, and is, in the case before us, secured on the plaintiff company's property. That being so, it is clear that, with regard to the transaction which is the subject of this appeal, it was one of loan by the defendant to the plaintiff company of £5,000, repayable at thirty days' notice on either side, charged upon £30,000 worth of debenture stock, and secured by the plaintiff company's mortgage. Whatever may be the nature of the debenture stock, I think that that transaction constituted a mortgage security in the ordinary sense, one to which the ordinary rules of equity applicable to mortgage securities apply. Now, one of those rules prevents the equity of redemption from being, as it is called, "clogged" or "fettered." It was boldly claimed on behalf of the appellant that because the mortgagors here were a limited company the rule as to clogging in cases of mortgages does not apply. The learned counsel could give no real reason in support of such a contention, and I need only say that it appears to me to be incapable of substantiation. I see no reason why a mortgage by a company should be in any different position from that of a mortgage by a private individual, so far as regards the clogging of the equity of redemption. Then, again, it was said on behalf of the appellant that the transaction between the plaintiff company and the defendant was, if properly looked at, really one by which the defendant purchased an option; that any reference there may have been in the memorandum of the transaction to a mortgage security was a mere small collateral matter, which might in substance be disregarded, and that the main object of the transaction was the purchase of the option. I will not pause to consider whether, even if that allegation could have been substantiated, the transaction, so far as regards the security—however minor in importance it may have been—could be freed from the rule as to clogging. To my mind it is clear, when the terms of the letter of the 11th of June, 1901, which formed the basis of the transaction between the parties, are looked at, the transaction was really in principle and substance a transaction between a mortgagor and a mortgagee, with certain collateral benefits stipulated for by the mortgagee as mortgagee and in no other capacity. That being so, it appears to me that the rule as to clogging is clearly applicable to such a security as we find here.

This question then arises: Has there been a clogging in fact within the purview of the rule? I think that there has been, having regard to the authorities, and particularly to the last authority in the House of Lords, which is a guide to us—viz., *Noakes & Co. (Limited)* v. *Rice*. I am satisfied on the construction of the letter of the 11th of June, 1901, that the twelve months' option there given to purchase the stock was not limited or intended to be limited to what I may call the redemption period—that is to say, it was intended to be exercised, and in terms was exercisable, even if during the twelve months the plaintiff company had paid off the principal, interest, and costs. On the terms of the contract, therefore, it is to my mind clear that, even if before the twelve months all

that was really due on the mortgage security had been paid off, the clause with regard to the option still applied, and was intended to apply and to affect the stock which was the subject of the option. That being so, it is also clear on the face of the letter that the option given to the mortgagee purported directly to affect the mortgage security. It purported to give an option to the mortgagee to purchase "the whole or any part of such stock"—"such stock" clearly referring to the mortgage stock and to no other stock. It purported, therefore, to give power to the mortgagee in any point of view, to pay a sum of money to the plaintiff company on terms of getting a much larger sum of mortgage debenture stock, which, as I have said, was secured on the plaintiff company's property. That purports to bind and affect the mortgage security in the hands of the mortgagors, the plaintiff company, even after payment of principal, interest, and costs. It appears to me, therefore, clearly to fall within the principle to which I have referred, and is a clog on the equity of redemption. It was contended on behalf of the appellant that it ought not to be held a clog because the provision could not be specifically enforced. But even assuming that—I will not pause to consider whether such a provision could be enforced or not—the fact that it could not be specifically enforced does not in my opinion render that fettering clause good. That appears to me also to follow from what was said by the members of the House of Lords who took part in the decision in *Noakes & Co (Limited)* v. *Rice*, for *Browne* v. *Ryan* was there referred to and approved by all the noble lords except by Lord Lindley, who said: "I am not satisfied that the Court of Appeal in Ireland did not go too far in holding that the plaintiffs' action for damages could not be sustained." With that exception all the noble lords, as I gather from the report of the case, approved of the decision in *Browne* v. *Ryan*. Now, it is noticeable, when the facts of *Browne* v. *Ryan* are looked at, that the fettering clause there was one which could not have been specifically enforced. And in that case it was decided that the whole clause nevertheless was bad and could not be enforced by the mortgagee, even so far as a claim on it for damages for breach. It appears to me that in questions such as I am now considering we are bound to follow loyally the views expressed by so large a majority of the lords who decided the case of *Noakes & Co. (Limited)* v. *Rice*. That being so, it is clear to my mind that in the present case the clause which I have pointed out as a fettering clause or a clog on the equity of redemption is wholly bad, even though it might not have been capable of being specifically enforced. The principle really, as I understand it, which governs cases of this kind is that stated by Rigby, L.J., in *Rice* v. *Noakes & Co. (Limited)*, in the report of the case in the Court of Appeal, where he said, at p. 457 of [1900] 2 Ch.: "The property which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not either expressly or by implication reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force." Here this fettering clause purported to give, as I have pointed out, to the mortgagee a hold upon the property which falls within the mischief referred to by Rigby, L.J. I will only say further that with regard to the case of *Carritt* v. *Bradley*, as pointed out by Collins, M.R., the ground of the decision in that case clearly renders it no authority which affects our decision on this appeal. *Carritt* v. *Bradley* is clearly distinguishable. The governing principle in *Carritt* v. *Bradley* was that the stipulations which were there said to form a clog did not bind or really attempt to bind the shares which constituted the mortgage security. I therefore agree in thinking that this appeal fails, and should be dismissed.

COZENS-HARDY, L.J.—I agree. In substance there is a mortgage transaction by which as part of the transaction itself the mortgagee stipulates that he may by his own act cease to be a mortgagee and become a purchaser. It was argued on behalf of the appellant that under the document in question no relief could have been obtained by way of specific performance, but he could only obtain damages. As at present advised I do not agree with that view. It seems to me that there are two periods which would have to be considered. The mortgagors could not redeem except on giving a thirty days' notice. The relation of mortgagor and mortgagee certainly subsisted until the expiration of the thirty days. If in that interval of time the mortgagee gave notice to exercise his option I do not as at present advised see that there could have been any answer at all to an action for specific performance of the agreement. It would have simply been a contract by the mortgagee to purchase the equity of redemption of the mortgaged property, and that—assuming there be no objection to the contract—is a contract of which the court would enforce specific performance. No doubt if the thirty days had elapsed and the mortgagors had got back the debenture stock certificate the case of *South African Territories (Limited)* v. *Wallington*, 46 W. R. 545, [1898] A. C. 309, would have applied. And it may well be, and I think would be, the case that the mortgagee could not then have claimed specific performance, as the remedy would have been in damages. But it is really not material to consider that distinction. If the former view as to specific performance is right, it seems to me that the decision of Hargraves, J., in *In re Edwards' Estate*, 11 Ir. R. Ch. Rep. 367, is directly and precisely in point. If the other view is right, then we have the decision of the Court of Appeal in Ireland in *Brown* v. *Ryan*, approved as it was by the House of Lords in *Noakes & Co. (Limited)* v. *Rice*, that it does not really matter, if the right to damages arises out of some contract directly relating to and purporting to affect the subject-matter of the mortgage. It has been said, however, and it has been strenuously argued, that all these doctrines have no application at all to the case of a company, that a company can give mortgages such as an ordinary individual cannot give, that a company can give an irredeemable mortgage, and that if it can give an irredeemable mortgage without any right of redemption at all, then it must of necessity be able to impose any sort of clog on the equity of redemption. In the view which I take it is not necessary to decide that point in the present case. The mortgage stock here was not irredeemable, and if irredeemable stock might have been issued, I cannot see that that would have any bearing on a transaction which was a separate and independent security given on stock of this nature. But as the matter has been mentioned, speaking only for myself, I desire to say that as at present advised, I think, in the language of Lord Macnaghten, "redemption is of the very nature and essence of a mortgage," and I fail to see how, apart from some statutory authority such as is given by the Companies Clauses Consolidation Act, 1863, and subsequent statutes, there can be any right in a limited company to put itself in a different position and in a stronger position from that of any other owner of property dealt with by way of mortgage. I only state this in order that it may not hereafter be supposed that by

silence I had acquiesced in the argument on behalf of the appellant.

*Appeal dismissed.*

Solicitors, *Dale, Newman, & Hood; H. Percy Becher.*

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## High Court of Justice.

Chan. Div. } Byrne, J. } Feb. 9, 10.

CLARK v. ROBINSON. (a.)

*Contract—Vendor and purchaser—Contract in letters—Contract "subject to an agreement"—Reference to formal contract—Intention—Statute of Frauds.*

*In answer to an offer to purchase land for £275, the vendor accepted "subject to the conditions of sale and an agreement." At that time the property was subject to some incumbrances which the vendor had not yet removed, though he was trying so to do. The purchaser had apparently been allowed to go on the land, and had executed some repairs there, but the vendor had remained in occupation. The conditions of sale referred to were conditions used at an abortive auction at which the property had been offered for sale.*

*Held, on the facts, in an action by the purchaser for specific performance, that there was in this case no concluded contract.*

Filby *v.* Hounsell, 45 *W. R.* 232, [1896] 2 *Ch.* 737, *discussed.*

This was an action for the specific performance of an alleged contract to sell certain copyhold land at Bishopwearmouth, in the county of Durham, the alleged contract being embodied in certain letters between G. Clark, deceased, of whose will the plaintiffs were executors and trustees, and one Campbell, acting as agent for the defendants. The defendants were the trustees of the will of a deceased testator who was owner of the land.

The plot of land in question was, with other land of greater area not belonging to the defendants, subject to a charge the amount of which in the aggregate greatly exceeded the amount of the price of the plot of land under the alleged contract.

The property had previously been offered for sale by auction, but the sale proved abortive, owing, as alleged by the defendants, to the existence of the above-mentioned incumbrance.

Negotiations with the incumbrancer were in progress for the payment off of the incumbrance, but had at the time of the alleged contract not been satisfactorily concluded. The parties then entered into negotiation for the purchase and sale of the property by private treaty, and a large number of letters passed between them.

On the 26th September, 1900, Mr. Campbell, who was one of the vendors, wrote to Clark saying: "In reference to the piece of land which you made an offer for at the auction, we have for certain reasons altered the matter, and we are now prepared to sell the plot for £50 cash and an annual ground-rent or interest of £12 18s. 4d."

On the 4th of October Clark replied: "I am not inclined to buy the piece of land referred to, subject to a ground-rent. I offered £250. I would not mind making the offer £275." After some further correspondence Clark finally refused to offer a larger sum, and on the 19th of October Campbell wrote: "I am sorry that you will not give more for the land, but I will accept it subject to the conditions of sale read at the auction and an agreement. Will you ask your solicitor to give me a call? I am communicating with the solicitor of the trust at York. I will have the agreement on Monday." Mr. Campbell appears to have put a stamp on the document, and he wrote across it "Accepted per letter of the 19th of October, 1900, J. W. Campbell as agent." Campbell also wrote to the solicitor to the effect that he had accepted an offer for £275 subject to the agreement and conditions of sale. Subsequently one of the purchasers went on the piece of land and did some repairs to some fencing. There was also a sub-letting of the land to one Wright. On the other hand, one of the alleged vendors who had lived with his mother in a house near the field stated that they had always been in possession.

The effect of the evidence is summarized in the judgment.

The main question between the parties was whether the said letter constituted a binding contract.

*Norton, K.C.*, and *G. F. Hart*, for the plaintiffs.—The letters constitute a binding contract.

They cited the following cases: *Crossley* v. *Maycock*, 22 W. R. 387, L. R. 18 Eq. 180; *Rossiter* v. *Miller*, 26 W. R. 865, 3 A. C. 1124; *Bolton* v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295; *Jones* v. *Daniel*, 42 W. R. 687, [1894] 2 Ch. 332; *North* v. *Percival*, 46 W. R. 552, [1898] 2 Ch. 128; *Bonnewell* v. *Jenkins*, 26 W. R. 294, 8 Ch. D. 70; *Filby* v. *Hounsell*, 45 W. R. 232, [1896] 2 Ch. 737.

*J. M. Gover*, for defendants.—The letters show only a preliminary agreement subject to and conditional on a further agreement being prepared incorporating the terms already arranged and any others not yet settled. The true principle applicable is that stated by Jessel, M.R., in *Winn* v. *Bull*, 26 W. R. 230, 7 Ch. D. 29, and quoted with approval in Fry on Specific Performance, at p. 241. The principle recognizes two classes of cases, and the present case falls clearly under the class first mentioned, so that the agreement was conditional and not final. [He cited the following cases: *Harvey* v. *Barnard's Inn*, 29 W. R. 922, 50 L. J. Ch. 750; *Hawksworth* v. *Chaffey*, 55 L. J. Ch. 335, 34 W. R. Dig. 41; *Lloyd* v. *Nowell*, 44 W. R. 43, [1895] 2 Ch. 744; *Chinnock* v. *Ely*, 13 W. R. 176, 4 De G. J. & S. 638; *Honeymann* v. *Marryatt*, 6 H. L. C. 112, 6 W. R. H. L. Dig. 21.] The present case may be distinguished from those quoted by the plaintiff on the ground that they fell under the second part of the above-mentioned principle.

*Norton, K.C.*, in reply.—*Filby* v. *Hounsell* applies.

BYRNE, J. (after stating the facts).—The first question that arises in this case is whether or not there was a completed contract for the sale and purchase of this piece of land when the letter of the 19th of October, 1900, was written and received. The case has been extremely well argued on both sides, and the distinction between the two classes of cases has been referred to, and has been recognized on both sides. I cannot do better, I think, than read the passage from Fry on Specific Performance, section 511, which says, "The law upon this point has been summarized as follows by Jessel, M.R. It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

a question of construction, whether the parties intended that the terms agreed on should merely be put into form or whether they should be subject to a new agreement the terms of which are not expressed in detail." That is the citation of the judgment in *Winn* v. *Bull*. Then it goes on: "In that case accordingly a writing purporting to be a contract for a loan, but expressed to be made subject to the preparation and approval of a formal contract, was held not to be a concluded contract. 'If,' said Sir George Jessel in another case, 'there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the person making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the court will enforce." Now *primâ facie*, and subject to something I am going to say presently on the case of *Filby* v. *Hounsell*, on which counsel for the plaintiff relied, it appears to me this case falls within the class of cases where the terms are made conditional upon an agreement being executed. The words are "expressed to be subject to an agreement." I pause here a moment to mention a little of what took place. I need not go through the whole history of it, but, put shortly, it is this: The intending purchaser employed as solicitor Mr. Barker, and Mr. Barker never inquired whether there was a written agreement for sale or not. He says he assumed there was a proper contract. The difficulty on the title was pointed out at a very early stage, and an abstract was lent to Mr. Barker that he might look into it and see the difficulty arising on the title. There was a good deal of delay. Unfortunately the purchaser died, and his executors took the matter up. One of them, whose evidence I have heard, says that he thinks it was Mr. Barker who told them that there was an agreement. "I should have been," he says, "very glad if there was no agreement at all."

Having heard all the evidence in the case, I am strongly disposed to think that what is suggested by the defendant is the true solution of much of the difficulty that has arisen in this case—viz., that the vendors thought throughout that there was no concluded contract; they meant to have an agreement as soon as they could get rid of the difficulty; they had arranged all the terms that were to be put into an agreement, but they did not seem to come to an agreement, and that is what they meant by "subject to an agreement." [His lordship proceeded to consider as to whether there had been any occupation or user of the land by the purchaser with the vendor's consent, and concluded that there had possibly been occupation upon the footing that there was not an agreement, and continued:]

Now the question comes up for determination, Was there a concluded agreement or not between the parties? *Primâ facie* there was no agreement, unless the plaintiff can so identify the words used "subject to an agreement" as meaning subject to the agreement on the form of agreement indorsed on the conditions of sale, in which case he might bring it within the authority on which he relies of *Filby* v. *Hounsell*. In *Filby* v. *Hounsell* property was put up for sale at a public auction with printed conditions and a memorandum indorsed, by which the purchaser acknowledged he had purchased the property for so much and agreed to complete the purchase according to the conditions of sale. The property was not sold at the auction, but subsequently, though on the same day G. C. Hounsell wrote to the auctioneers as follows: "To Frank Jolly & Co.—Dear Sirs,—I hereby offer the sum of £350 for No. 1, Kenmure-road, Hackney, lease about eighty-one years, ground-rent £8, and if my offer is accepted I will pay deposit and sign contract on the auction particulars." The reply to that is: "On behalf of our client we beg to accept your offer of £350 for the house, subject to contract as agreed. We enclose draft contract herewith," which was a copy of the agreement indorsed on the particulars, "and shall be glad to receive same signed, together with cheque for deposit, at your early convenience." The draft undertaking was never signed by Hounsell, but nevertheless the learned judge held that in that case the words "subject to contract as agreed," although at first sight they appeared to make the contract conditional, when carefully looked at, appeared to him to show that the acceptance was absolute and not conditional. His lordship says: "The offer stated in effect that if accepted the defendant would pay a deposit of £35 and sign the form of contract on the auction particulars. Now that form of contract was in writing and definitive in all its terms, and clearly identified by the offer. It left nothing to be agreed upon thereafter. The signing it was a form. The contract between the parties was complete on acceptance of the offer, whether the form on the auction particulars was signed or not." Now in the present case I have not got that identification, and it appears to me that I have not evidence which would justify me in saying that the parties meant that they would sign the agreement indorsed upon the conditions of sale. Under those circumstances I have come to the conclusion there was no concluded contract in this case, and the other matters that have been referred to really do not arise. It is an unfortunate case that there should have been such litigation. There has been a sub-sale apparently by the purchaser. I am afraid I cannot assist in any way. The action must be dismissed with costs.

Solicitors, *Tufnell, Southgate, & Son*, for *A. A. Barker*, Sunderland.

*Ridsdale & Son*, for *George Crombie*, York.

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Chan. Div. Farwell, J. — Feb. 24; March 7.

*In re* JOHNSON.

ROBERTS v. ATTORNEY-GENERAL (*a.*)

*Conflict of laws—Intestate—Domicil of origin—Domicil of choice—Distribution.*

*A testatrix, born in Malta, died in Baden, leaving part of her personal property undisposed of by her will. She was domiciled in Baden at the date of her will and up to her death, but was not naturalized there. According to the law of Baden the legal succession to the property which the testatrix had not disposed of by will was governed solely by the law of the country of which she was a subject at the time of her death.*

*Held, that the undisposed-of personal estate was to be distributed among the persons who would be entitled thereto according to Maltese law.*

The testatrix, Mary Elizabeth Johnson, was born out of wedlock in Malta in 1810. Her father, Thomas Johnson, was a British subject and domiciled in England at the date of her birth. Her mother,

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Marianna Attard, was domiciled in Malta at her birth. They eventually married in 1815.

The testatrix left Malta about 1832 or 1833. She made a will which did not dispose of the whole of her property. She was at the date of her will and thenceforth down to her death, on the 25th of December, 1894, domiciled in Baden. She was not, however, naturalized in Baden; and "according to the law of Baden the legal succession to the property of the deceased of which she has not disposed by will is governed solely by the law of the country of which the testatrix was a subject at the time of her death."

This was the finding of fact in the master's certificate, and, there being no summons to vary, was binding on all parties.

On these facts the master submitted certain questions to the court which, in the opinion of Farwell, J., resolved themselves into this one question—according to what law were the rights of the persons claiming the undisposed-of personal estate of the testatrix to be determined?

The personal estate consisted entirely of personal property (movables), situate partly in Germany and partly in England.

*Upjohn, K.C.*, and *Daniel Jones*, for plaintiff, the executor of the will.—According to the Baden law the distribution of the intestate's effects depends upon the law of the country of which she was a subject at her death. That must mean the law of England: *Moorhouse* v. *Lord*, 11 W. R. 637, 10 H. L. Cas. 272.

*Butcher, K.C.*, and *Austen-Cartmell*, for the next-of-kin.—According to Maltese law the testatrix was born in Malta, and the law of Malta is applicable in this case: *Abd-ul-Messih* v. *Farra*, 13 App. Cas. 431, 36 W. R. Dig. 72; *Udny* v. *Udny*, L. R. 1 H. L Sc. & Div. App. 441, 17 W. R. H. L. Dig. 5; and *Collier* v. *Rivaz*, 2 Curt. 855.

*R. J. Parker*, for the Attorney-General.

FARWELL, J., stated the facts, and proceeded: Now, the rights of the parties claiming in an English court movables (and there is no question in this case of leaseholds or real estate) of an intestate, depend on the law of his domicil at the time of his death. It is a settled principle of English law that no one shall be without a domicil; everyone takes at birth the domicil of his father if he be legitimate, of his mother if illegitimate, and he may in later life acquire instead thereof a domicil of choice, but until he does so, or if he abandons his domicil of choice, his domicil of origin remains or revives. To quote Lord Watson in *Abd-ul-Messih* v. *Farra*, "Lord Westbury in *Udny* v. *Udny* said: 'Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time.' According to English law, the conclusion or inference is that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity upon which his majority or minority, his succession and testacy or intestacy, must depend."

But when I turn to the law of Baden, the municipal law of which, according to our law, the testatrix has attracted to herself, I find that the courts of Baden pay no heed to domicil. She was foreign to them in birth, and had done in her lifetime no act which their courts recognized as entitling her to be regarded as a person the succession to whose movables should be regulated by their law. According to their law, the succession to her movables is regulated by the country of which she was a subject at her death.

Now, I do not understand that anyone contends, and if they did it would be impossible for me to hold, that this results in *circulus inextricabilis*, an unending reference from one court to another: see La Revue de Droit International, vol. 30, p. 155, by M. Bartin. In my opinion the true view is this: the question, having arisen in an English court, primarily falls to be decided in accordance with the law administered by that court. That law distributes movables according to the domicil at the death, and according to that law every person must have a domicil somewhere or other, either of origin or of choice. When the court has ascertained that the domicil of origin has been displaced by domicil of choice, distribution of movables follows the domicil of choice.

But in order to establish a new domicil of choice the court has to be satisfied that it has been adopted *animo et facto*; it is essential that there should be both *animus et factum*. When, therefore, the law of the land said to be chosen as the new domicil, disregards domicil and declines to distribute in accordance therewith, or to treat it as of any force, there cannot have been any change of domicil *de facto*, and the case is accordingly remitted to this court as a case where the *propositus* has intended but has failed to obtain an effectual domicil of choice. No change is effectual unless the *factum* is proved, and the *factum* cannot exist in a country where the law refuses to recognize it. The result is that this court, finding that there has been no new domicil chosen, must conclude that a domicil of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicil at all, and that the *propositus* therefore is left with his domicil of origin unaffected. The Baden court in effect disavows him, and disclaims jurisdiction. This appears to me to be the logical result of the application of our rules respecting domicil, and to be in accordance with justice. It is argued that the proper course is to remit the case again to the Baden courts, leaving them to say what their law would do with the movables of the *propositus*; but the only ground on which the question is referred to them at all is by reason of our law of domicil. When they have once rejected this they have rejected the *propositus* and all claim to direct the distribution of his movables altogether—he is a mere stranger within their gates. Why, then, should this court ask their assistance when the only ground for seeking it is repudiated by them? Take the converse case. Suppose that the Baden court is distributing the movables of an English subject whose domicil of birth is English, but who according to our law has acquired a domicil of choice in Baden, they would disregard the domicil altogether, and if they treat the question of English law as a matter of fact as we do, on which evidence must be adduced, they would distribute the movables in accordance with the domicil of origin of the *propositus*, exactly as I am proposing to do in the present case. If, on the other hand, they regard it as a question of their own law and not of fact, as M. Labbé appears to hold in regard to French law (see Journal du Droit International Privé, 1885, p. 5), and there is a conflict between their views and ours, I see no reason why in distributing movables under the jurisdiction of this court we should surrender our own law to their views of our law in order to secure uniformity. [The learned judge then referred to an American case of *Hilton* v. *Guyot*, quoted in Minor in Conflict of Laws, and proceeded:] I cannot think that I should have due regard to such rights if I were to abrogate our own ordinary rules simply for the sake of securing uniformity with the view taken of those rules by the courts of another country. If the movables of the

same *propositus* are differently distributed amongst persons according as the court directing the distribution is in England or Baden, the reason is because the two systems of law are intrinsically different and can only be reconciled by international treaty: Story, Conflict of Laws, s. 28.

But in the particular matter with which I have to deal I do not think that any great divergence must necessarily result. It is not for me to say how the Baden courts would interpret their rule of distributing according to nationality. The one case in which an unavoidable conflict arises appears to me to be that of a native subject of Baden who has acquired a domicil of choice in England. I see no way to avoid this except by treaty. Nor do I think that the fact that in the converse case, such as is now before me, we distribute our own subject's movables in accordance with our law, although he would have acquired a Baden domicil, if it were possible, there is any breach of international comity, inasmuch as we make this distribution, not in disregard of, but in compliance with Baden law, which rejects the jurisdiction over the movables of the *propositus* that we offer it. [His lordship then referred to the cases of *In re Brown-Séquard*, 70 L. T. Rep. 811; *The Forgo case*, and the discussion thereon in Sewell on French Law Affecting British Subjects, 1897, p. 46, *et. seq.*; an article by M. Bartin in the Revue de Droit International, vol. 30, pp. 129, 272; articles by Herr Keedel and Signor Fiòre in the Journal du Droit International Privé, 1901, and the debate on the subject at the session of the Institut du Droit International held at Neuchatel in 1900, set out in the same volume.] I have given these treatises and Herr Bar's work the best consideration that I can, but I cannot find any such basis of authority on which to found any conclusion, and I gather that the disputants are urging their views of what ought to be, rather than stating their opinion of what is, the law. This is certainly the effect of the resolution at Neuchatel.

It was urged in argument that the finding in the certificate is that according to the law of Baden, movables are to be distributed according to the intention of the *propositus*. I have already given my reasons for holding that the Baden courts have really refused jurisdiction. But, even if this were not so, I should arrive at the same conclusion in a different way. When it is said that the Baden courts regard the nationality of the *propositus*, I apprehend that this means that they distribute according to the law of the nation to which the *propositus* belongs, or, in other words, of which he is a subject.

But the British Empire consists of a large number of states, countries and colonies, and differs from continental nations in that it does not impose its own laws wherever its sway extends, but admits many different systems of law within its bounds. There is no one uniform law of the Empire which can be taken for this purpose as the law of the nationality of the *propositus*. To what nationality, then, does the *propositus* belong, or of whom is he a subject? The only possible answer appears to me to be that he is a subject of the British Crown, and that his nationality is the British Empire; but inasmuch as there is no one law of the Empire to which the rule in question can refer, resort must be had to the law of England.

The first proposition seems to be clear; the *propositus*, whether born in England, Scotland, Canada, Cape Colony, or the Channel Islands, is a natural born subject of the Crown; and as *Calvin's case*, 7 Rep. 1, shows, the Crown is one and indivisible, and cannot be severed into as many distinct kingships as there are kingdoms. And even if it could, how is it possible to determine what is a distinct kingdom? Even if India or some of our great colonies could lay some claim to be so considered, how could the Isle of Man, or, indeed, Scotland, since the Act of Union? But to admit that either of these latter must be treated as one with England would let in all the inconveniences which have been pointed out in argument, and would, moreover, create an extraordinary anomaly. I base my opinion on principle and on considerations of policy and convenience. "Allegiance is the tie or *ligamen* which binds the subject to the king in return for that protection which the king affords the subject" (1 Bl. 354). As is said in *Calvin's case*—*Protectio trahit subjectionem et subjectio protectionem.* It is admitted that it is the same thing for this purpose to say that the *propositus* is the subject of X. as to say that he belongs to the nationality of X. I see no way in which the *propositus* can claim to belong to a separate part of the king's dominions as to a separate nationality without denying allegiance to the king as supreme over the whole empire as one empire. This point seems to me to be decided by *Calvin's case*. And consistently with this we find that when the East India Co. was abolished by 21 & 22 Vict. c. 106, it was enacted (section 2), "India shall be governed by and in the name of her Majesty." So, too, the sanction, either express or implied, of the Crown is required for the validity of all Acts of Colonial Legislatures: Dicey on the Law of the Constitution, p. 98. Turning from principle to policy and convenience, how is the foreign court to ascertain what law of what part of the British Empire is to apply? Foreign states are in diplomatic relation with this country as representing the whole empire. The only possible solution appears to me to be that foreign courts must necessarily refer such questions as these to, and decide them according to, the law of the country with which alone they are in diplomatic relation; and inasmuch as the law of England distributes such movables in accordance with the domicil of origin, substantial justice is done to all his Majesty's subjects. I conclude therefore that distribution according to the law of nationality means according to English law, but according to such law as applicable to the particular *propositus*, and not to Englishmen generally without regard to their domicil of origin.

The testatrix in this case is found by the certificate to have been born a subject of the British Crown, and to have had her domicil of origin in Malta. Her movables, therefore, will be distributed amongst the persons who would be entitled thereto according to Maltese law.

Solicitors for plaintiff, *Hickson & Moir*.

Solicitors for next-of-kin according to Maltese law, *S. W. Johnson & Sons*, for *Adamson & Adamson*, North Shields.

Solicitor for Attorney-General, *Solicitor to the Treasury*.

K. B. Div. (Bigham, J.) Dec. 10.

GREENOCK STEAMSHIP CO. (LIMITED) v. MARITIME INSURANCE CO. (LIMITED). (a.)

*Insurance—Marine—Voyage policy—Round voyage—Implied warranty of seaworthiness—Insufficiency of coal—Sacrifice of cargo and spars—Negligence clause—Breach of warranty covered by insurance.*

*Although the warranty of seaworthiness implied in a policy for a round voyage is that the ship is seaworthy for the whole voyage, the warranty, so far as the obligation of the shipowner to have on board a proper supply of coal is concerned, is sufficiently observed if the voyage is so arranged as that the vessel can and shall coal at convenient ports* en route.

*A policy of insurance for a round voyage contained the following clauses: "This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. . . . Held covered in case of any breach of warranty . . . at a premium to be hereafter arranged."*

*The vessel started on one of the stages of the voyage with an insufficient supply of coal to carry her to the next coaling place, in consequence of which it became necessary to sacrifice part of the cargo, spars, and fittings.*

*Held, that the starting of the vessel on a stage of the voyage with an insufficient quantity of coal was a breach of the implied warranty of seaworthiness on the part of the shipowner.*

*Held, also, that the right of the shipowner, under one of the above clauses, to call upon the underwriter to hold him covered in case of a breach of warranty could only be exercised by him on payment of a reasonable additional premium, and that in the present case such premium would exceed the amount of any loss that could be claimed by the shipowner.*

*Held, further, that the shipowner was not entitled to recover under the negligence clause, because the loss was not due to any negligent act.*

Action tried in the Commercial List.

This was an action brought by the owners of the steamship *Gulf of Florida*, against the defendant company on a policy of insurance dated the 19th of July, 1897.

The policy was for a round voyage to ports on the West Coast of South America and back to the United Kingdom or the Continent, and contained the following terms: "Against the risk of total loss only, but including collision clause, general average, and salvage charges. Perils insured against of the seas, &c. Subject to and including Gulf Line voyage clauses as annexed."

These clauses included the following: "This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. Including all risks incidental to steam navigation. General average salvage and special charges payable as *per* official foreign adjustment, if so made up, or *per* York-Antwerp Rules, 1890, if in accordance with the contract of affreightment. Held covered in case of any breach of warranty, deviation, and [or] any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged. It shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said ship, &c., and any part thereof without prejudice to this insurance."

The case was tried upon an agreed statement of facts.

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

On arrival at Montevideo *The Gulf of Florida* filled up her bunkers with coal, and left on the 18th of December with 562 tons of coal. Meeting with an accident on the same day, she put back to Montevideo.

On the 23rd of December she resumed the voyage, by this time having 542 tons in her bunkers, which was considered still sufficient to take her to St. Vincent, her next coaling place. On the voyage she encountered strong head winds and seas. The coal was found to be burning quickly; consequently on the 9th of January the speed was reduced. On the next and following days part of the cargo, fittings, and spars were used as fuel; but for this sacrifice the vessel would not have made St. Vincent unassisted. The quantity of coal when the ship left Montevideo both on the 18th of December and the 23rd of December was in fact insufficient for the passage to St. Vincent. The plaintiff company paid £662 1s. 11d. for the cargo, so used as fuel, to the consignees, and the value of the spars and fittings so sacrificed was £312 4s.

The plaintiffs claimed that they were entitled to the defendants' proportion of the value of the spars and fittings so sacrificed and of the sums paid for the cargo so sacrificed; and alternatively for their proportion of the value of the spars and fittings so sacrificed and of the ship's contribution in general average in respect of the burnt cargo. Further, they claimed that they were entitled to recover on the payment of an additional premium to be fixed by the court.

*Carver, K.C.*, and *Leck*, for the plaintiffs.

*J. A. Hamilton, K.C.*, and *Simey*, for the defendants.

The following cases were cited: *Thin* v. *Richards*, 40 W. R. 617, [1892] 2 Q. B. 141; *The Vortigern*, 47 W. R. 437, [1899] P. 140.

*Cur. adv. vult.*

BIGHAM, J.—The main question in this case is whether, when *The Gulf of Florida* sailed from Montevideo for St. Vincent on the 23rd of December, 1897, there existed an implied warranty on the part of the plaintiff that she was seaworthy for that voyage. It is found as a fact that she was insufficiently coaled, and this was clearly a breach of the warranty, if such a warranty existed.

Now, the policy sued upon is a voyage policy—the body of the policy and the attached clauses clearly show it, so that, when the vessel originally started from the United Kingdom on her round voyage, a warranty existed that she was seaworthy for that round voyage. But the warranty is one thing and the observance of it is another. It is clear that in such an adventure it is practically impossible for the ship to sail with sufficient coal for the whole of the contemplated voyage. She would have to call at convenient ports on her route for the purpose of replenishing her bunkers, and therefore though the warranty at starting is that she shall be seaworthy for the whole voyage, the warranty is sufficiently observed if the voyage is so arranged as that the ship can and shall coal at convenient ports *en route*. The warranty may be stated as an undertaking that the vessel shall be sufficiently coaled for the whole of her voyage, the warranty to be observed by coaling sufficiently at successive points to navigate the vessel to the end of her voyage. This, I think, is the true effect of *Thin* v. *Richards* and of *The Vortigern*. There is, to use the language of Collins, L.J., a recurring obligation to bring the vessel up to the required standard at each stage. It is true that in both those cases the question arose between shipowner and cargo owner, and not between shipowner

and underwriter. But this, in my opinion, makes no difference, and I am fortified in this view by the judgment of A. L. Smith, L.J., in *The Vortigern*. He there states the law as follows: "In my judgment, when a question of seaworthiness arises either between a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that at the commencement of each stage the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage. If he fails in this he fails in defeating the issue of unseaworthiness which *primâ facie* has been established against him. In each case it is a matter of proof as to where the necessity of the case requires that each stage should be, and I think that in the present case the necessity of coaling places at Colombo and Suez has been established." This view of the law does not in any way conflict with the well-known rule that once the warranty of seaworthiness for the whole voyage is complied with, the ship owner's obligation to the underwriter is at an end. It merely allows a convenient way of enabling the shipowner to fulfil his warranty—that is to say, to fulfil it by stages instead of once for all at the beginning of the risk. I therefore hold that the warranty of seaworthiness still existed at Montevideo, and was there broken. The result is, that when the vessel sailed from Montevideo the policy no longer attached to the risks insured against.

But there are other questions to consider. It is said that the breach was due to the negligence of the engineer, and that, therefore, the loss is covered by the negligence clause attached to the policy. This clause is one of a number of clauses introduced into the policy by the shipowners for their own benefit. It is in the following words: "This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. . . ." I do not think this clause has any application to the present case. The underwriters are are only responsible for losses which are directly attributable to the risks insured against. The loss in question—viz., the burning of the ship's fittings and spars—was not directly due to any negligent act at all. It was due to the voluntary act of those engaged in the navigation of the ship. The original negligence was no doubt a *causa sine quâ non*, but it was not a *causa causans*; therefore it cannot be taken into consideration. Moreover, as I have before stated, the loss did not happen until after the policy had ceased to attach.

The plaintiffs, however, relied upon another of the appended clauses as affording them a right to recover. The consideration of this clause presents more difficulty. It is as follows: "Held covered in case of any breach of warranty, deviation, and [or] any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged." Now, undoubtedly the warranty of seaworthiness is far and away the most important of the few implied warranties which a shipowner enters into when he insures his ship, and I am satisfied that if proper effect is to be given to this clause it must be held to apply to that particular warranty. What, then, is the operation of the clause? In my opinion it entitles the shipowner, as soon as he discovers that the warranty has been broken, to require the underwriter to hold him covered. It also entitles the underwriter to exact a new premium commensurate with the added risk. But what is to happen if the breach is not discovered until a loss has occurred? I think even in that case the clause still holds good, and the only open question would be, What is a reasonable premium for the added risk? To answer this the parties must assume that the breach was known to them at the time it happened, and must ascertain what premium it would then have been reasonable to charge. If they cannot do it by agreement, they must have recourse to a court of law. It is like the case of goods sold at a reasonable, though an unnamed, price. The sale is good, but the price has to be ascertained, either by agreement or at law. In the present case the parties ask the court to fix this additional premium, and I am prepared to do it. What might an underwriter fairly require as a premium for insuring a steamer which starts on a voyage short of coal? One of the almost inevitable consequences of such a state of things is that some other fuel will have to be used during the voyage—cargo, or ships' fittings, or spars. Such a sacrifice will constitute a general average loss, for which the underwriter will be responsible to the shipowner. Would it be reasonable to require the underwriter to charge as premium a less sum than the amount of a so obviously probable loss? I think not, and indeed I think the underwriter would reasonably be entitled to charge more, for the short supply of coal would not merely bring about the general average loss I have mentioned (as it did in this very case) but would also materially increase the risk of a total loss of the vessel herself. Thus I come to the conclusion that the additional premium in this case ought to be at least equivalent to the average loss now claimed. It follows that the plaintiffs can recover nothing in this action, for the additional premium more than meets the loss claimed.

A question was argued before me as to whether the loss in question was a general average loss or gave rise to a larger claim on the part of the shipowner under the sue and labour clause. It is not material to consider this question, for even if the full value of the burnt goods could be recovered under the sue and labour clause, I should still be of opinion that the additional premium would exceed the amount of the claim; but I desire to say that in my opinion the sacrifice cannot be regarded as within the sue and labour clause. At most it is the subject-matter of general average. There must therefore be judgment for the defendants.

Solicitors for plaintiffs, *Coote & Ball*, for *Adamson & Adamson*, North Shields.

Solicitors for defendants, *Field, Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool.

## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) And Chan. Div. (Buckley, J.) — Feb. 25; March 4; April 21, 22; May 5.

BERRY v. GAUKROGER. (a)

*Inland revenue — Estate duty — Incidence — Settled property—Pecuniary and residuary legatees—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *ss.* 8 (4), 9 (1) (5) (6), 14 (1).

*In respect of property, of which the deceased was not competent to dispose, the scheme of the Finance Act,* 1894, *is to tax, not the interest which ceased with the death, but the property out of which the interest was enjoyed, and to make every person who takes property otherwise than through the executor liable to pay a proportionate part of the estate duty. Accordingly where property, real and personal, was left upon trust for conversion and to pay an annuity to the testator's widow for life, and after her death upon trust to pay legacies amounting to* £9,000 *and to divide the residue among persons named,*

*Held, by the* Court of Appeal, *reversing the decision of* Buckley, J., *that under section* 8 (4) *of the Finance Act,* 1894, *the estate duty, which became payable on the death of the widow (who died in* 1900), *should be borne rateably both by the pecuniary legatees and the residuary legatees; and, consequently, that the pecuniary legatees were not entitled to throw the entire duty upon the residue.*

Adjourned summons.

This summons, which was taken out during the course of an administration action, raised the question of the incidence of estate duty as between legacies and residue.

The following statement of facts is taken from the judgment:

John Berry died on the 25th of August, 1869, having by his will, made the same day, after bequeathing certain legacies, devised and bequeathed his residuary real and personal estate to trustees, upon trust to convert and pay his funeral and testamentary expenses and debts and the legacies before bequeathed, and to invest the residue, and out of the income to pay his wife an annuity of £500 a year, and to pay some other small annuities; and he directed that, after his wife's death, his trustees should hold the trust funds upon trust to pay thereout certain legacies, amounting in the aggregate to £9,000, and then to divide the residue amongst certain persons named.

An administration action was brought, and in the action a sum of Consols was carried over to the account of the widow's annuity.

The widow died on the 16th of November, 1900.

By an order dated the 12th of March, 1901, payment of the legacies was ordered, and inquiries were directed to ascertain the parties entitled to the residue.

Under section 1 of the Finance Act, 1894, estate duty became payable on the widow's death upon so much of the fund as represented proceeds of real estate of John Berry, in that it was settled property in which the deceased (the widow) had an interest ceasing on her death.

Having regard to section 21 (1) of the Finance Act, estate duty was not payable so far as the fund represented personal estate.

The proportion of the fund representing real estate was ascertained or taken to be twelve-seventeenths of the total amount.

The estate duty upon twelve-seventeenths of the £9,000, being the amount required to pay the legacies, was £223 14s. That had been paid. The legacy duty had also been paid. Payment had then been made to the legatees of the difference between their respective legacies and their respective proportions of the £223 14s. and of the legacy duty.

The pecuniary legatees of the £9,000 had thus borne the £223 14s., and, of course, also the legacy duty, in their legacies.

The present summons was an application on the part of the pecuniary legatees that they should, to the extent of £223 14s., be recouped out of the residue.

*W. Baker*, for the pecuniary legatees.

*J. Austen-Cartmell*, for the persons entitled to the residue.—The widow not having been competent to dispose of this fund, the executor is not, and every person taking any part of it is, accountable for the duty: section 8 (4). The property did not pass to the executor as such, and a rateable part of the duty is charged upon it: section 9 (1). The persons accountable under section 8 (4) are in the present case persons entitled to a sum charged on the property within section 14 (1). That section, therefore, applies, and its effect is to distribute the burden rateably between the pecuniary legatees and the persons entitled to the residue: *In re Countess of Orford*, 44 W. R. 383, [1896] 1 Ch. 257; *In re Parker Jervis*, 47 W. R. 147, [1898] 2 Ch. 643. This rule applies unless there is a contrary intention shown in the will: section 14 (1). Such a contrary intention is not shown by the direction to pay testamentary expenses. For the trustees, who under section 8 (4) are the persons primarily accountable for the duty, are accountable, not as executors, but as trustees; and testamentary expenses are expenses incurred by an executor in his executorial capacity; and it is absurd to say that the testator contemplated the payment of a duty imposed several years after his death: *Sharp* v. *Lush*, 27 W. R. 528, 10 Ch. D 468; *In re Clemow*, 48 W. R. 541, [1900] 2 Ch. 182; *In re Treasure*, 48 W. R. 696, [1900] 2 Ch. 648. In no case is estate duty payable in respect of real estate a testamentary expense: *In re Jolley*, 17 Times L. R. 244; *In re Sharman*, 49 W. R 555, [1901] 2 Ch. 280. The gift of legacies to persons named, with a residuary gift, is not an expression of a contrary intention: *In re Countess of Orford*; *In re Power*, 47 W. R. 183; *In re Chisholm*, [1902] 1 Ch. 457, 50 W. R. Dig. 4.

He also referred to *In re Campbell*, [1902] 1 K. B. 113, 50 W. R. Dig. 72; *Earl Cowley* v. *Commissioners of Inland Revenue*, 47 W. R. 525 [1899] A. C. 198; *In re Webber*, 44 W. R. 489, [1896] 1 Ch. 914; *Wade* v. *Wade*, 47 W. R. 43, [1898] 2 Ch. 276; and *In re Duke of St. Albans*, 49 W. R. 74, [1900] 2 Ch. 873.

*W. Baker*, in reply.—Section 14 (1) does not apply, because the pecuniary legacies were not a sum charged on the property. In any case there is an express provision to the contrary.

*Cur. adv. vult.*

BUCKLEY, J., after stating the facts, said: The question I have to determine upon this summons is whether the pecuniary legatees ought to bear that £223 14s., or whether that amount ought to be thrown upon the annuity fund or the portion of it representing real estate, so as that the residuary legatees and not these pecuniary legatees shall bear it. The solution of this question looks reasonably easy. The annuity fund is settled property within the Finance Act, 1894: *In re Campbell*. By section 9 (1) of the Finance Act the estate duty is a first charge on the property, and when the duty has been raised under this charge and paid, there remains to be

(a.) Reported by J. I. STIRLING and H. L. ORMISTON, Esqrs., Barristers-at-Law.

administered a fund more than sufficient to pay the £9,000 legacies. In a due course of administration the legatees would receive their £9,000, less, of course, the legacy duty, and the balance would be paid to the residuary legatees; or, again, if the executor, under section 6 (2), or any of the parties accountable under section 8 (4), pays the duty, he will be entitled to a charge under section 9 (5) and (6); and, again, the duty being raised under this charge and paid, the balance will be administered as before between the pecuniary legatees and the residuary legatees. Or again, if the pecuniary legatees (who seem *primâ facie* to be persons to whom the property passes for a beneficial interest in possession on the death of the widow within section 8 (4)) themselves pay the duty, they would be entitled to the like charge under section 9 (6), and could recover it by virtue of that charge, and would thus not bear the duty themselves.

But Mr. Cartmell, who appears for the residuary legatees, to whom and to whose intimate knowledge of this difficult Act I am indebted for a most valuable argument, contends that the pecuniary legatees of the £9,000 are, within section 14 (1), "persons entitled to a sum charged" on the property. It is thus necessary to determine what, upon the true construction of section 14 (1), is "a person entitled to a sum charged." In my opinion, that person is a person not included within the class of persons who, under section 8 (4), are accountable for the duty. I arrive at this conclusion upon the following grounds: First, if that person be so included, then section 14 (1) gives to every member of the class accountable under section 8 (4), except that person, a right to sue him, and gives him no similar right to sue any other member of that class—a construction which, in the absence of good reason to the contrary, seems highly improbable. Secondly, in section 14 (1) the person authorized and required to pay the estate duty is, I think, mentioned by way of contrast to the person entitled to the sum charged. Thirdly, if the person entitled to the sum charged is a member of the class accountable under section 8 (4), the following result ensues—namely, (*a*) if he pays the duty, then under section 9 (6) he will be entitled to a charge and can recover as against the property all that he has paid, and he in that case will bear nothing, for section 14 (1) does not enable a person who has not paid (which in this case would include all the other members of the class accountable) to recover against him; whereas (*b*) if another member of the class accountable pays the duty, then the person entitled to the sum charged can be rendered liable to pay his proportion, for under section 14 (1) the person who has paid can sue him. It is impossible to adopt a construction which would lead to so incongruous a result. And, fourthly, if the construction be adopted that the person entitled to the sum charged is not, within section 8 (4), a person accountable, then the whole matter falls into order. For, being excluded from section 8 (4), he pays nothing to the revenue, and the person liable to the revenue can recover under section 14 (1) the proper sum from him.

Section 14 (1), in my opinion, contemplates the case of persons who either are entitled to such a charge as, under section 7 (1) (*a*), is brought into account for the purpose of estimating the duty (say, a charge made by the testator in his lifetime in favour of the trustees of his daughter's marriage settlement) or persons who under the testator's disposition become entitled to capital sums, say to portions, or to annuities, say, rent-charges or annuities charged upon the testator's property. If the case of such persons be considered, I think it will be found that the construction at which I arrive works consistently so as to throw upon such persons the proper portion of the duty which they ought to bear.

I am therefore of opinion that the "person entitled to a sum charged" under section 14 (1) is in this Act excluded from the class of persons who in section 8 (4) are spoken of as being persons to whom property passes for a beneficial interest in possession.

It remains to determine what upon the above principles is the character borne by the £9,000 legacies in the present case. If A. bequeaths £100 to B. and his residue to C., it is impossible, I think, to say, or at any rate to say for the purposes of this Act, that B. is a person entitled to a charge. B. takes a fixed sum and C. takes what remains, but B. does not take by way of charge. B. is, I think, in that case a person who, within section 8 (4), takes a beneficial interest in possession. Next, suppose that A. dies before the Finance Act, having bequeathed his property to X. for life, and having given upon the death of X. £100 to B. and the residue to C. Upon the death of X., it seems to me that B. takes a beneficial interest in possession just as in the former case he took such an interest upon the death of A. The £9,000 legatees in this case, in my judgment, take beneficially in possession under section 8 (4), and are not persons entitled to a charge within section 14 (1).

Mr. Cartmell, however, refers to the decision of North, J., in *In re Countess of Orford*. That case is, I think, distinguishable. At [1896] 1 Ch. 263 the learned judge, after referring to the decision of Stirling, J., in *In re Bourne*, 41 W. R. 70, [1893] 1 Ch. 188, and pointing out that that was a decision in respect to the estate of a testator who was dealing with his own estate, goes on to say, "But the present case is quite different. It is not a case of dealing with a testator's own estate." The disposition with which North, J., had to deal was a disposition by way of exercise of a power. The case before me is a case of dealing with the testator's own estate.

For these reasons I think that the £223 14s. is not to be borne by the pecuniary legatees of the £9,000. They are entitled to receive payment of their legacies (the fund after payment of the estate duty being sufficient for the purpose), less, of course, the legacy duty.

The residuary legatees appealed.

*J. Austen-Cartmell*, for the residuary legatees.

*W. Baker*, for the pecuniary legatees.

The following additional cases were referred to: *In re Maryon Wilson*, 48 W. R. 338, [1900] 1 Ch. 565; *In re Meyrick, Meyrick* v. *Hargreaves*, 45 W. R. 120, [1897] 1 Ch. 99; *In re Shaw, Tuckett* v. *Shaw*, 43 W. R. 315, [1895] 1 Ch. 343; *In re Croft*, 40 W. R. 425, [1892] 1 Ch. 652; *Moore* v. *Dixon*, 29 W. R. 12, 15 Ch. D. 566; *Trollope* v. *Routledge*, 1 De G. J. & Sm. 662; *Gray* v. *Gray*, 44 W. R. 406, [1896] 1 Ch. 620; *In re Bourne*, 41 W. R. 70, [1893] 1 Ch. 188; *Robertson* v. *Broadbent*, 32 W. R. 205, 8 A. C. 812; and *Bothamley* v. *Sherson*, 23 W. R. 848, 20 Eq. 304.

*Cur. adv. vult.*

May 5.—VAUGHAN WILLIAMS, L.J.—I take the facts as stated in the judgment of Buckley, J., and I agree with him as to the question which we have to propose to ourselves — which is, whether the pecuniary legatees ought to bear the £223 14s., or whether that amount ought to be thrown upon the annuity fund, or the portion of it representing the real estate, so that the residuary legatees and not the pecuniary legatees shall bear it. It is to be recollected that the property, in respect of which the question of the incidence of estate duty arises in this case, is property

of which the deceased was not competent to dispose, and that in respect of such property the scheme of the Act is to tax, not the interest which ceased with the death, but the property out of which the interest was enjoyed. Section 8 of the Finance Act provides for the collection of estate duty, and sub-section 4 of that section provides for cases in which property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of that property. Now, that is admittedly the present case. In such a case it is provided that "every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing, or the management thereof is at any time vested, and every person in whom the same is vested in possession, by alienation or other derivative title, shall be accountable for the estate duty on the property." In my judgment each of the pecuniary legatees, and also the residuary legatees, all took upon the death of the testator a portion of the property for which his executor was not accountable, for a beneficial interest in possession, and as such became accountable for the duty, and therefore debtors to the Crown for the duty. In the present case I do not think it is necessary to decide whether each person taking a beneficial interest in possession became accountable for the duty on the whole £9,000, or only to the extent of his beneficial interest, but I am inclined to think only to the extent of his beneficial interest. By section 9, sub-section 5, any "person authorized, or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty or raising the amount of the duty when already paid, have power" to raise the amount by sale or mortgage of the property. This sub-section applies to all property passing, whether "free property" of the testator or not. Sub-section 6 of section 9 provides that "a person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him." I agree with Buckley, J., that sub-section 6 would give this charge to any person accountable under section 8 (4). It was argued before Buckley, J., that section 14 (1) would enable a person accountable under section 8 (4) to recover an amount equal to the proper rateable part of the estate duty from persons to whom property passes for any beneficial interest in possession within the meaning of section 8 (4), as being persons entitled to a charge on such property. I suppose the argument was meant to apply to a case in which the person authorized or required to pay the estate duty had paid that duty on the whole sum out of which the interests in possession passed on the death of the deceased. I doubt, however, whether, even in such a case, the persons taking the interest in possession would fall within the words "the person entitled to any sum charged on such property." I will assume the negative for the purpose of my judgment; but, notwithstanding my agreement in most of the premises arrived at by Buckley, J., I cannot agree in his ultimate conclusion. It seems to me that the moment you find that under section 8 (4) every person to whom property (other that free property of the testator) passes for a beneficial interest in possession (which includes these pecuniary legatees) is accountable for the duty, be it on the whole fund or his portion of the fund, and therefore *pro tanto* a debtor to the Crown, the court ought in the due course of administration to take the whole duty out of the fund, and to deduct that duty rateably from the legacy of each legatee and from the residue alike. If this were not so, the ultimate incidence of the estate duty on the fund passing would depend upon the accident of which of the parties accountable was in fact called on to pay, or on the fact that no one was called on to pay, but that payment was left to be determined in due course of administration. It seems to me that the pecuniary legatees cannot relieve themselves of the burden of a rateable part of this duty unless they can show that, outside the Finance Act, there is something which entitles them to have, as against the residuary legatees, the amount of their legacies free of estate duty. Now, in the first place, it seems to me the whole scheme of the Finance Act, so far as it relates to property passing on the death of the deceased in respect of which his executor is not responsible for estate duty is to tax the property itself so passing, and to make the estate duty a first charge. The decision of North, J., in *In re Countess of Orford*, seems to me to be a distinct authority on the construction of the Finance Act, 1894, that in all cases where the duty becomes payable for which the executor is not made accountable by section 6 (1) the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares, and it follows that the duty cannot be thrown wholly on the residue. North, J., although he thought section 14 supported the conclusion he was arriving at, nevertheless arrived at his judgment independently of section 14, and, I think, independently of the fact that in that case the funds were settled upon trust to invest in land. It was argued that the residuary legatees ought to bear the estate duty in this case by reason of the rule as between specific and residuary legatees laid down by Lord Selborne in *Robertson* v. *Broadbent*, 8 App. Cas. 812, and *Bothamley* v. *Sherson*, 20 Eq. 304, and it was said also that the estate duty was analogous to probate duty, and that the ultimate incidence of this estate duty ought to be determined as if it were probate duty, and the case of *In re Bourne*, and the judgment of Stirling, J., were cited in support of this contention. But I do not think that the observations of Stirling, J., are applicable to the present case, for it seems to me that estate duty in a case in which property passes on the death of the deceased, and his executor is not accountable for estate duty, is not analogous to probate duty, but rather to succession duty. Moreover, whatever may be the analogy, it seems to me that the scheme of the Finance Act in cases in which the "executor as such" is not accountable for estate duty, and in particular the terms of section 8 (4), making the person to whom such property passes for a "beneficial interest in possession" accountable, exclude the analogy of probate duty, and also any rule which governs the incidence of charges and costs between specific legatees and residuary legatees *inter se*.

ROMER, L.J.—I also think that the appeal must succeed. I quite agree that the onus is on the appellants to show that under the Finance Act of 1894 a rateable part of the estate duty is cast upon the pecuniary legacies payable out of the proceeds of sale of the realty. If the Act contained no provision to that effect, then the appellants, being only entitled to the residue of the proceeds, could not throw any part of the duty on the pecuniary legatees. On the other hand, if the Act does cast on the pecuniary legatees a proportionate part of the duty, there is nothing which would justify the court in holding that, as between the residuary and pecuniary legatees, the former must indemnify the latter against that proportionate part. I think that in cases like the present the Act does cast a rateable part of the duty

on the pecuniary legatees. Section 8, sub-section 4, applies. In my opinion the pecuniary legacies are "property" which passed on the death of the annuitant to the legatees for a "beneficial interest in possession." And in this case the interest in possession is an absolute interest. In my view the word "property," which is used in different parts of this sub-section, does not in every part mean of necessity exactly the same property. I think the section has been expressly framed so as to make it elastic. For example, the words "any property" do not mean of necessity the whole of the property which passes on the death within the meaning of the phrase that opens the sub-section. In the present case I think the pecuniary legacies come within the words "any property," and, that being so, I think that under section 9 (1) the duty assessable as against these legacies became a first charge on the legacies as against the legatees. And, as above observed, I find nothing in the Act or the will which would justify the court in freeing the pecuniary legatees from this charge by making the residuary legatees idemnify them from it. In this view it becomes unnecessary for me to consider the effect of section 14 (1) of the Act. I may add that in my view, inasmuch as the pecuniary legatees became absolutely entitled to the legacies, they could under section 8 (4) be made liable by the Crown to pay, not all the duty on the whole proceeds of the realty, but only the duty chargeable as against the pecuniary legacies. On the other hand, though it is not necessary for me to determine the point, I incline to the view that not only the trustees of the whole fund, but also the beneficiaries who became entitled to the residue, could at the instance of the Crown have been made to pay the whole duty on the fund. But in that event there would have been, under the general law applicable to such cases, a right of adjustment and recoupment as between the residuary and pecuniary legatees by treating the whole duty as rateably payable by the residuary and pecuniary legatees. And, moreover (though, as above stated, it is not necessary for me to determine the point), I may add that section 9 (6) appears to me to allow the residuary legatees, paying the whole duty (they having only a limited interest in the fund regarded as a whole), to recoup themselves as to the part assessable against the pecuniary legatees by obtaining a charge which would rateably embrace the interest of the pecuniary legatees in the fund.

COZENS-HARDY, L.J.—In my opinion the judgment of Buckley, J., cannot be supported. It seems plain that the annuity fund was property passing on the death of the annuitant within the meaning of the Finance Act, and in so far as the annuity fund arose from the proceeds of sale of real property it was property in respect of which estate duty became payable, notwithstanding section 21 (1). The estate duty has been paid by the trustees, and the question is simply whether the legatees of the £9,000 are bound to contribute their rateable proportion of the estate duty, or whether the whole must be borne by the persons entitled to the residue of the fund. Before Buckley, J., the argument for the residuary legatees seems to have been rested mainly on section 14, sub-section 1, the legacies being treated as charged upon the fund, belonging to the residuary legatees, and the legatees being, therefore, bound to repay. I doubt whether this contention was well founded, but it is not in my view necessary to decide this, for I prefer to base my judgment upon section 8, sub-section 4. I think the legacies must be regarded as property which passed to the legatees for a beneficial interest in possession on death of the annuitant. If so, the legatees were accountable to the Crown for the estate duty. It is true that the Crown, having the right to demand the duty from other persons—namely, the trustees—have not proceeded against the legatees, but that, I think, can make no difference. It is an old and well-established principle of equity that when several persons are liable in respect of one and the same obligation the rights of the parties *inter se* are not affected by the circumstance that one of those persons has been called upon to discharge and has discharged the obligation. This right of contribution must, I think, prevail here, and although the money has been found out of the entire fund, it ought to be contributed rateably according to the beneficial interests in the fund, or. in other words, the legatees must bear their rateable proportion. This is, I think, exactly the sort of case contemplated by section 14, sub-section 1. The only other question is whether there is anything in the language of the will sufficient to exempt the legatees from this liability to contribute. I can find nothing in the use of the word "legacy" to justify this conclusion. The charge created by the Finance Act under section 9, sub-section 1, was, of course, not in contemplation by the testator, who died many years before the Finance Act. It is a fresh burden, and it must be borne rateably according to the beneficial interest of the parties in the fund.

Solicitors, *James, Mellor, & Coleman*, for *Learoyd & Co.*, Halifax; *Williamson, Hill, & Co.*, for *England & Co.*, Halifax.

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From Chan. Div.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) Feb 26.

QUICKE v. CHAPMAN (a.)

*Easement — Light — Implied grant — Derogation from grant—Title of grantor to adjacent land—Leaseholds —Building agreement—Conveyancing Act*, 1881 (44 & 45 *Vict. c* 41), *s.* 6 (2) (4) (5).

*A builder entered into an agreement under which he was to be at liberty to enter upon certain plots of land for the purpose of building houses thereon. On the completion of each house a lease of the premises was to be granted him, but nothing in the agreement was to operate as a demise of any part of the land. A house was built and a lease duly granted to the builder, who assigned it to the plaintiffs. The builder subsequently erected, under the terms of the agreement, another house on an adjoining plot of land which interfered with the lights of the plaintiffs' house.*

*Held, that, as the builder had no such interest in the adjacent land as would have enabled him at the time of the assignment to the plaintiffs to grant them an easement of light over it, no action could be maintained by the plaintiffs against him on the ground of derogation from the grant of light implied in the assignment to them.*

This was an appeal from a decision of Kekewich, J.

By an agreement dated the 29th of August, 1899, the Ecclesiastical Commissioners for England granted to W. G. Chapman, a builder, the right to enter upon a certain piece of land of about two acres situate on the north-west side of Stamford Brook-road, in the parish of Hammersmith, in the county of Middlesex, "for the purpose of carrying out the several works thereinafter agreed to be done by him, but for no other purpose whatsoever," amongst which purposes was the

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

erection of private dwelling-houses in accordance with designs to be submitted to the commissioners, and within the times and in the manner therein set out. And the commissioners agreed, at the cost and request of a grantee, when and as any one or more of the dwelling-houses should be erected and completed, to demise such dwelling-house to the grantee or to such person as he should direct, each lease to be in a specified form. And the grantee agreed until leases had been granted of all the land to pay to the commissioners by way of rent for the land during the term of ninety-nine years the sum therein set out, deducting therefrom a proportion as the leases were granted, and also to pay all rates, taxes, and outgoings to be imposed on the premises, and to perform all covenants and agreements agreed to be inserted in the leases in like manner as he would be bound to do if such leases had been actually granted to him so far as the nature of the case would permit.

It was also further provided that nothing therein contained should be deemed to operate as an actual demise to the grantee of the lands or any part thereof, or to create as between the grantee and the commissioners the relationship of tenant and landlord.

In accordance with this agreement Chapman built a house, No. 28, Stamford Brook-road, and on the 28th of March, 1901, the Ecclesiastical Commissioners granted to Chapman a lease of the house (in the form specified in the agreement) for a term of ninety-seven and a-half years from the 25th of March, 1901, at the rent and subject to the conditions therein set out, and (*inter alia*) subject to the following: "The lessors (their successors and assigns) shall at all times have power, without obtaining any consent from or making compensation to the lessee (his executors, administrators, and assigns), to deal as the said lessors may think fit with any of the lands and premises adjoining or opposite or near to the hereditaments hereby demised, and to erect or suffer to be erected on such adjoining, opposite, or neighbouring lands or premises any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now or at any time during the said term hereby granted be enjoyed by the said lessee or other the lessees, tenants, or occupiers of the hereditaments hereby demised or any part thereof."

This lease was registered by Chapman under the provisions of the Land Transfer Acts, 1875 and 1897, with possessory title, and on the 2nd of August, 1901, was transferred by him according to the provisions of the said Acts to J. N. Quicke and W. S. Barnes for the residue of the term, for the sum of £650.

At this date plans had been settled, and Chapman had commenced to build a house, subsequently known as No. 30, Stamford Brook-road, on land adjoining No. 28 under the provisions of the agreement of the 29th of August, 1899, but no lease of it had then been granted by the commissioners, nor was Chapman then entitled to demand one.

When Quicke and Barnes took their assignment this building did not interfere with the access of light to No. 28, but they were then aware that a house was to be erected at No. 30 larger and more expensive than other houses in the road. They did not, however, know its exact position, nor in what manner, if at all, it would interfere with their lights.

This house, when erected, interfered with the lights of No. 28, in consequence whereof Messrs. J. N. Quicke and W. S. Barnes brought this action against Chapman, alleging that in obstructing the access of light to No. 28 Chapman was derogating from his own grant to them, and claiming an injunction to restrain him from interfering with the access of light to their windows and damages.

The plaintiffs' house was at present in the occupation of a Mrs. Worsley.

Kekewich, J., held that Chapman's act was obnoxious to the maxim that a man shall not derogate from his own grant, and that the plaintiffs were entitled to compensation in damages.

Chapman appealed.

*P. O. Lawrence, K.C.*, and *R. J. Parker*, for the appellant.

*Warrington, K.C.*, and *Mitchell*, for the respondent.

The following cases were referred to in the course of the argument: *Booth* v. *Alcock*, 21 W. R. 743. L. R. 8 Ch. App. 663; *Beddington* v. *Atlee*, 35 W. R. 799, 35 Ch. D. 317; *Pollard* v. *Gare*, [1901] 1 Ch. 834, 49 W. R. Dig. 54; *Birmingham Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295; *Godwin* v. *Schweppes*, 50 W. R. 409. [1902] 1 Ch. 926; *Broomfield* v. *Williams*, 45 W. R. 469, [1897] 1 Ch. 602; *Day* v. *Singleton*, 48 W. R. 18, [1899] 2 Ch. 320.

COLLINS, M.R.—This is an appeal from Kekewich, J., in a case where the plaintiff claims against the defendant that the plaintiff is entitled by virtue of an implied grant, to light coming into certain windows upon a house which he acquired from the defendant. and he complains that the defendant has obstructed those lights. It is admitted here that the grant of lights is one to be implied out of the circumstances—that is to say, there is no express grant of light for any particular time made by the defendant to the plaintiff—and that any implication that there is has to be got out of the terms of the grant itself into which are read the terms of the Conveyancing Act, 1881. The provisions of the Conveyancing Act have been the subject of consideration in several cases, and the result of them all, I think, is stated very well in the judgment of Joyce, J., in *Godwin* v. *Schweppes*. [His lordship read the judgment from "There are no express words in any of the deeds" to the words "had then the power to grant."] Now it is said here that there is an implied grant of light. In order to found that implication it is not sufficient to show that the grantee got from the grantor a house with windows; he has made no way at all towards founding the implication by proof of that fact, because the implication which it is desired to set up is an implication that the grantor has granted a right of access of light over land of his own on to the land granted, and unless he is in a position to grant the passage of light over land of his own, there can be no implication at all. If the land adjoining the obstructed window does not belong to the grantor, the grantee does not found any basis for an implication of grant passing from the grantor. Therefore the solution of this case really lies in a true appreciation of what the basis of an implication of a grant of light is. As I have said, it must rest upon the facts ascertained as to what is the interest of the grantor in land, out of which interest he is supposed to make this grant of an easement, constituting his land the servient tenement. Has the plaintiff who complains here (and the onus is upon him, I think) shown that the person who he says has granted him this easement was himself in a position to grant it? What he does show is this, that the defendant here is the person who by an agreement with the Ecclesiastical Commissioners has a right to enter upon a certain tract of land which belongs to them, and which they have laid out for the purposes of a building scheme, and he undertakes an obligation to cover that land with houses upon certain plots laid out by them, according to plans to be approved by them and

according to dimensions, the maximum and minimum limits of which are fixed for him by the terms of his bargain; and it is further provided that unless and until he has conformed to all the conditions imposed by them as to the building of the houses and the production of plans and the approval by the commissioners—unless and until he has completed in each case a house upon the particular plot—he is not entitled to and does not acquire any interest in the land—that is to say, he does not become a tenant. Then and then only is he entitled to take a lease—either through himself or his nominee. That is the whole extent of his interest in the land adjoining that on which the house of the plaintiff is built.

The defendant had completed the house now in the plaintiff's occupation and he had taken a lease of it in accordance with the printed form imposed upon him. He had taken the lease in his own name and from him the plaintiff bought that house.

Now where are we to get the foundation for an implication of a grant of light from the defendant to the plaintiff on the sale of this house? His interest in the adjoining land, as I have pointed out, was only that which he had under his agreement with the Ecclesiastical Commissioners, and unless that agreement enabled him to grant a passage of light and put him into a position to make that land servient to the extent of light passing over it, there could be no grant and no implication of it.

When you criticize the defendant's position in regard to this adjoining land, it seems to me quite obvious that he could not, if he would, have granted a right to the passage of light over this land. He himself had at most a sort of licence coupled with an interest in the land, which could not ripen into ownership until he had actually completed the building upon the land. In other words, he was not in a position to acquire a sufficient interest in the adjoining land to enable him to grant any right over it until he had, under the terms of his bargain with the Ecclesiastical Commissioners, himself created an obstruction to the passage of light (I do not measure the amount of the obstruction at present) on the adjoining land, as he was bound to build houses, in this particular case, opposite the windows as to which the complaint is made. The agreement between him and the Ecclesiastical Commissioners did give him a certain margin of choice—that is to say, it rested with him to set the plans before the commissioners; but he was hampered there by certain conditions. But within those conditions I suppose he had a discretion as to the exact dimensions of the house he was going to submit for their approval. It is contended that, that being so, he had come under an obligation to only submit with reference to the adjoining plot of land a house that would in the least degree admissible interfere with the access of light in the plaintiff's house. There is certainly no contract imposing such an obligation on the defendant, and it can only be got out of the implication arising from the fact that the defendant had sold a house with windows in it to the plaintiff. When we look back to that implication to see what is the nature and extent of it, we can only get at it by introducing all the rights and obligations that the defendant had under the agreement with reference to the adjoining land; and the implication is to be measured in view of all those rights and obligations, and those rights and obligations embrace the one of tendering for approval the plans of a house to the full extent of that which is here in question.

Therefore, *in limine*, it seems to me the plaintiff's case fails, because when you examine the basis of the foundation, it negatives the possible inference of a grant of light to any larger extent than that compatible with the enjoyment and performance of all the rights and obligations contained in the building scheme. All those had to be performed. The inference of implication had to be measured on the footing that all those were performed. Therefore it seems to me that this case breaks down in its initial stage and it is not necessary to follow it further.

There was, in my judgment, under the particular circumstances of this case, no implication whatever of any right to light over the adjoining land—no implication of a grant made by a person who was in a position to make it, and therefore, there being no right to the access of light, of course there can be no claim for damages or injunction in respect of interference with it.

In my judgment this appeal must succeed.

ROMER, L.J.—I am of the same opinion. The learned judge in the court below has decided this case on the view that the defendant was in the position of a person who had covenanted not to build on the adjoining land. If the defendant had been in that position the judgment of the learned judge no doubt could have been supported, but as a matter of fact the defendant was not in that position. He had entered into no such covenant, express or implied, and indeed the learned counsel for the respondent felt obliged before us not to attempt to base their case on such a grant as that. They base their case on the doctrine that a grantor shall not derogate from his own grant, and they say that what the defendant has been doing was a breach of that doctrine so as to make him liable to the plaintiff in damages. The rules governing a grant of light are now well settled so far as they are relevant to the case before us. Even in a case where you do not find the word "lights" expressly mentioned, since the Conveyancing Act, 1881, you must treat each grant as if the word "lights" had been expressly mentioned. So that in that sense it has always since the Act to be taken that there is an express grant of lights. But that will carry us no further so far as concerns the question that we have now to consider, for on the face of the deed itself you cannot merely from the use of the word "lights" gather to what extent that word carries the grantee. There is nothing on the face of the deed itself which would enable you to say that the word "lights" implies any rights over adjacent land not conveyed. Of course the case is far different from the case where you find that a grantor purports expressly to grant a right of way over the adjoining land which he mentions. In that case he will be bound by what he has attempted to do whether he had a title to that adjoining land or not, and of course it is far different from a case where a grantor chooses to enter into an express covenant purporting to bind the adjacent land, by which covenant he may be bound whether at the time of the conveyance he has the title to that land or not. But otherwise what passes by the word "lights" is only a general right, and the extent of it has to be ascertained by the circumstances of the case existing at the date of the grant.

Now there are two things you have to inquire into in order to see whether there is a grant to be implied of light over the adjacent land. You must first inquire into the title with regard to that adjacent land to see whether the grantor has such an estate or interest in that adjacent land as will support an implied grant by him of the right of light over that land. You inquire into the title with that object. That inquiry is one purely as to title and has nothing to do with the question whether the grantee did or

did not know at the time of the state of the title. For if he did not know at the time of the state of the title, still if he is claiming a right over the adjacent land he was bound to take such title as the grantor had. He is in no better position than he would have been if he had inquired into the title of the adjacent land. But there is more than that, in my opinion, which has to be inquired into in order to see what passed by implication by the use of the word "lights." In my opinion you are also entitled to inquire into the surrounding circumstances which are relevant to such a question as this—the circumstances affecting the two pieces of land, though this is not strictly a question of title and might not appear on the title at all if inquired into. The circumstances to be relevant must in my opinion have been known to both parties; but if they are known to both, although not strictly a question of title, in my opinion those circumstances also have to be considered in order to see whether there is any implied grant of a right of light over the adjacent land or not.

Now, applying those principles to the present case, it is perfectly clear to my mind that the plaintiff here has no case. In the first place, on the mere question of title to the adjacent land being looked into, that in itself negatives any possible implication of a grant by Mr. Chapman of a right of light over the adjacent land; and I need not go into the circumstances, for to my mind they are perfectly clear. But, further, I should like to say that, apart from the question of title, the other circumstances which are in evidence here, having regard to the findings on the question of fact on the part of the learned judge, in my opinion, would in themselves also be sufficient to negative the implication of a right of light being granted over the adjacent land. On both those grounds it appears to me that the plaintiff ought never to have succeeded, and the appeal must be allowed.

COZENS-HARDY, L.J.—I am entirely of the same opinion, and I have very little to add. I decline to imply a grant of light against a man who could not have made a grant of light over the adjoining land. The whole point seems to have been very clearly put by Bowen, L.J., in his judgment in the case of the *Birmingham Bank* v. *Ross*, where he points out that the obligation relied upon is not one which arises simply from the interpretation of the deed. It is a duty which arises from outside circumstances, having regard to the relation of grantor and grantee which the deed creates. Supposing you take the deed alone, no amount of construction could evolve from the deed itself the protection which the grantee desires. It does not appear from the deed whether the grantor had the power of giving the protection which is necessary for the enjoyment of that which he grants. It is only by looking outside the deed that you can see whether he had such a power of protection. Now looking here you find that the defendant had no more power to grant the right of light over the adjoining land than if it had been land altogether outside the building agreement, and over which he never had license, any right, or title whatsoever.

On this ground alone, without in any way differing from what my brother Romer has said on the other part of the case, I think it is quite clear that this appeal ought to succeed.

Solicitors, *W. S. Barnes; J. E. Hetley.*

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From Chan. Div.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 25.

*In re* APPLEBY.
WALKER *v.* LEVER.
WALKER *v.* NISBET. (*a.*)

*Will—Construction—Rule against perpetuities—Void trust for sale—Intention of testator—Class ascertained with prescribed limit.*

*Effect will be given to the intention of a testator, which appears from his will, to benefit certain persons who can be ascertained within the rule against perpetuities even though he has directed his intention to be carried out by means of a trust for sale which is void as offending against the rule against perpetuities.*

*Decision of* Byrne, J. (*ante*, p. 153), *affirmed.*

This was an appeal from a decision of Byrne, J. (reported *ante*, p. 153).

R. Appleby by his will in 1848, having given his personalty, other than leaseholds, to trustees for sale and conversion and for investment as therein mentioned, and having given and devised his real and leasehold estates to his trustees, directed them to hold his real and leasehold estates and residuary personalty, and the stocks, funds, and securities of which the same might consist, upon certain trusts for his daughter Ann Skinner, the wife of J. H. Skinner, during her life. And after her death, in case she should leave J. H. Skinner, or any future husband, surviving her, to pay the rents and profits, interests, dividends, and income to J. H. Skinner, or such future husband, during his life, and subject to these trusts the real and residuary personal estates were after the death of Mrs. Skinner to be held upon certain trusts for her children, and in default of children (which event happened), after the decease of Mrs. Skinner and of any husband of hers, and of such failure of her children as aforesaid, the trustees were to sell the real and leasehold estates and hold the moneys to arise from the sale, and also the residuary personal estate, upon trust for certain persons and their children as therein mentioned, all of whom were ascertainable within the period allowed by law.

The testator died in 1854.

In the same year J. H. Skinner was appointed a trustee of the will together with the two trustees named in the will who had accepted the trust.

In 1873 these two other trustees died, leaving J. H. Skinner the sole trustee.

In 1875 two new trustees were appointed, who were the plaintiffs in the first summons.

Ann Skinner died in 1882 without ever having had a child.

J. H. Skinner died in 1899.

In February, 1899, the surviving trustee took out the first summons against the beneficiaries and persons claiming under them asking for an inquiry who were the persons then entitled and in what shares to the residuary estate.

Shortly afterwards one trustee, who was the legal personal representative of Mrs. Skinner, the sole next-of-kin of the testator, took out the second summons against the other trustee, who was appointed to represent the heir-at-law of the testator, and against all the persons claiming under the trust for sale, to have it declared that all the limitations after the death of J. H. Skinner were void for remoteness.

Byrne, J., held that the trust for sale was mere machinery, and that the equitable interest in the pro-

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

perty went to the persons who would have taken them under the trust for sale if it had been valid.

The plaintiff appealed.

*Mulligan, K.C.*, and *Waley*, for the appellant.—Byrne, J., founded his decision on *Goodier* v. *Johnson*, 30 W. R. 449, 18 Ch. D. 441, and *Goodier* v. *Edmunds*, [1893] 3 Ch. 455, but those cases were very different from the present. This will shows no indication that any of the beneficiaries therein named are to have any interest at all in the land until it is sold, but the trust for sale is not to arise until the death of any future husband, and therefore offends against the rule against perpetuities. It is true that the class of persons to take is ascertained within the rule, and that they may elect to take the property as real estate, but that is not enough: they must also elect within the time to take the property as land. That event is not limited by the testator in his will, and consequently they might delay beyond the period before exercising that option. An indefinite option of this kind is bad. *London and South-Western Railway* v. *Gomm*, 30 W. R. 321, 620, 20 Ch. D. 562. The case of *In re Daveron*, 42 W. R. 24, [1893] 3 Ch. 421, really assists the appellant, because it shows that the beneficiaries who claim in a case like this must elect to take the property as land. Here there has been no election.

They referred to *Dungannon* v. *Smith*, 12 Cl. & F. 546; *Wollaston* v. *King*, 17 W. R. 641, L. R. 8 Eq. 165; and *In re Harvey, Peek* v. *Savory*, 39 Ch. D. 289, 37 W. R. Dig. 203.

*Rowden, K.C.*, and *R. Hughes; Norton, K.C.*, and *Turner; Levett, K.C.*, and *Potts; Younger, K.C.*, and *MacSwinney; T. H. Carson, K.C.*, and *Beddall; E. P. Hewitt* and *Douglas*, for the respondents, were not called on to argue.

COLLINS, M.R.—This question arises on construction, and the case before us is an appeal from Byrne, J. The testator directed in substance that the rents and profits of real estate should be received by certain persons in succession, his daughter or any husband or future husband of hers. I leave out the intermediate dispositions, which are not material, and on the death of the survivor there was to be a sale, and certain persons were named, or rather certain classes were named, who were to take the proceeds of sale. Now it turns out that the sale itself, being, according to his disposition, one that might take place beyond the limited period, on the question of perpetuity the trust for sale was undoubtedly bad; and the question is, what are the rights of the parties in view of that fact.

Byrne, J., has held that inasmuch as on the face of this will there is clear indication that a certain class ascertainable and ascertained within the proper period was intended by the testator to receive the rents and profits until the sale, and intended to have the proceeds after the sale, that was a clear indication on the part of the testator of an intention to dispose of that property to those persons, and that the sale if it has become impossible, as the parties say, was a mere piece of machinery, and that striking it out of the will does not affect the other rights of the parties in accordance with the intention of the testator. That is contested here by Mr. Mulligan, for he says it involves this: that there must be an election on the part of those beneficiaries, in view of the impossibility of sale, to take the property in the form of realty as it was irrespective of sale; and he says you cannot get that election or give effect to it unless you can get the election in fact. That really appears to me to be the only point that he makes upon the case.

It seems to me that the case is concluded by authority. We have what is called the *dictum* of the late Master of the Rolls, Sir George Jessel, in *Goodier* v. *Johnson*, and we have the decision of Stirling, J., in another case upon the same will, and the judgment of Chitty, J., in *In re Daveron*, which is in fact directly in point, and a decision on a matter upon which Stirling, J., gave an opinion but did not decide it. Chitty, J., says this in the case of *In re Daveron, Bowen* v. *Churchill*: "The will contains a general devise to the use of trustees which carries the reversion in fee; and the trusts which he declared are to pay this ground-rent of £70 so long as the lease shall run in certain proportions and to certain persons. I need not go through that part of the will, because there is no question in regard to the validity of this trust as declared. Now comes the question whether I can give effect to the testator's intention, seeing that he has directed a sale and his directions as to the sale are invalid. It is plain that the trust to sell and pay the proceeds to 'A' (a named person) confers an equity on 'A' and gives him the whole beneficial title which the testator is entitled to in fee simple. In equity 'A' is the beneficial owner and 'A' can come to the trustees and say: 'I desire you not to sell, but to convey the estate to me.' About that there is no question. It is equally plain that if there is a direction to sell and to pay the proceeds in shares to A., B., and C., then A., B., and C., are regarded in equity also as the owners of the estate. They can by the doctrine of election prevent any sale taking place, and if they all express their intention the trustees could lawfully convey the estate to them in the shares in which they were entitled to the purchase-money. The difference between the cases I have put of the proceeds going to one person or the proceeds going to several consists in this, that where there are several they must all concur to stop the sale. I mention these points to show how equity regards the substance of the matter and considers those beneficially entitled to the purchase-money as entitled to the estate itself. One other observation is material in regard to this point, which is, that where there is a trust for sale—a valid one, of course—and where there is no gift of intermediate rents, the persons who take the proceeds of sale being thus regarded as equitable owners of the estate unquestionably take the rent for the period during which the sale is postponed." Then he goes on to say: "I think it right to take the broader rather than the narrower view of the subject. I think the point made on behalf of the heir-at-law that the testator intended that the property should be taken in the shape of personalty and not in the shape of realty is insufficient to displace the conclusion at which I have arrived. The doctrine of election for the purpose of reconversion, which proceeds on the footing of the equitable property in the thing being vested in those that take the proceeds of sale, shows that the court does allow persons thus entitled to take the property as of a different quality to that which the testator intended; or, to put it quite shortly, where the testator intended that several persons should take a gift in money they may all concur in saying 'We will not take it in money but we will take it in land.'"

Now in this case there is a clear intention, it seems to me, on the will to benefit these particular persons who are ascertained; and that being the intention of the will, there is simply the failure of a piece of machinery which if it had been effectual might have enabled them to take it in a different shape. As it is the intention stands; it is unaffected by the failure of the power of sale, and the persons entitled to the property take it in the form in which it now is without going through the process of sale. For these reasons I think the appeal fails.

ROMER, L.J.—I agree. I think the principle which governs the decisions of *In re Daveron* and *Goodier* v. *Edmunds*, and which had been previously indicated by Sir George Jessel in *Goodier* v. *Johnson*, was a right principle and, when applied as it ought to be in the case before us, governs this appeal.

I take the will in the present case, and I look at it, disregarding in the first instance any question as to perpetuity at all, to ascertain what is the meaning of the testator; and having got that, then I apply the rules as to perpetuity generally. Well, looking at the will, what do I gather with regard to the gift over to the persons who are to take in fifths in the events which have happened? I gather this, that the testator clearly intended those persons to have the beneficial interests in these freeholds; that he intended the trust for sale as a means by which he would enable that property to be more easily divided between them, and to be enjoyed in substance. But I certainly gather from this will the intention that these persons should benefit in this property, and that so far as there is a trust for them, it is clearly a trust which is perfectly good. Suppose the property under the trust for sale had not been sold for some years, who would have been entitled under this will to the rents and profits in the meantime, although there is nothing said on the face of the will with regard to it? Why, clearly, the persons whom the testator has indicated as being the persons beneficially interested in the property. But suppose those persons had all been *sui juris*, and had elected at the time to take the property without it being sold at all, putting aside any question of perpetuity. They could have said to the trustees, "Please hand us over this property unconverted." Why? Because the testator in this will has shown that he regards those persons that he indicated as being the persons who are to have a beneficial interest under his will in the property, the persons to whom the property is beneficially given, and the trust for sale is the machinery for carrying that out.

In this particular case that intention of the testator is further shown by the power of maintenance, although I desire to say for my own part that I should have come to exactly the same conclusion on this will even if the power of maintenance had not been found there. It appears to me, having once come to the conclusion what the meaning of the will is, when you find it is only the trust for sale which is invalid because of the law of perpetuity, but that the trust for the beneficial interest is good, then the court does that which in my opinion it is bound to do in a case like that—namely, although the sale cannot be carried out, the trust for sale being bad, yet the court will hold that the beneficial interest in the property has passed and is perfectly good and should be enforced.

COZENS-HARDY, L.J.—I am entirely of the same opinion. We are really asked to differ from the view of Stirling, J., in *Goodier* v. *Edmunds* and from the actual decision of Chitty, J., in *In re Daveron*.

The Master of the Rolls has referred in detail to Chitty, J.'s, judgment, and I would only read a sentence from Stirling, J.'s, judgment: "Where it can be seen that the trust for sale is mere machinery for facilitating the division between the persons for whom the property is destined I think that effect ought to be given to the equitable interest even though the instrument by means of which the division is intended to be carried out may prove unavailing." That seems to me, if I may say so, a perfectly clear and satisfactory statement of the law. It has been argued before us by Mr. Mulligan that the case depends upon some election by the beneficiaries. That seems to me to be quite a fallacy. The view taken by the court in cases of this kind does not at all depend upon the fact of election. The right of election is only an illustration of a consequence from the doctrine of equity that the persons who take the proceeds of sale are regarded in equity as the real beneficial owners. They do not take it because they elect to take it, but because they are beneficial owners, and the application by the court of the doctrine of election is an illustration of the fact that they are beneficial owners. Like Romer, L.J., I do not rely on the maintenance clause in any other sense than as assisting a general indication of intention, but I should certainly arrive at the same conclusion if the maintenance clause had not been there.

Solicitors, *S. J. Daw; Capron, Hitchins, Brabant, & Hitchins; Walter Turner; Iliffe, Henley, & Swest; Stuart & Tull; Bloxam, Ellison, & Co.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 18.

HUDSON v. GRIBBLE (SURVEYOR OF TAXES).
BELL v. GRIBBLE (SURVEYOR OF TAXES). (a.)

*Inland revenue—Income tax—Salary—Deductions—Sum payable or chargeable by virtue of any Act of Parliament—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *rr.* 1, 9, *Schedule E—Manchester Corporation Act*, 1891 (54 & 55 *Vict. c. ccvii.*), *ss.* 5. 7.

*The Manchester Corporation Act*, 1891, *empowered the corporation to establish a fund for encouraging thrift amongst their officers and servants, and to frame a scheme under which every person who contributed to the fund should on retirement be entitled to receive back the whole amount of his contributions with interest, and in case of his death his representatives should be entitled to receive the same. The scheme made under this power provided that persons entering the service of the corporation after the passing of the Act should contribute to the fund a certain percentage of their salaries or wages, to be deducted by the corporation, and that persons who were in the service of the corporation at the passing of the Act might, on application, be admitted to the benefit of the fund and become contributors, and that no contributor should cease to contribute while in the service of the corporation.*

*Held, affirming the judgment of* Phillimore, J., *in* Hudson v. Gribble, 50 *W. R* 557, [1902] 2 *K. B.* 298, *and reversing his judgment in* Bell v. Gribble, *that a servant of the corporation who contributed to the fund, whether compulsorily or on his own application, was not entitled, under the first rule of section* 146 *of the Income Tax Act*, 1842, *to have the amount of his contribution deducted from his assessment to income tax under Schedule E.*

Beaumont v. Bowers, 48 *W. R.* 557, [1900] 2 *Q. B.* 204, *not followed.*

Appeals from judgments of Phillimore, J., on cases stated by income tax commissioners.

The first of the two cases is reported 50 W. R. 685, [1902] 2 K. B. 298.

In the first case, Thomas Hudson, the deputy town clerk of the city of Manchester, having been assessed to income tax on the sum of £800, being the gross amount of the profits of the office or employment held by him, appealed to the commissioners claiming that he was entitled to have a certain deduction made from that assessment.

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(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

By section 5 of the Manchester Corporation Act, 1891 (54 & 55 Vict. c. cvii.), the mayor, aldermen, and citizens of the city of Manchester were empowered to establish a fund for the encouragement of thrift amongst the officers and servants of the corporation, with a view of providing a sum of money which, in the event of the retirement or death of any person in the service of the corporation who had contributed to the fund, should be available for himself or his representatives; such fund to be called "the thrift fund."

They were further empowered to prepare and approve by resolution a scheme for the establishment of such fund, determining by any such scheme (*inter alia*) what classes of persons should be entitled to contribute to and participate in the benefit of the fund.

By section 7 it was required that any such scheme should contain provisions to the following effect: that any contributing member retiring *bonâ fide* from the service of the corporation and not to escape dismissal for fraud or misconduct should be entitled to receive back the whole amount of his contributions with interest; that in case of his death his representatives should be entitled to receive the same; and that any contributing member dismissed for fraud or misconduct or retiring to escape dismissal should, at the discretion of the corporation, forfeit all or any part of his contributions.

By section 9 it was required that the corporation should, at the end of each half-year after the establishment of the thrift fund, contribute thereto, out of the rate or revenue upon which the salary or wages of each contributing member was or were chargeable, a sum equal to one-third of the sum which during the same half-year had been contributed thereto by such contributing member.

On the 3rd of August, 1892, the corporation by resolution approved a scheme for the establishment of, and did thereby establish, the thrift fund.

The scheme provided, *inter alia:* (1) That persons entering the service of the corporation after the 5th of August, 1891 (the date of the passing of the Act), should contribute and pay to the thrift fund £3 15s per cent. of their salaries or wages, which might be deducted by the corporation, and that no such person should cease to so contribute to the thrift fund while in the service of the corporation; (2) that persons in the service of the corporation on the 5th of August, 1891, might, by application in writing, be admitted to the benefit of the thrift fund and become contributors, provided that no person who should have been so admitted and should so become a contributor should cease to contribute while in the service of the corporation.

The appellant, who was already in the service of the corporation at the time of the passing of the Act, made an application in writing to be admitted to the benefit of the fund, and he thereupon became, and had since continued to be, a contributor to the fund, and under the provisions of the scheme he could not cease to contribute to the fund while in the service of the corporation.

By the first rule in section 146 of the Income Tax Act, 1842, which contains the rules for charging the duties under Schedule E, it is provided that the duties shall be annually charged on the persons exercising the offices or employments of profit mentioned in the schedule for all salaries, fees, wages, perquisites, or profits accruing by reason of such offices or employments, "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and *bonâ fide* paid and borne by the party to be charged."

By the ninth rule it is provided that, in estimating the duty payable for any such office or employment of profit, all official deductions and payments made upon the receipt of the salaries and profits thereof shall be allowed to be deducted, provided that a due account thereof shall be rendered to the commissioners and proved to their satisfaction.

The appellant contended that under these rules he was entitled to deduct the amount of his contribution to the thrift fund from his salary, and that he was only chargeable on the amount of his salary after making such deduction.

In the second case the facts were similar to those in the first case, with the exception that the appellant Bell entered into the service of the corporation after the passing of the Act.

The commissioners refused to allow the appellants' claims and confirmed the assessments, but stated these cases for the opinion of the court.

Phillimore, J., affirmed the decision of the commissioners in the first case, and gave judgment for the Crown, on the ground that the amount contributed by the appellant Hudson to the fund was not payable by virtue of any Act of Parliament, but by virtue of the scheme and of the appellants' application to be admitted to the benefits thereof. In the second case he reversed the decision of the commissioners, and gave judgment for the appellant Bell, on the authority of *Beaumont* v. *Bowers*, 48 W. R. 557, [1900] 2 Q. B. 204.

The appellant Hudson appealed in the first case.

The Crown appealed in the second case.

*Asquith, K.C.*, and *Ryde*, for the appellant Hudson and the respondent Bell.

*Sir Robert Finlay, A.G., Sir Edward Carson, S.G.*, and *Rowlatt*, for the Crown.

VAUGHAN WILLIAMS, L.J.—In my judgment, the decision of Phillimore, J., in the first case is right and ought to be affirmed. The question which we have to decide is whether or not certain sums of money which have been deducted by the corporation of Manchester from the salaries or wages of persons employed by them come within the words of the first rule of Schedule E of the Income Tax Act, 1842. That rule provides for the payment of income tax by persons exercising certain offices or employments of profit on all salaries, fees, wages, perquisites, or profits accruing by reason of such offices or employments, "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and *bonâ fide* paid and borne by the party to be charged." The question is whether or not these deductions made by the corporation come within the terms of that part of the rule which defines the nature of the sums which may be deducted. In my judgment the deductions made by the corporation under the scheme in question do not fall within the definition, they do not fall within either part of it. The sums deducted are not deductions of duties or other sums payable or chargeable by virtue of any Act of Parliament; and further, in my opinion it would not be true to say that they had been really and *bonâ fide* paid and borne by the party to be charged. I will deal with the second part of the definition first. In my judgment, if one examines the nature of these deductions, it is clear that they cannot be said to be really and *bonâ fide* paid and borne by the party to be charged. Under the scheme these sums, although payment of them was postponed, never ceased to be the property of the person employed from whose salary or wages they were deducted by the corporation. Without going into the details of the Act under which the scheme was

framed or of the scheme itself, it plainly appears to be the intention of the Act and of the scheme, that any employed person, who is not guilty of certain offences and misconduct mentioned in the Act and the scheme, is to be entitled on withdrawing from the service of the corporation to receive back the whole amount of his contributions to the thrift fund with interest; and that in the case of the death of any employed person that amount is to be paid to his legal personal representatives. All that it is true to say of these sums is that payment of them has been postponed. It cannot be said that the true effect of the deductions is that the sums so deducted have been paid or borne by the person employed.

With regard to the other part of the definition I do not think the words used cover deductions of this nature. I agree with the argument of the law officers that the words are really intended to cover sums which have been deducted in respect of payment of taxes. I am inclined to think that the deductions authorized by this rule are limited to such cases. It is not, however, necessary to decide that. It is sufficient to say that these deductions are not duties or other sums payable or chargeable by virtue of any Act of Parliament. No one is bound to accept an engagement in the service of the Manchester corporation. If he chooses to enter their service, he is really voluntarily entering into a service which he knows will carry with it as part of his contract of service his agreement that a certain percentage of his wages shall be deducted and appropriated to the purposes of the thrift fund scheme. It is not true to say of such deductions that they are sums payable or chargeable by virtue of an Act of Parliament. Speaking generally, I wish to say that, in my judgment, the object of the words used in this rule was to prevent double taxation.

An independent argument was put forward by counsel for the appellants. They said that the Income Tax Act of 1842 was an Act by which incomes alone were intended to be taxed, and they quoted the judgment of Lord Macnaghten in *London County Council v. Attorney-General*, 49 W. R. 686, [1901] A. C. 26. They contended that in this case the part of the salary of the person employed which was represented by the deduction never really came to him, that his true income was his salary less this deduction, and that he ought only to be taxed on his salary less the deduction. To my mind that contention is not well founded. It is not true to say that the Manchester corporation were never indebted to their servant in the whole amount of his salary. If they were sued by him, they would have to admit their indebtedness for the whole and then justify the deduction as made by virtue of their contract with him. I ought to add that, if my view as to the construction of this rule with respect to deductions is correct, then it seems to me that the decision in the case of *Beaumont v. Bowers* was wrong. I need not, however, decide that question. It is sufficient to say that in both these cases it is clear that the sums deducted were not within the words of the rule either as being payable or chargeable by virtue of any Act of Parliament or as having been really and *bonâ fide* paid and borne by the party to be charged. I therefore think that the appeal in the first case should be dismissed, and the appeal in the second case allowed.

STIRLING and MATHEW, L.JJ., concurred.

*Judgment for the Crown.*

Solicitors for the appellant in the first case, *Austin & Austin*, for *Thomas Hudson*, Manchester.

Solicitors for the respondent in the second case, *Austin & Austin*, for *R. Bell*, Manchester.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

From K. B. Div.
(Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 13.

KODAK (LIMITED) v. CLARK (SURVEYOR OF TAXES). (a.)

*Inland revenue—Income tax—Company resident in United Kingdom hold* 98 *per cent. of shares in foreign company—Control—Liability to pay income tax on profits made by foreign company—Income Tax Act,* 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, case* 1—*Income Tax Act,* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

*The respondent company was incorporated in England and registered under the Companies Acts to acquire* (inter alia) *not less than* 95 *per cent., and did in fact acquire* 98 *per cent. of the share capital of a foreign company, the remaining* 2 *per cent. being held by shareholders abroad independently of the English company.*

*Held, that the respondent company was not assessable under Schedule D, case* 1, *of the Income Tax Act,* 1842, *to income tax upon the full amount of the profits of the foreign company as the Crown contended, because there was no evidence to rebut the respondent's contention that their interest in the foreign company was simply that of a shareholder, that they did not direct and control the foreign company, and that there was no such relationship of principal and agent or of master and servant existing between the two companies as to make the respondents liable under the claim put forward by the Crown.*

*Decision of* Phillimore, J. (*ante, p.* 75, [1902] 2 *K. B.* 450), *affirmed.*

This was an appeal on behalf of the Crown, from a judgment of Phillimore, J., on a special case.

The material facts may be shortly stated thus:

In 1880 the business of George Eastman, of Rochester, United States of America, was established to manufacture photographic materials.

That business was taken over by the Eastman Dry Plate and Film Co., of Rochester, which company in 1889 entered into an agreement to sell its business in the United Kingdom, and in all other parts of the world except North and South America, to the Eastman's Photographic Materials Co (Limited), of London, a company registered under the Companies Acts, 1862-1886, with a nominal capital of £150,000.

That business was carried on wholly independently of the business of the American company, the Eastman Dry Plate and Film Co.

In 1890 this latter company transferred its business to a company called the Eastman Co., formed under the laws of the State of New York.

In the following year a company called the New Process Film Co. was formed, also according to the laws of the State of New York.

Those two companies amalgamated in 1892, and became the Eastman Kodak Co., of Rochester.

The Eastman Co. and the Eastman Kodak Co. were distinct from the Eastman Photographic Materials Co., but the last-mentioned company purchased a considerable part of the goods which it dealt in from the Eastman Co.

On the 30th of September, 1898, an agreement was entered into between the Eastman Photographic Materials Co., of London, and George Eastman, of New York, for the sale to him of the property and undertaking of the company for the sum of £344,000.

On the 15th of November, 1898, Kodak (Limited) was registered in England under the Company Acts. In the prospectus the names of the places

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

where business was carried on were set out as London, Paris, Berlin, and Rochester (United States of America).

There was a statement also that the French, German, and American companies were to be worked as subsidiary companies. It was also stated that the object of the company was to acquire, *inter alia*, and carry on the business of Eastman Photographic Materials Co., and to acquire and hold not less than 95 per cent. of the paid-up issued share capital of the Eastman Kodak Co., of New York; to carry on the business of dealers of photographic materials in England, the United States of America, and other countries, and to superintend and manage the business of any company of which the company held shares, debentures, or other interests.

The dividends were to be paid in London, but the directors had power to pay dividends or interest payable to any shareholders whose names were entered in the local register of any foreign country or colony, in such foreign country or colony.

Of the shares of the Eastman Kodak Co. 98 per cent. were transferred to and acquired by Kodak (Limited).

Among the other statements made in the case was one that Kodak (Limited), in fact, did not interfere in or control the management of the Eastman Kodak Co., and that it had dealt with Eastman Kodak Co. as an ordinary customer for goods purchased by it, and that the goods were invoiced in the ordinary way of business, and paid for by bank drafts.

The report of the directors of Kodak (Limited) of March, 1900, issued to the shareholders, showed the amount standing to the credit of the profit and loss account of the combined companies to be £345,778. Kodak (Limited) were assessed in respect of the whole of the profits made by the combined companies under section 100, Schedule D, case 1 of 5 & 6 Vict. c. 35.

Kodak (Limited) appealed against the assessment, contending that the business carried on by the Eastman Kodak Co. was carried on in America, and not in the United Kingdom, and, therefore, that no assessment could be made under the Income Tax Acts in respect of its profits upon Kodak (Limited), as they were not profits of Kodak (Limited); that the only interest Kodak (Limited) had in Eastman Kodak Co. was that of a shareholder; that the dividends to which Kodak (Limited) were entitled in respect of the shares in Eastman Kodak Co. were taxable only (if taxable at all) under case 4 or 5 of section 100, Schedule D, of the Act of 1842, and not otherwise, and only in respect and to the extent to which they were actually received in the United Kingdom, and that no part of such dividends had, in fact, been received in this country; that the Eastman Kodak (Limited) and Kodak (Limited) were distinct and separate entities.

Kodak (Limited) admitted their liability to be assessed for the year 1899-1900 in respect of the profits of the business carried on by Kodak (Limited), as the successors to Eastman Photographic Materials Co. (Limited), including therein the profits made by means of the French and German companies.

The commissioners were of opinion that: (1) The American company was carried on by and was the business of Kodak (Limited), and that the profits and business were technically the profits and business of Kodak (Limited); (2) that if the business at Rochester, and the profits made thereat, were technically the business and profits of the American company, the American company for all purposes were the agents of Kodak (Limited); (3) that Kodak (Limited) were successors to both the prior English and American companies; (4) that Kodak (Limited) were liable for the profits made in America under Schedule D, case 1.

Phillimore, J., held that the English company were not assessable under Schedule D, case 1, of the Income Tax Act, 1842, to income tax upon the amount of the profits of the foreign company, there being no evidence here upon which the commissioners could hold that the American company was carried on or controlled by the English company or was the agent of the English company.

The Crown appealed.

*Sir R. B. Finlay, A.G., Sir E. Carson, S.G.*, and *Rowlatt*, for the Crown.—Kodak (Limited), being an English company, is liable to pay income tax on all its profits, whether made here or abroad. Part of its profits are derived from the American company, which we say, following the rule laid down in *San Paulo Railway Co.* v. *Carter*, 44 W. R. 336, [1896] A. C. 31, is a company carried on in America by Kodak (Limited), which holds such a commanding number of its shares that it must be taken to be controlled and worked by and as being part of the English company. The question is simply, Whose is the American business? The determining factor in the answer is, By whom are the preponderating number of its shares held? There is evidence that Kodak (Limited) intended to treat the American business as their business from the terms of the prospectus, and the same inference is to be gathered from the memorandum and articles of association: *Frank Jones Brewing Co.* v. *Apthorpe*, 4 Tax Cas. 6; *United States Brewing Co.* v. *Apthorpe*, 4 Tax Cas. 17; *St. Louis Breweries (Limited)* v. *Apthorpe*, 47 W. R. 334, 4 Tax Cas. 111. It is not a question of degree. Therefore it can make no difference in principle whether one share or 2 per cent. of the shares are held by independent persons. As the evidence stands, the whole undertaking of the Eastman Kodak Co is owned by Kodak (Limited), except so far as it is subject to a charge in favour of the holders of 2 per cent. of the shares. In *Apthorpe* v. *Peter Schoenhofen Brewing Co.*, 79 L. T. Rep. 98, 47 W. R. Dig. 75, Collins, L.J., in the course of his judgment, points this out, and says: "One central factor in this question is whether or not the ultimate tribunal of appeal, the ultimate controlling power, is in England." There is therefore ample evidence to support the finding of the commissioners.

*Danckwerts, K.C.*, and *Kerly*, for Kodak (Limited).—We say that the American company and the respondent company are two distinct businesses and there is no relationship of principal and agent or of master and servant between them. Kodak (Limited) does not hold all the shares. Two per cent. of the shares—whatever number of shares that may amount to—they have no interest or concern in at all. The interest that Kodak (Limited) has in the success of the American company is limited to that merely of an ordinary shareholder. They participate in the American profits only to the extent of the dividends on the shares they hold, which are paid in this country. They have never suggested that on such dividends they are not liable to pay income tax. They admit they are. The contention of the Crown is wholly misconceived. The Crown is attempting to make Kodak (Limited) accountable for the profits made by the American company, the management of which they had not the control of. What was said by Lord Watson in his judgment in the *San Paulo Railway Co.* v. *Carter*, [1896] A. C., at p. 41, really decides this case. He said: "The decision does not involve any new controversy upon the construction of the Income Tax Acts," and goes on to point out that "the directors only can be said to manage and control the affairs of a company and that the shareholders in that sense

have no control." Our point here is that, whatever interest Kodak (Limited) has in the American company, it is that of a shareholder only. [They were stopped.]

*Sir R. B. Finlay, A.G.*, did not reply.

VAUGHAN WILLIAMS, L.J.—The argument of the company is—that whatever may have been true in other cases, the fact is that in this case there is a body of shareholders holding 2 per cent. of the shares of the American company in contradistinction to the 98 per cent. of the shares held by Kodak (Limited). That they appear upon the face of the case to be a body of independent shareholders, and that under these circumstances it is impossible for the holders of the 98 per cent. of the shares to claim 98 per cent. or any proportion of the profits. Their right is said to be a right only to receive dividends, and whatever amount of control they may exercise, it is the control of shareholders and of shareholders only—and they have no control either as masters or as principals. I think I may say, and that I ought to say, to save time, that this view is that which the court thinks to be the right view, and I do not think that anything would be gained by further repetition of the view that I take, the result of which is that the judgment of Phillimore, J., should be affirmed.

STIRLING and MATHEW, L.JJ., agreed.

*Appeal dismissed.*

Solicitors, *The Solicitor of Inland Revenue; Kerly, Son, & Verden.*

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## High Court of Justice.

Chan. Div. } Feb. 18.
Farwell, J. }

HART v. THE PORTHGAIN HARBOUR CO. (LIMITED). (a.)

*Contract—Construction of works—Plant and materials on ground—Mortgage by contractor—Default in completion of works—Rights of building owner.*

*The clause in an ordinary contract for the construction of works upon lands, that the plant and materials brought upon the land to be used for the purposes of construction shall be considered to be the property of the owner of the land, must, in the absence of any stipulation in the contract incompatible with such construction, be construed as immediately vesting in such owner all plant and materials so brought upon the land, subject to a right of the contractor, upon his completion of the works, to have the plant returned to him.*

Action.

The defendant company had entered into an agreement with a contractor for the construction of harbour works. The contract contained clauses providing that all plant and materials brought upon the ground should be considered the property of the company till the completion of the works contracted for should have been certified in manner therein provided; also that the contractor should, at his own expense, erect all necessary temporary works and remove them when no longer required; also, that the company should be entitled to take possession and complete the works in case the contractor became bankrupt or upon certain specified defaults upon his part.

The contractor mortgaged certain plant and materials, including the materials of a temporary dam across the mouth of the harbour, to the plaintiff by a registered bill of sale. He never completed the works. He became bankrupt. The plaintiff purchased his equity of redemption in the plant and materials from the trustee in bankruptcy.

The company was insolvent and unable to complete the works. Trustees for the debenture-holders took possession of the works, plant and materials, and they were sold by order of the court in a debenture-holders' action.

The plaintiff brought this action to recover possession of the plant and materials comprised in the bill of sale.

*Upjohn, K.C.*, and *A. Beddall*, for the plaintiff, relied on *In re Keen & Keen*, 50 W. R. 334, [1902] 1 K. B. 555.

*Butcher, K.C.* and *Dunham*, for the defendant company.

*Ashton Cross*, for the debenture-holders.

*Herbert Jacobs*, for the purchaser on the sale, cited *Reeves* v. *Barlow*, 32 W. R. 672, 12 Q. B. D. 436; *Brown* v. *Bateman*, 15 W. R. 350, L. R. 2 C. P. 272; and *Sumpter* v. *Hedges*, 46 W. R. 454, [1898] 1 Q. B. 673.

FARWELL, J., after stating the facts, said. The question I have to determine is the construction of the clause in the contract which provides that all plant and materials brought upon the ground shall, till a certain event which never happened, be considered the property of the company. I construe it as vesting them in the company subject to a right to reconveyance in certain events. In my opinion *In re Keen & Keen* was decided upon the terms of that particular contract in question, which, as Bigham, J., pointed out, contained clauses incompatible with the idea that the plant vested immediately in the company. It is therefore no authority upon this case. I am of opinion, therefore, that the plaintiff's claim fails, and the action must be dismissed.

Solicitors, *Batchelor & Cousins; Busk, Mellor, & Norris*, for *P. A. A. Weston*, Bristol; *Nye, Moreton, & Clowes; W. H. Newton*, for *G. A. T. Tuckey*, Bristol.

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Chan. Div. } Feb. 6, 7, 11.
Farwell, J. }

WAUGH v. CRIPPS (a.)

*Will—Construction—Devise to "B. and her heirs"—Gift over to collateral heirs—Rule of construction—Estate tail.*

*By his will a testator gave two houses to his daughter A. for life, and after her death as to one house "to her daughter B. and her heirs," and as to the other house "to her son C. and his heirs"; and, further, "if either the said B or C. should die without an heir their share is to go to the survivor's heir or heirs."*

*Held, that B. and C. took estates tail, and that the words "heirs" in the last phrase, "the survivor's heir or heirs," must be read as "heirs general" and not as "heirs of the body," although the word had that latter*

(a.) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

*signification throughout the other parts of the will, where there were gifts over.*

Summons.

The testator in this case left two testamentary documents, both of which were admitted to probate, dated respectively the 30th of December, 1862, and the 13th of August, 1866, and he died on the 18th of August, 1866.

The questions to be determined arose on the construction of the second document, which was in these terms: "I leave to my daughter Mary Vine a freehold cottage in High-street, Mile Town, Sheerness, No. 195, and after her death it is to go to her daughter, Susan or Susannah Vine and her heirs; if the said Susannah Vine should have no heir the cottage is to go to her eldest brother, Edward Robert Vine, and his heirs; if he should die without an heir, it is to go to his surviving brothers or their heirs, to be equally divided between them. I also leave to my daughter Mary Vine two cottages in Chapel-street, Wards Town, Nos. 10 and 11, freehold, and after her death No. 10 is to be left to her son Thomas and his heirs, and No. 11 is to go to his surviving brothers or brother or their heirs, to be equally divided. I leave to my daughter Catherine Graham a freehold house, being No. 13, Victoria-terrace, Wards Town, Sheerness, during her life, and after her death to go to her eldest daughter, Mary Graham, and her heirs; if she should die without an heir it is to be divided equally between the survivors. I also leave to my daughter Catherine Graham two cottages in Chapel-street, Wards Town, Nos. 9 and 12; after her death No. 12 to go to her youngest daughter, Elizabeth Graham, and her heirs, and No. 9 to go to her son, William Graham, and his heirs; if either the said Elizabeth or William should die without an heir, their share is to go to the survivor's heir or heirs."

Elizabeth Graham, the daughter named in the last clause, died a spinster on the 25th of September, 1891, and William Graham, the son named in the last gift, died a bachelor in December, 1897. Catherine Graham, the tenant for life named in the last gift, died on the 23rd of April, 1902.

The question to be decided was what estates Elizabeth and William Graham took in the houses respectively devised to them.

*Hon. Frank Russell*, for the plaintiffs (the heirs of the testator), submitted that the gift to Elizabeth Graham and her heirs and to William Graham and his heirs created estates tail. The words "heirs" was used frequently in the will in the sense of "heirs of the body," and the court will assume that it was so used in this instance: *Re Birks, Kenyon* v. *Birks*, [1900] 1 Ch. 417, 48 W. R. Dig. 209.

*Fischer Williams*, for the defendants (the devisees of said William Graham, and those claiming through such devisees), referred to Fearne on Contingent Remainders (10th ed.), vol. 1, p. 466; *Tilburgh* v. *Barbut*, 1 Ves. sen. 89; and *Doe d. Littledale* v. *Smeddle*, 2 B. & Ald. 126.

*Hon. F. Russell* replied.

FARWELL, J., after stating the facts set out above, proceeded as follows: Under these circumstances the first question arises—What estate did Elizabeth and William Graham take in the houses respectively devised to them? I am of opinion that they took estates tail. The general rule of construction is well settled, and is thus stated in Fearne on Contingent Remainders (10th ed.), vol. 1, at p. 466: "But we are to remember, however, that although a devise over after a dying without heirs is in general void, yet this rule is not without exceptions; for if the person to whom the limitation over is made be a relation of, and capable of being collateral heir to, the first devisee, in that case the first devisee takes only an estate tail because the limitation over to the collateral heir plainly denotes that only lineal heirs could have been intended." But it is argued that the rule is confined to the case where the object of the gift over is or may be the collateral heir, and that in the present case it is obviously impossible that the children of a brother who survives his sister or of a sister who survives her brother can ever be heirs to the predecessor. But the rule is merely a rule of construction, not a rule of law, and has been established to give effect to the intention for reasons applicable to the present case. Thus in *Nottingham* v. *Jennings*, 1 P. Wms. 23, at p. 24, Holt, C.J., says: "I agree if the devise over had been to a stranger it had been void, and B. had taken a fee simple; but in the present case the word (heirs) can import nothing more than issue, for how could he possibly die without heir, living the other brother?"

In the present case I ask the same question. How could Elizabeth or William die without an heir if the other survived? But the gift over assumes the existence of the one at the death of the other, and the title of the heirs of the survivor is contingent on evidence of survivorship of their ancestor. If it is absurd to suppose that the testator meant heirs general in a gift to A. and his heirs, because he has given the property over in the event of the failure of heirs general to a person who may be such heir general, it is equally absurd to suppose that he meant heirs general when the gift over to a stranger is made to depend on the existence of one who is, or may be, heir general at or after the total failure of heirs general. In my opinion the rule as stated in Fearne may be amplified thus: If the person, to whom the limitation over is made, be capable of being collateral heir to the first devisee, or if the event on which the gift over is made necessarily depends on the existence of a collateral heir of the first devisee on such first devisee's death, the first devisee takes only an estate tail.

The next question is, What is the meaning of the words "the survivor's heir or heirs"? I do not feel at liberty to alter the meaning of the words, and to read them as if they were "heirs of the body." It is argued that the testator has throughout this document used the word "heirs" when he meant "heirs of the body," but this is by force of the several gifts over under the rule of construction to which I have already referred. In this case I have no gift over, and the word "heir" is not a flexible word like "issue," which was the word in *In re Birks*. The gift was contingent on the death of the survivor during the lifetime of the tenant for life, for *nemo est heres viventis*, and if the tenant for life had died first, the gift would have failed for want of a particular estate to support it. But in the event that happened it has taken effect, and I can find nothing to justify me in altering the plain meaning of the words. The alternative phrase "heir or heirs" is too narrow a foundation to build an argument upon. Mr. Russell relied upon *Simpson* v. *Ashworth*, 6 Beav. 412, but in my opinion the reason on which Lord Langdale's decision is based has no application to the present case. The will there contained divers gifts to the sons and daughters and their heirs, which, by virtue of the rule above-mentioned were held to be gifts in tail; and then there was a gift over of a daughter Catherine's share "to my son and daughters that have heirs, share and share alike." Lord Langdale held that the testator intended the same quantity of estate to go over which he had given in

the first instance—that is, he inferred from the fact that all the original gifts were to the sons and daughters in tail that the intention was that the share of a daughter given over in the event of her death "without lawful issue" was given for a similar estate. But I have no such indication of intention in this case. The heirs of the survivor are not objects of any prior gift. In order to make Lord Langdale's decision apply, the gift here should have been to the survivor, his or her heirs or heir, instead of to the heirs or heir of the survivor.

Solicitors for the plaintiff, *Sismey & Cook*, for *Copland & Son*, Sheerness.

Solicitors for the defendants, *Crossman, Prichard, & Co.*, for *Blome-Jones*, Sheerness.

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Chan. Div. } March 4.
Joyce, J. }

HARRINGTON *v.* SENDALL. (*a*)

*Club—Absence of express power to alter rules—Power of majority to bind minority—"General purposes" of club—Power to increase subscription.*

*In the absence of an express power to alter its rules, a club has no inherent authority to increase the annual subscription provided for by the rules, against the wishes of a dissentient minority of its members.*

The plaintiff in this action was, and had been since 1886, a member of the Oxford and Cambridge University Club, and he moved to restrain the defendants, who were the committee of the club, from interfering with his enjoyment as such member of the use and benefit of the club and its privileges and property, and from posting up his name as that of a member in default with his subscription, and from erasing his name from the list of members of the club.

The facts were as follows:

In 1886, when the plaintiff joined the club, the entrance fee was forty guineas and the annual subscription eight guineas.

At a general meeting held on the 28th of May, 1902, it was resolved, by a majority of the members present, that the annual subscription should be increased to nine guineas. The plaintiff was not present at the meeting and had previously expressed his dissent from the proposal, and after the passing of the resolution he gave notice to the secretary of his dissent from and objection to it.

In January, 1903, the plaintiff tendered £8 8s as his subscription for the year, but his cheque was, by the instructions of the defendants, returned to him as insufficient in amount.

On the 3rd of February he received notice that his subscription was still unpaid, and subsequently his name was posted in the manner complained of in this action.

The rules of the club contained no provision for making amendments or alterations thereto. The preamble recited that the club "was instituted for the association of gentlemen educated at Oxford and Cambridge Universities, and for promoting and continuing a mutual interest and fellowship between them. As every member will upon payment of his entrance fee and subscription become entitled to the benefits and privileges of the club, so such payment will be considered as a declaration of his submission to the following rules and regulations." Rule 14 provided that an annual subscription of £8 8s. should be due and payable from each member on the 1st of January. Rules 16 and 17 provided for the posting of names of defaulters and the erasion of their names from the list of members if the default continued. Rule 23 provided that an annual meeting of the club should be held for general purposes in the month of May in each year, of which due notice was to be given in the manner therein mentioned.

The evidence showed that the club was founded in 1830, since which date the rules had been altered, varied, or added to in over fifty different ways on more than thirty separate occasions by means of resolutions passed at the annual meetings. The subscription had on three several occasions, the latest being in 1881, been increased by various increments to its present amount. The rules had also been altered on several occasions since the plaintiff became a member, and he had made no objection to any such alteration. It further appeared that since 1881 the annual expenditure had increased by over £2,000, of which £1,000 was due to increased rating and taxation.

*Hughes, K.C.*, and *Simon*, for the plaintiff.

*Haldane, K.C.*, and *R. J. Parker*, for the defendants.—By a long continued course of practice extending over many years the expression "general purposes" in rule 23 has been interpreted as involving a power to alter rules; apart from that there must be an inherent power to do so; the individual members are not liable for the club's debts, but only the committee, who have to look to members' subscriptions to indemnify them; if the club can, and do, authorize the committee to incur certain expenses, and can determine the amount of them, they can also increase the means for defraying them—*i.e.*, raise the subscription; that follows almost as a corollary. But we rely chiefly on the interpretation accorded by usage to rule 23, and say that, if not generally, yet within reasonable limits, the members have power by a majority to effect alterations, and the plaintiff has always acquiesced in that view of the position.

JOYCE, J.—The question in this case is whether a majority of the members of the Oxford and Cambridge Club, assembled in general meeting, have power to alter the rule which regulates the amount of the annual subscription to the club in such a way as to bind a dissentient minority to pay a larger subscription in future years. When the plaintiff joined the club he became entitled, as a member, to the then benefits and privileges of the club, and must be taken to have submitted himself to then rules and regulations. I say the "then" rules and regulations because they had been from time to time modified in various ways. In other words, he agreed to be bound by the written contract contained in those rules and regulations. Now, those rules contained no express power to alter or amend the rules from time to time, but it is contended that there must be an inherent power in a majority of the members to do this, either in any way they may think fit, or at least within certain limits. No authority was cited to me for this proposition, and in my opinion there is no more power to alter the rules in this case than there is for any other association depending on express written contract to alter the regulations imposed by it. In my opinion there is no power in the members to alter the rules when such power forms no part of the written contract. With regard to rule 23, it is not alleged that the ordinary meaning of the phrase "general

(*a*.) Reported by ALAN C. NESBITT, Esq., Barrist-r-at-Law.

purposes" would include a power to alter the rules, but it is said that the rule has always been interpreted upon that footing. Now, in dealing with an ancient statute, you may no doubt appeal to continued usage as a means of interpreting, but not, in my opinion, when you are dealing with an altogether modern contract, as in the present case. Nor is the analogy of a partnership, where the articles can be amended, any guide to this case, which is quite dissimilar. If a majority can raise the subscription to nine guineas, why not to twenty guineas, or why can they not call upon individual members to discharge the liabilities of the club? Again, it is alleged that the plaintiff has acquiesced in the interpretation contended for of rule 23 by acquiescing in other alterations of rules. These, however, appear to have been of quite a minor character, and the plaintiff felt no objection to them; because he did not come and ask for an injunction in these matters, I cannot hold that he is not entitled to do so in a case where his pecuniary interest is indirectly affected. If he, therefore, insists upon his rights, I declare that he is entitled to the injunction he asks for.

Solicitors, *Lawford, Waterhouse, & Lawford; Walker, Martineau, & Co.*

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Prob. Div. & Adm. Div. Divorce. } Nov. 25.

WADE *v.* WADE.
BROOKE *Intervening.* (*a.*)

*Divorce—Practice—Intervener's costs.*

*Where the respondent did not deny at the trial his adultery with a woman, who, on learning that he was not going to deny the charge, obtained leave to intervene, and the petition as against her was dismissed.*

*The Court held that the intervener ought to be placed in the best possible position to obtain the costs of her intervention, and that the costs of it ought to fall upon the respondent as well as the petitioner.*

This was an application by an intervener for a first charge for her costs upon a fund paid into court by the respondent (the husband) for security for the petitioner's costs of the hearing under the following circumstances:

The wife petitioned for a dissolution of her marriage on the ground of adultery, cruelty, and desertion, the adultery alleged being with a woman or women unknown and with a woman named. The husband denied all the charges, but the woman who was named, being a governess in very poor circumstances, took no steps to intervene, as she relied upon the husband fighting the case.

When the case came on for hearing the husband stated that he was not in a position to contest the adultery and the desertion, but that he would contest the allegations of cruelty.

The intervener then applied for leave to intervene in the suit and defend herself against the particular charge of adultery which concerned her, and the case was thereupon adjourned to enable her to prepare her defence.

At the hearing the charge of adultery against her failed, and so far as she was concerned the petition was dismissed.

*Newson*, for the intervener, applied for a first charge for her costs upon the fund in court, as hereinbefore stated.

*Barnard*, for the petitioner, contended that the court had power to condemn the husband in the costs of the intervener.

*Priestley* raised no objection to the intervener's application.

BARNES, J., granted a decree of judicial separation on the ground of desertion, with costs against the respondent; and, dealing with the intervener's application, said that he thought that no case had been made out against her, and if any suspicion of a case attached to her, which he did not think really did, it had been entirely dispelled by her evidence. He thought he ought to place the intervener in the best possible position to obtain payment of the costs which she had incurred, and rightly incurred, in defending herself. It would not have been for her to have intervened if the husband had fought the case out as he ought to have done. The expense of her intervention ought to fall upon him as well as upon the petitioner, and an order would therefore be made against both the petitioner and the respondent to pay the costs of the intervener. Having regard to the conduct of the husband the petitioner ought to have an order for her costs, as her solicitor did not appear to have acted improperly in laying the case before the court, especially after the admission made in court on behalf of the husband.

Solicitors for petitioner, *Sanders & Harding*, for *Tunnicliffe & Salthouse*, Bradford.

Solicitors for respondent, *Corbin, Greener, & Cook*, for *Beaumont, Wilson, & Croft*, Leeds.

Solicitors for intervener, *Jaques & Co.*, for *Neill & Holland*, Bradford.

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(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

## Court of Appeal.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) April 7.

CARR v. HENRY AND ANOTHER. (a.)

*Convict—Administrator of convict's property—Power of sale—Action by convict against administrator—Felony Act,* 1870 (33 & 34 *Vict c.* 23), *ss.* 12, 17, 20.

*The power of sale over the property of a convict conferred, by section* 12 *of the Felony Act,* 1870, *on his administrator, is absolute, and is not limited to a power of sale for the purpose of making the payments authorized by the Act. If in regard to any sale of such property the administrator has in fact exercised a discretion, and his conduct has been otherwise* bonâ fide, *there has been a* bonâ fide *sale by him within section* 17, *and the sale cannot be called in question by the convict.*

*Decision of* Buckley, J. (*ante* p. 166, [1903] 1 Ch. 90), *affirmed.*

This was an appeal from the decision of Buckley, J. (reported *sub. nom. Carr* v. *Anderson, ante,* p. 166, [1903] 1 Ch. 90).

The facts were as follows:

On the 25th of July, 1895, Carr, the plaintiff in this action, was convicted of felony, and sentenced to six years' penal servitude. Sir Robert Anderson was appointed his administrator under the provisions of the Felony Act, 1870, and, as such, took possession of his property. This property consisted of, *inter alia,* jewellery, shares in the Louisville and Nashville Railway, and certain bonds. During the course of administration all the property was sold with the exception of four foreign bonds, which were alleged to be worthless. The sale of the Louisville and Nashville shares had been conducted by a subordinate official at Scotland Yard who subsequently turned out to be a dishonest person, and who in this particular case, instead of going to a stockbroker, negotiated the sale of the shares through a money-changer. The sale of the jewellery was made under a course of practice alleged to be universally followed at Scotland Yard, property of this sort of comparatively small value being sold without special directions given in respect of it.

In July, 1901, the plaintiff brought this action against Sir Robert Anderson, the late, and Mr. Henry, the present Assistant Commissioner of the Criminal Investigation Department, asking for an account of his property which had come into their hands, for delivery up of what might be found due to him, and for damages for wrongful conversion of his property.

Buckley, J., held that, the defendant, Sir Robert Anderson, having exercised a discretion in the sale of the property, and his conduct having been otherwise *bonâ fide,* was entitled to rely on the Felony Act, 1870.

The plaintiff appealed.

*Astbury, K.C.,* and *M. R. Emanuel* used the same arguments in the court below.

*Birrell, K.C.,* and *T. T. Methold* were not called upon.

COLLINS, M.R.—I am of opinion that the decision of Buckley, J., was perfectly right. The learned judge had the opportunity of seeing and hearing Sir Robert Anderson, and came to the conclusion that he acted *bonâ fide.* He has carefully considered the allegations made by the plaintiff and the distinction urged in the case of the jewellery, and has found that the sale of those articles having been in accordance with a well-established practice, the fact that Sir Robert Anderson did not interfere with that practice does not affect him with liability. In my opinion, the mere fact that the defendant did not interfere with such a practice does not show that he exercised no discretion. In my opinion, moreover, such a sale is not unreasonable, and *primâ facie* is the proper course to be taken in such cases.

ROMER, L.J.—I agree. I will only add a few words as to the jewellery. I am satisfied that Sir Robert Anderson knew of the sale, and exercised a certain amount of discretion in not interfering. But it is alleged that there is a practice at Scotland Yard, under which a convict's property is sold without having regard to whether a sale is advisable or not. All I can say is that, if there be such a practice, the sooner it is departed from the better, and if an administrator failed to exercise any discretion in such a sale, and caused someone else in the office to effect such a sale to the loss of a convict's estate, that administrator would probably find himself affected with liability for it if the matter came before this court.

COZENS-HARDY, L.J.—Under the Felony Act, 1870, an administrator is bound to exercise some discretion on the sale of a convict's property. If he does so exercise it, the sale is binding and cannot afterwards be impeached by the convict. To my mind it is perfectly clear that Sir Robert Anderson did authorize the sale, and exercise his discretion *bonâ fide.* The appeal must therefore be dismissed.

*Appeal dismissed.*

Solicitors, *Emanuel, Round, & Nathan; Wontner & Sons.*

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From Registrar in Bankruptcy. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) April 3.

*In re* PILLING.
*Ex parte* THE BOARD OF TRADE. (a.)

*Bankruptcy—Receiving order—Scheme of arrangement—Release of debts by majority of creditors on condition of court's approval of the scheme—Approval of scheme—Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 3.

*A debtor, who is anxious to obtain the court's approval of a scheme of composition, must lay before the court all the terms and arrangements of that scheme It is not sufficient for the debtor by himself to carry out part of the scheme, and then to come to the court to get its sanction as to the balance of the scheme.*

In re E. A. B. (50 *W. R.* 229, [1902] 1 *K. B.* 457), *and* In re Baines (86 *L. T. Rep.* 691, 50 *W. R. Dig.* 17), *discussed.*

This was an appeal from a decision of Mr. Registrar Brougham.

The facts were as follows: On the 7th of September, 1898, a receiving order was made against J. R. Pilling. Subsequently the debtor applied for the approval of a composition of 7s. 6d. in the £, payable to those of his creditors who had not released their claims against the estate. At the date of the receiving order the claims against the estate, after various deductions had been made, amounted to £76,671. Creditors for £55,979 of this amount chose to rely on their securities. With regard to the

(a.) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

(a.) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

balance of £20,692, creditors for £13,389 had executed releases, each of which releases contained a proviso that the release should have no force or operation unless the composition scheme obtained the sanction of the court.

The registrar, on the matter coming before him, came to the conclusion that the composition ought to be approved, and he accordingly ordered the receiving order to be discharged.

The Board of Trade appealed.

*Sir R. B. Finlay, A.G.*, and *Muir Mackenzie*, for the Board of Trade.—The whole object of section 3 of the Bankruptcy Act, 1890, is to provide for a settlement under the control of the court. When you get, as here, a withdrawal by private arrangements of the majority of the creditors, the subsequent composition with the remaining creditors is not a scheme which should be sanctioned by the court. The releases here are not absolute, but conditional. It was never intended that such private arrangements as these should be made. The Acts of 1883 and 1890 restored the control of the court in these matters. If this scheme is sanctioned, it will mean that a debtor will practically be enabled to bargain for his discharge with creditors outside the court. The small minority of creditors which remains here, is a residue left for show: *In re Dixon and Cardus*, 37 W. R. 161, 5 Morr. 291.

*Reed, K.C.*, and *P. M. Francke*, in support of the scheme.—It is difficult to consider a general principle of law without a separate knowledge of the facts. Here the official receiver, in accordance with the general practice, questioned not only the debtor but also the persons giving the releases to see whether it was a proper sort of arrangement. Moreover, the release is not conditional, it is an absolute release with a defeasance clause. [ROMER, L.J., referred to a passage in the judgment of Blackburn, J., in *Newington v. Levy*, 19 W. R. 473, L. R. 6, 50 W. R. 299, C. P. 180, at p. 191, as an authority for the proposition that release in this form simply amounted to a covenant not to sue except in a certain event.] It is not for the debtor to satisfy the court that everything is in order.

The following cases were also referred to: *In re E. A. B.*, 50 W. R. 299, [1902] 1 K. B. 457; *In re Baines*, 86 L. T. Rep. 691, 50 W. R. Dig. 17.

COLLINS, M.R.—This is an appeal from a decision of Mr. Registrar Brougham approving of a certain scheme of composition by the debtor under the provisions of the Bankruptcy Act, 1890, s. 3, and the point taken by the Board of Trade is that on the details of the scheme they are left in complete ignorance as to how, under the releases, a large proportion of the debts have been withdrawn. They say that on the face of this scheme and on the face of the documents adduced as part of the scheme, there appear facts which, if unexplained, leave them in doubt as to whether or not this scheme can be a legitimate scheme, and that they ought not to be called upon to approve it. The scheme which is now put forward is this: The debtor says, "I propose to pay my creditors a composition; I pay into court a certain sum for costs, and I will pay in a sum sufficient to pay a composition of 7s. 6d. in the £," and he says in the fourth paragraph that such creditors as released their debts shall not be included in the payment of the composition. Now it turns out that a very considerable percentage of the creditors are said to have released their debts. I think the terms of the release are very important. They say, "Provided always, and it is hereby expressly agreed and declared that if the said proposed composition of 7s. 6d. in the £ or any other proposal for a composition involving payment of 7s. 6d. in the £ shall not be approved by the court, or the receiving order shall not in any other manner be rescinded, then these presents shall have no force or operation." Therefore that document, which is part of the scheme, shows on its face that there is not an absolute release; in fact, that there is only a release that takes place in a certain event which has not happened—namely, the approval of the scheme. The Board say, "This on its face is not a scheme that we can approve of. This agreement has been made simply for the purpose of assisting you in attempting to carry out this scheme; it is an agreement to hold in suspense the right in the creditor of proving for his debt until he finds whether or not you are going to get that scheme passed or not, reserving all his rights as a creditor in the event of your not getting that scheme passed." It seems to me that the Board of Trade are right in their contention, and I think it may be tested in this way. Can the debtor claim to put himself in a better position by keeping back from the official receiver the special terms upon which he has secured the assent of certain creditors; can he be in a better position than if he had averred at the outset as part of the scheme, and before he had carried out his arrangement with his creditors, what he proposed to do? It seems to me that he cannot, and that if he had come forward with a scheme stating on its face that he proposed to bring about an agreement with a given percentage of creditors on the terms that they should approve provisionally a release of their debts subject to the composition being approved, and had stated all the facts, I do not think the official receiver or the Board of Trade would have been justified in accepting such a scheme.

Now it is said here that the registrar who upheld this scheme really decided on the authority of another case—the case of *In re E. A. B.*—in this court. That appears to me to be the ground of his decision, but when one comes to criticize the case of *In re E. A. B.* it does not seem to support this view at all. It seems to me, with deference, that he has misapprehended the effect of that decision. There certain of the creditors of the debtor had arranged to release their debts, but they had made that arrangement, as the court held, without the knowledge or privity of the debtor. They had arranged with a third person acting entirely without his knowledge or consent, and in point of fact they had absolutely, not as part of the scheme, but absolutely and finally released their debts, with the result that the creditors—the only creditors left whose interests were to be considered—were the creditors whose debts had not been released. Now that case proceeded upon a totally different ground, and in point of fact it shows, by the grounds upon which it was put, that had the arrangement in question been made, not by a third party without the knowledge of the debtor, but by the debtor himself, the decision of the court would have been totally different. It was dealing with a case where another person entirely outside the debtor's knowledge had obtained releases from several of his creditors. That is not this case, and if the facts, as I have already said, were averred on the face of his scheme, I do not suppose for one moment the debtor could have asked the assent of the court. He would have had to show, if he had averred all the facts on the face of the scheme, the terms upon which he was securing the release provisionally of these persons, and he is in no better position because he has kept that back from the view of the court. There is another case that has been referred to as an authority for the proposition that this release is a complete release. That case—*In re Baines*—was decided by my brothers Wright and Phillimore, and is reported in 86 L. T. Rep. 691. The head-note is this: "In the absence of fraud the security required by

the Bankruptcy Act, 1890, s. 3 sub-section 9, need not extend to debts, releases for which have been executed and delivered as escrows to take effect on the approval of the scheme by the court, but the creditors who have executed such releases have no interest entitling them to vote upon the scheme." That decision again, appears to me to have been arrived at on a misapprehension as to the decision in *In re E. A. B.* It purports to be decided upon the authority of that case, but against the judgment of the court. Wright, J., said: "I confess that but for the passage cited to us from the case of *In re E. A. B.*, I should have thought that the requirement as to security being found for 7s. 6d. in the £ was inserted in the Bankruptcy Act of 1890 on the ground of public policy, for the very purpose of insuring that the debtor should not by means of private and piecemeal arrangements with friends escape the stigma and possible consequences of bankruptcy in a case where any misconduct was imputed to him, without securing 7s. 6d. in the £ on all the unsecured debts for which he was liable at the date of the receiving order;" and he then held himself bound, contrary to his own judgment, by what he considers the result of the decision in *In re E. A. B.* But when that case is looked at, and the grounds which I have referred to are considered, it is obvious that that case stands entirely outside the principle which the learned judge seems to think it established. It is not a decision that an escrow is equivalent to a release when it has been brought about by the operation of the debtor himself. It is not dealing with an escrow at all. It is dealing with an absolute release, and an absolute release promoted, not by the debtor, but by a person acting without his privity. It therefore does not justify the decision in *In re Baines*, and, but for the view that it did justify it, the learned judges who decided *In re Baines* would not have come to the decision that they did come to. For these reasons I think that the decision of the learned registrar must be reversed.

ROMER, L.J.—I am of the same opinion. Seeing that the case of *In re E. A. B.* has been misunderstood, I think it right to add a few words upon the point in addition to what has been said by the Master of the Rolls. *In re E. A. B.* decided two points. The first was that when you find releases of debts brought about by arrangements to which the debtor was neither a party nor privy, he is not prevented from having a composition, effected with the other creditors, sanctioned by the court merely because of these arrangements which he did not bring about directly or indirectly. The other point decided was this, that debts properly released before the date of the receiving order and the date of the composition, under circumstances which do not affect the bankrupt, need not be regarded in considering the scheme of composition. I should desire to add myself that I do not think it would be necessarily fatal to a scheme of composition that the debtor might have been party to such releases. The releases might have been obtained under circumstances and conditions which reflected in no way upon the debtor, and which might fairly be disregarded by the court in considering the question of the composition. What I do say is this, and this is what governs the present case, that if you find a debtor going about obtaining releases from a large body of his creditors under terms which are unexplained, and then you find he comes seeking to make a composition with the minority of his creditors who remain, then I do say that neither the court nor the official receiver are bound to inquire into or ascertain the circumstances under which those releases were obtained, and the court will not sanction the composition on the assumption that the releases were brought about without bargaining by the debtor or without some consideration or promise passing from him. The court under these circumstances, I think, ought, in the exercise of its discretion, to refuse to accede to the scheme of composition, and especially is that the case if you find the releases conditional on the scheme being approved by the court. That in itself is fatal to this case. There are also two other points which are fatal to the respondents in this appeal. One depends upon the form of release, which has been mentioned by the Master of the Rolls and which I need not repeat; and the other is the fact that it appears from the particular form of the releases that those releases were part, as it were, of the scheme of composition and that the circumstances under which those releases were obtained, or some of those releases, were not fully and properly brought to the consideration of the court as part of the scheme, as should have been done. In a case of this kind it is not sufficient for the debtor as part of a scheme for settling with his creditors to by himself carry out part of his scheme and get releases, and then come to the court and seek to obtain its sanction only with regard to the balance of the scheme. A scheme which is going to settle with the debtor's creditors ought to be brought before the court as a whole and considered by the court as a whole.

COZENS-HARDY, L.J.—I agree. It is not necessary to hold, and I do not hold, that an absolute unconditional release of a debt coupled with the withdrawal of a proof in no way dependent upon or connected with the composition scheme is a fatal objection to the scheme. But here it is apparent upon the face of the documents that there was no absolute unconditional release of the debts, and I think it is equally apparent that the debtor was desirous of making an arrangement with all his creditors; as to 65 per cent. of them in terms the details of which we do not know, and as to 35 per cent. upon terms of paying them 7s. 6d. in the £, and the court when asked to sanction the scheme ought to have before it not merely a proposal for the payment of the 7s. 6d. to the 35 per cent., but all the terms and arrangement as to dealing with the other 65 per cent. I only wish to add one sentence about the case of *In re Baines*. The decision in that case discharging the order approving of the scheme was, if I may say so, obviously right, but I cannot agree with the observations of Wright, J., and Phillimore, J., for with the greatest respect I think they misunderstood the decision of this court in the case of *In re E. A. B.* There is nothing in that case which in any way supports the view that releases executed as escrows to become operative only on approval of the scheme are to be put in any way on the same footing as absolute unconditional releases of debts obtained, not by the debtor, but by somebody else without the privity, knowledge, or consent of the debtor. For these reasons I think the appeal ought to be allowed.

*Appeal allowed.*

Solicitors, *The Solicitor to the Board of Trade; Emanuel, Round, & Nathan.*

From Chan. Div.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) April 2.

*In re* EARL HOWE'S SETTLED ESTATES. (*a.*)

*Inland revenue—Estate duty—Payment by instalments—Interest—Tenant for life and remainderman—Charge of interest upon inheritance—Interest properly incurred—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 9 (5).

*Though a tenant for life may properly exercise the option given by sub-section* 8 *of section* 6 *of the Finance Act,* 1894, *of paying estate duty by instalments, and thereby incur the obligation of paying interest on the unpaid instalments, he is not, as between himself and the remainderman, relieved by the exercise of such option from his duty to keep down interest on charges, and cannot charge such interest on the inheritance as "interest properly incurred by him" under sub-section 5 of section* 9 *of the Act.*

This was an appeal from a decision of Buckley, J.

The facts were as follow: On the death on the 25th of September, 1900, of the third Earl Howe, certain estates, settled by a deed of 1883, under which the third earl was tenant for life, devolved upon the plaintiff, the fourth Earl Howe, as tenant for life, the next tenant for life being Viscount Curzon, an infant, with remainders over.

Estate duty to the amount of £50,163 2s. 3d. became payable on the death of the third earl, and the plaintiff elected, as he was entitled to do under the Finance Act, 1894, to pay this duty by eight annual instalments of £6,270 7s. 9d. each.

The first instalment was paid on the 25th of September, 1901, no interest being payable under the Act on that instalment.

The second instalment fell due on the 25th of September, 1902, and the Commissioners of Inland Revenue applied to the plaintiff for the payment of the same, with interest, amounting to £1,316 15s. 8d., for one year from the 25th of September, 1901, at 3 per cent. on the whole of the unpaid duty.

The plaintiff took out an originating summons asking for a declaration that he was entitled to raise by sale or mortgage of or by charge on the settled estates the interest payable with the instalments as they fell due.

Buckley, J., on the general principle that *primâ facie* a tenant for life whose income was increased by postponement of the payment of duty ought to bear the interest as the price of the postponement, held that the plaintiff must himself pay the interest and was not entitled to raise it out of the inheritance.

The plaintiff appealed.

By sub-section 8 of section 6 of the Finance Act, 1894, " . . . the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight yearly instalments . . . with interest at the rate of 3 per cent. per annum from the date at which the first instalment is due . . . and the first instalment shall be due at the expiration of twelve months from the death, and the interest on the unpaid portion of the duty shall be added to each instalment and paid accordingly . . ."

By section 9, sub-section 5 of the same Act, "a person authorized or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property, or any part thereof."

*R. J. Parker* and *Northcote*, for the plaintiff.—The plaintiff is a person authorized or required to pay the estate duty. He has exercised an option, which it is open for him to exercise under the Act, and by reason of that proper exercise of his option, interest has been incurred by him. This is interest properly incurred by him in respect of the estate duty and may be raised by a mortgage of the inheritance under sub-section 5 of section 9. The object of that sub-section is not to confer a benefit on the tenant for life or on any particular person, but to enable the Crown to obtain payment of what is due. To hold that interest cannot be charged upon the inheritance will have practical results of the highest inconvenience, as insurance companies who now advance the whole sum which appears due on the account delivered by the commissioners, will henceforth be put on inquiry as to how much is due for principal and how much for interest.

*Ashworth James*, for the remainderman, was not called upon to argue.

*Kenyon Parker*, for the trustees of the settlement.

COLLINS, M.R.—This is an appeal from Buckley, J., upon a question arising under the Finance Act, 1894. Counsel for the appellant say in effect that they will be satisfied with nothing short of a declaration that under section 9, sub-section 5, of the Act the tenant for life has the right to charge the inheritance with interest upon the sum payable as estate duty under the Act. Now I am certainly not prepared to go that length. It appears to me that the reasons given by Buckley, J., in his exhaustive judgment have settled the question, and that his decision is right. And when one comes to read the sub-section it appears to me that counsel's contention leaves out the most crucial part of it. No doubt the Finance Act does, under section 6, sub-section 8, allow estate duty to be raised and paid by instalments at the option of the person who has to pay it. Here the tenant for life has elected to pay it by instalments; and the particular point that now arises is whether the tenant for life, having power to raise the duty itself by a charge upon the inheritance, is entitled also to raise the interest payable on that duty, having regard to the fact that the duty is paid by instalments, the interest payable in the present case amounting to £1,316 15s. 8d. Now that question depends upon the construction of section 9, sub-section 5, which is in these terms: [His lordship read the sub-section, and continued:] Now it has not been disputed by counsel for the appellant that it is the duty of the tenant for life to keep down the interest on charges. Now, starting with that primary obligation upon him, has he under this Act to keep down the interest on the instalments, or is he entitled to charge that interest as well as the instalments upon the inheritance? According to the words at the end of the sub-section, the right conferred on him is to raise "any interest and expenses properly paid or incurred by him" in respect of this duty; and unless the tenant for life who comes to ask to be allowed to raise the interest and expenses can aver and prove that the same have been "properly paid or incurred" by him, he is not entitled to the benefit of the sub-section. Now, how can it be said that a tenant for life has power to impose on the persons entitled in remainder the obligation to pay money which he ought himself to pay? How can it be said that interest has been "properly incurred" by

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

him when it has only been incurred by the fact he has not done that which he ought to do—that is, pay the money himself. This, shortly put, appears to be the principle upon which Buckley, J., has decided this case. It may be that the other persons who are authorized under the Act to pay duty by instalments stand on a different footing from a tenant for life. But when you come to the case of a tenant for life it is impossible for the court to dismiss from its mind this latter part of the sub-section and to declare without inquiry and as an abstract proposition that the tenant for life can be allowed to charge the inheritance with the amount of interest on estate duty. Counsel say that to hold that a tenant for life cannot charge the inheritance with interest will be inconvenient to the insurance companies or banks who are in the habit of making advances to tenants for life to enable them to pay the duty and interest. But it is a matter for inquiry as to whether in any particular case the tenant for life has brought himself within the powers given by the sub-section to charge the interest by showing that the interest has been "properly incurred." The interest to be chargeable must of necessity have been properly incurred, and the obligation is upon the tenant for life seeking to charge it upon the inheritance to show that it has been properly incurred. There is nothing before the court in the present case to show whether the interest has been properly incurred, and no special circumstances have been brought to the notice of the court as a reason for allowing the tenant for life to charge the interest. It is not necessary for us now to state what special circumstances would justify the court in allowing a tenant for life to charge the interest, but certainly it is impossible for us to make the declaration asked for here by this tenant for life, that he has an unqualified power of raising the interest by charging it upon the inheritance. I do not mean to say that there might not be cases of hardship in which the court would hold that interest had been properly incurred by the tenant for life within the sub-section, but no such case has been made here. I entirely agree with the reasoning of Buckley, J., and in my opinion the conclusion at which he has arrived is right. The appeal must therefore be dismissed.

ROMER, L.J.—I have come to the same conclusion. Under section 6, sub-section 8, a tenant for life has the option given him of paying the estate duty by instalments, and if he exercises that option he has on paying the first instalment of duty to pay also interest upon the unpaid portion of the duty. Now, in the absence of some very special circumstances, it is, in my opinion, the clear duty of the tenant for life as between himself and the remaindermen to keep down the interest which has to be paid on the unpaid portion of the duty, and he is not entitled to cast the duty of paying that interest upon the remaindermen. It is a clear obligation cast upon him alone, and one which, to my mind, he is bound to perform. I can find nothing in the Act which would justify the tenant for life, who is bound to pay the interest as between himself and the remaindermen, by exercising any of the general powers conferred upon him by the Act, to evade the obligation upon him to pay the interest, and enable him to cast that obligation upon the estate. Counsel say that section 9, sub-section 5, gives the tenant for life that power. In my opinion it does not. That sub-section is a general clause giving a general power to various persons, among whom, I agree, is included a tenant for life; but a general power so given would not in my opinion justify a tenant for life in exercising the power so as to unduly favour himself in the way he would do if he were allowed to do what he now asks. In my opinion both his duty and his obligation prevent him from exercising his power so as to give himself an undue advantage. There is nothing in the requirements or necessities of the Crown to induce us to give a tenant for life such a power as is now asked for—namely, a power to exercise the provisions of the sub-section in his favour so as to give himself something to which he is not entitled. Then there is this to be considered, that this application is an application coming from the tenant for life himself asking to be allowed to exercise this power for his own benefit. I think the court is entitled to say "We will not give you the direction you ask for because, although there is a general power given by the Act to various persons that does not justify you in asking us to give a direction which will enable you to exercise that general power for your own benefit." We are not concerned with the position of any person who can say he has advanced money without notice of any duty on the part of the tenant for life in respect of raising the interest. Such a person will be entitled to have his position considered, but all I say is that a tenant for life is not the person entitled to come and ask for it. It is said that our decision will cast doubts upon the title of banks or insurance companies who are in the habit of lending money for the payment of estate duty upon the security of the inheritance Now, I am by no means sure that a person can safely lend money to a tenant for life upon the security of a charge upon the inheritance to enable him to pay the interest on estate duty. If the tenant for life says to such a person, "I am tenant for life and I want to borrow the money upon the security of a charge made by me on the inheritance, which I am entitled to give as between tenant for life and remainderman," in my opinion the person lending the money upon such a security would not have a good title, and I should further say that if a person who had advanced money with such notice could say that he had a good charge for the amount of principal and interest on the inheritance, then the remainderman would be entitled to require the tenant for life, who had so improperly raised money which he ought himself to have paid, to at once indemnify the estate. The result, therefore, is that this tenant for life is asking us to decide that he is entitled to exercise the power in his own favour, while if he had so exercised it himself without coming to the court he would have had to indemnify the estate at the instance of the remainderman. He has no right to come here and ask for any such general direction as he seeks. In my opinion the decision of Buckley, J., was right, and this appeal must be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion, and will only add a few words. The question is, what are the rights of a tenant for life who pays estate duty. They are defined by section 9, sub-section 6, which says that "a person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him." In other words, he is to have a charge of the same nature and to the same extent as if a mortgage of the estate had been given him by the executor under sub-section 5. How can it be said that a tenant for life finding money for the payment of the instalments of estate duty could under sub-section 6 take a mortgage not only for capital but also for the interest which he ought to keep down himself? It seems to me that that reduces the contention of the appellant to an absurdity. The tenant for life cannot under that sub-section himself get a charge

in respect of interest which he ought to have kept down. Can it be said, then, that he is able to give a stranger a charge greater than that which he himself would have been entitled to. I do not think so. The stress of the argument rests upon sub-section 5, which enables a tenant for life to raise by sale, mortgage, or charge, not only the duty, but also "any interest and expenses properly paid or incurred by him in respect thereof." It is suggested that those words would be well satisfied by treating them as referring to a person who, not being under a personal liability to pay, is authorized to pay the duty, and may therefore be well entitled to say "I have nothing to do with the limitations of the settlement. I have paid the Crown and insist on receiving back the whole money and interest." But it occurs to me also that the words "interest properly incurred" may have reference to two sub-sections of the Act of 1894 which have been amended by the Act of 1896. Looking at section 6 of the Act of 1894—the section providing for the collection and recovery of estate duty—we find it provides that "interest at the rate of 3 per cent. on the estate duty shall be paid from the date of the death up to the date of the delivery of the Inland Revenue affidavit or account or the expiration of six months after the death, whichever first happens," and shall form part of the estate duty. Those latter words were struck out by Part III. of the schedule to the Finance Act, 1896. I observe that North, J., held in *In re Fish, Lea v. Fish*, noted 103 Law Times, p. 267, that interest for that period formed part of the duty and was payable out of capital. Therefore, on the face of the Act, there is to be found at least one instance in which interest might become payable out of capital.

Then section 8, sub-section 10, says that "interest on arrears of estate duty shall be paid as if they were arrears of legacy duty." That, again, is repealed by section 16 of the later Act, which provides that simple interest at 3 per cent. shall be payable upon all estate duty from the date of the death, or where the duty is payable by instalments or becomes due at any date later than six months after the death, from the date at which the first instalment on the duty becomes due, and shall be recoverable in the same manner as if it were part of the duty. I am therefore of opinion that the view taken by Buckley, J., and by the Master of the Rolls and Romer, L.J., of sub-section 5 of section 9 is right. It seems to me to be contrary to all principle to allow a tenant for life to charge upon the estate interest which, by the language of the Act and by the policy of the law, is payable by him. If any case of hardship arises in consequence of a tenant for life being called upon to pay the interest on estate duty an appeal must be made, not to the language of the Act, but to the general jurisdiction of the court; but except in cases of that kind I am clearly of opinion that a tenant for life cannot avail himself of the general power of charging given by the Act by exercising it for his own benefit. I agree, therefore, in thinking that this appeal must be dismissed.

Solicitors, *Trower, Still, Freeling, & Parkin.*

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From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) } Feb. 2, 3, 4, 26.

CAPITAL AND COUNTIES BANK *v.* RHODES. (*a.*)

*Merger—Lease—Mortgage by sub-demise—Purchase of freehold by lessee—Mortgage of freehold—Entry by mortgagee by sub-demise—Refusal to pay rent—Legal estate—Registered land—Unregistered deed—Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 49—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 20—*Land Transfer Rules*, 1898, *rr.* 106, 107, 110.

*The rule of equity that the question of merger must be decided by the intention of the parties applies to the merger of estates as well as to the merger of charges, and since the Judicature Act*, 1873, *if the circumstances are such that a court of equity would have held that there was no merger in equity, there is now no merger at law.*

*Accordingly, where a lessee mortgaged his leasehold interest by way of sub-demise; and subsequently purchased the freehold reversion, and then mortgaged to another both the freehold reversion and also the leasehold term, with the intention that the mortgagee of the freehold should have a security on the unincumbered freehold reversion subject to the lease; and afterwards registered himself under the Land Transfer Act*, 1897, *as proprietor of the premises with a possessory title, and gave a charge thereon to the last-mentioned mortgagee which was also registered,*

*Held, that there was no merger of the term in the freehold, and that, apart altogether from the registration, the legal estate was vested in the mortgagee of the freehold, who was entitled to re-enter upon the premises under the proviso to that effect in the original lease on non-payment by the mortgagee by sub-demise who had entered into possession of the premises of the rent reserved by the original lease.*

*The fact that land is on the Land Register does not prevent its being dealt with by unregistered deeds which have the same operation and effect as if the land were unregistered. The registered proprietor deals with the land by virtue of an overriding power, and not by virtue of any estate in him. Consequently, the register of proprietors is not material for the purpose of ascertaining where the legal estate in registered land is, and such legal estate may be transferred by unregistered deeds.*

*The special powers given to a registered proprietor to create charges in the prescribed manner do not enable him to pass the legal estate by such charges, nor do they exclude the operation and effect of a common law unregistered mortgage.*

Quære, *whether a conveyance of the legal estate is a "stipulation" that may properly be added to a statutory charge.*

*Decision of* Kekewich, J. (71 *L. J. Ch.* 573, 50 *W. R. Dig.* 115) *reversed.*

This was an appeal from a decision of Kekewich, J. (reported 71 L. J. Ch. 573, 50 W. R. Dig. 115).

The defendant Rhodes was the lessee of No. 10, Stafford-street, under a lease dated the 31st of January, 1871, for a term of ninety-nine years from the 24th of June, 1869, at a yearly rent of £100. The lease contained a proviso for re-entry in favour of the lessor in the event of non-payment of the rent.

On the 20th of May, 1897, Rhodes sub-demised the premises by way of mortgage to Messrs. Flower & Sons (Limited) for the residue of the term except the last day thereof, to secure to Messrs. Flower & Sons the repayment of £5,000 with interest. He appointed the mortgagees his attorneys to assign and transfer

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the last day of the term, and declared that if the premises were sold under the power of sale or foreclosure, he and the persons claiming under him would stand possessed of the last day of the term in trust for the purchaser or persons foreclosing.

On the 7th of June, 1899, the freehold reversion was purchased at auction by Rhodes for £3,650; and on the 27th of July, 1899, the freehold of the premises was conveyed to Rhodes subject to, but with the benefit of, the lease of the 31st of January, 1871. On the same day, the 27th of July, 1899, Rhodes mortgaged both the freehold and the leasehold term to the Capital and Counties Bank to secure £3,000, which had been advanced by the bank to enable Rhodes to complete the said purchase.

On the 28th of August, 1899, Rhodes applied to be registered as proprietor, with possessory title, of the freehold, under the Land Transfer Acts.

On the same day he executed a deed by which he charged the land with payment to the bank of the money due and interest under the mortgage of the 27th of July, 1899, and also thereby conveyed the land unto and to the use of the bank in fee simple subject to redemption. This was duly entered in the register of charges, and a certificate thereof was on the 18th of September, 1899, issued to the bank as proprietors of the charge.

On the 17th of April, 1901, Rhodes entered into a deed of arrangement with certain of his creditors. To this deed the Capital and Counties Bank was not a party.

Some time before the 24th of June, 1901, Flower & Sons (Limited) entered into possession of the premises under the powers contained in their mortgage. Shortly after the expiration of twenty-one days from that date the Capital and Counties Bank demanded payment of a quarter's rent due on that day, under the lease of the 31st of January, 1871, from Flower & Sons and from Rhodes's trustee. Flower & Sons refused to pay the rent demanded, on the grounds (1) that the term created by the lease of the 31st of January, 1871, merged in the freehold which had thereby under the provisions of the Real Property Act, 1845, become the reversion expectant on their underlease by way of mortgage under which no rent was payable; and (2) that if it had not merged, still that Rhodes, by acquiring the freehold, could not claim from them the rent reserved by the lease of the 31st of January, 1871, being precluded therefrom by his own contract with them contained in the underlease to them and particularly by the covenant for indemnity implied from his having demised the premises to them as beneficial owners, and that consequently the Capital and Counties Bank, who derived their title through Rhodes, could not claim payment of the rent either, from Flower & Sons (Limited).

This was an action by the Capital and Counties Bank, to which Flower & Sons and Rhodes and his trustee were made defendants. The plaintiffs contended that no merger had been intended by Rhodes and that therefore no merger had taken place; and claimed (1) an account of what was due to them under their mortgages and foreclosure or sale; (2) a declaration that there had been no merger; (3) that they were entitled to re-enter under the proviso for re-entry in the lease of the 31st of January, 1871; and (4) that Flower & Sons (Limited) and Rhodes's trustee ought to be ordered to give up possession.

Kekewich, J., held that whether there was merger or not, Rhodes could not by acquiring the freehold defeat the security he had given to Flower & Sons; that Rhodes could not avail himself as against Flower & Sons of the proviso for re-entry contained in the lease of 1871; and that the bank, having no better title than Rhodes, could not re-enter for non-payment of the rent.

The bank appealed.

*Warrington, K.C.*, and *Sampson*, for the appellants.

*P. O. Lawrence, K.C.*, and *Druce*, for the respondents.

*Warrington, K.C.*, replied.

The following cases were referred to in the course of the argument: *Thorne* v. *Cann*, [1895] A. C. 11, 43 W. R. Dig. 121; *Ingle* v. *Vaughan Jenkins*, 48 W. R. 684, [1900] 2 Ch. 368; *Thellusson* v. *Liddard*, [1900] 2 Ch. 635, 48 W. R. Dig. 119; *Snow* v. *Boycott*, 40 W. R 603, [1892] 3 Ch. 110; *Brandon* v. *Brandon*, 9 W. R. 825; *Chambers* v. *Kingham*, 27 W. R. 289, 10 Ch. D. 743.

*Cur. adv. vult.*

Feb. 26.—COLLINS, M.R.—[His lordship stated the facts, and continued:] The principal question in this case is whether on the purchase by Rhodes of the fee his term was merged in the reversion, the result of which would be that the defendants, Flower & Sons, would hold directly under the owner of the fee (Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 9), without any obligation to pay rent, while the term held by Rhodes being extinguished, the rent of £100 a year would be no longer payable, and the security held by the bank would be land subject to a term not expiring until 1968, during which no rent could be recovered.

The bank accordingly in this action seek as their principal relief a declaration that there has been no merger of the term in the fee. They also claim a declaration that they are entitled to re-enter upon the premises under the proviso for re-entry in the lease of January, 1871, creating the term, and also demand possession. As to these two latter claims it is quite clear that the plaintiff bank cannot make them good unless the legal estate is vested in them. This, however, is a subordinate point so far as the ultimate rights of the parties are concerned, since the plaintiffs would have no difficulty in getting in the legal estate if they are right on the principal question. The question, therefore, in this view resolves itself into one of merger or no merger?

Now it seems to me quite clear that if the intention of the parties is that which determines this question, they certainly did not intend that a merger should take place. It is clear upon the facts that Rhodes could not have carried out his intention of purchasing the reversion without the co-operation of the bank, and that it was an essential condition of his getting that advance that he should be able to offer them the security of the rent of £100 per annum payable under the lease of the 31st of January, 1871. Apart from the terms of the instruments themselves by which the transactions were carried out, this is abundantly clear from the conditions of sale at the auction, which describe the property put up as "a freehold ground-rent," and refer to the value of the reversion and the substantial premiums likely to be paid for a renewal of the lease; and also from the document forwarded, by the bank managers with whom Rhodes opened negotiations, to the head office. This latter document contains the particulars of the advance demanded and the security offered, together with some observations as to the nature of the security. The security offered is described in terms similar to those in the conditions of sale as a freehold ground-rent of £100 per annum, and the value assigned to it is £3,650. The conveyance of the fee to Rhodes on the 27th of July is stated to be "subject to and with the benefit of the term," and in the mortgage of the same date from Rhodes to the

security on the unincumbered freehold reversion, subject to the lease. This was the real bargain, and it was plainly to the interest of the bank. The money would not have been advanced to Rhodes except on the security of the freehold ground-rent. This being so, it follows that whatever forms were adopted, no merger which would destroy the ground-rent ought to be allowed, and it might be sufficient to leave the case there. But it is perhaps desirable to consider the various steps.

By reason of section 20 of the Land Transfer Act of 1897 the conveyance of the 27th of July, 1899, did not upon delivery pass the legal estate. It remained in the vendors until the 28th of August, when Rhodes was first registered as proprietor. Therefore on the execution of the conveyance Rhodes had the equitable fee and the legal term, and thus far there was no merger. The charge of the 27th of July in favour of the bank operated upon the equitable fee and also upon the legal term. Whether it made the bank assignee of the term or whether it gave the bank an interest short of the legal term is a question of some difficulty. In the former view there could have been no merger unless and until the bank acquired the legal fee by reason of the charge of the 28th of August. In the latter view there might be merger the instant the legal fee vested in Rhodes on the 28th of August upon his being entered on the register of proprietors. Upon the whole I think the latter view—*i.e.*, that the bank did not become legal assignee of the term, is preferable and more in accordance with the language of the mortgage of the 27th of July.

But for my present purpose it is not material to consider which view is correct. The intention of the parties was clear that there should not be a merger. Moreover, the terms of the mortgage by way of sub-demise in favour of the respondents serve to support this conclusion. For by that mortgage Rhodes irrevocably appointed the respondents his attorneys to assign and transfer the last day of the term, and further declared that on a sale or foreclosure he would stand possessed of the last day in trust for the purchaser or persons foreclosing. It may well be argued that his position as trustee rendered it improper, if not impossible, for him to merge the term. But I prefer not to rely upon this argument. It is sufficient to say that the respondents have no right as against the appellants to something for which they never bargained with Rhodes, and which, if they get it at all, is due to a mere accident.

The result is that, in my opinion, there has been no merger of the term, and there must be a declaration to that effect.

The second question obliges me to consider carefully the scheme of the Land Transfer Act, 1875, as modified by the Land Transfer Act, 1897. It is to be observed that there is no compulsion under the Act of 1875, and with one exception there is no compulsion, direct or indirect, under the Act of 1897. The Acts establish a register of proprietors and a register of charges. The term "proprietors" is somewhat misleading, for persons entered on the register of proprietors need not have the legal fee vested in them, nor even any estate in the land. For example, a tenant for life may be the registered proprietor, or a trustee with power of sale but without any estate (section 6 of the Act of 1897), or the registered proprietor may be a mere nominee (section 5 of the Act of 1875). So far as I am aware no mention is made of "legal estate" except in section 20 of the Act of 1897 and in rule 59 of the Land Transfer Rules, 1898. The registered proprietor, whoever he may be, has a statutory power to transfer the property by a registered disposition, subject only, where the transfer is for value, to such incumbrances, restrictions, inhibitions, and notices as are inserted in the register or mentioned in the statutes (sections 29 and 30 of the Act of 1875), and subject also, where the land is registered with a possessory title, to the provisions of section 32 of the same Act. The registered proprietor has also a statutory power to create charges (section 22 of the Act of 1875). In short, the register of proprietors is not material for the purpose of ascertaining where the legal estate is. The transfer by registered disposition takes effect by virtue of an overriding power and not by virtue of any estate in the registered proprietor. By section 49 of the Act of 1875 the registered proprietor is the only person who can transfer or charge registered land by a registered disposition, but the section proceeds, "subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned." It is remarkable that the section does not say that any person not being the registered proprietor may create estates by unregistered deeds. It expressly includes the registered proprietor in the class of persons who may do so. There is nothing to suggest that all estates created by unregistered deeds must be equitable. Indeed it seems clear that a lease granted by an owner in fee or by a limited owner by an ordinary unregistered deed will pass the legal estate except in the case provided for by rule 59 of a lease for a term of forty years or more, or for two or more lives. The express provision that in this case the legal estate shall not pass until registration implies that in every other case the legal estate will pass. I can find nothing which prevents the passing of the legal estate by a mortgage created by an ordinary deed executed by an owner in fee, whether he is or is not a registered proprietor, and section 49 seems to me to assert the contrary. Notwithstanding that the land has become registered land, it may still be dealt with by deeds having the same operation and effect as they would have if the land were unregistered, subject only to the risk of the title being defeated, or in the language of section 49 the "estate" being "impaired," by the exercise of the statutory powers of disposition given to the registered proprietor, against which the mortgagee must protect himself by notice on the register. It is worthy of remark that section 20 of the Act of 1897, which provides that a person shall not under a conveyance on sale acquire the legal estate unless and until he is registered as proprietor is, by sub-section 2, limited to the first registration. In other words, it is merely a sort of indirect compulsion, a means of getting land on the register. It does not alter the general scheme of the Act after the land is once upon the register. The legal estate will pass on any subsequent conveyance on sale without registration. There is no penalty imposed for non-registration. Although the land cannot be removed from the register (section 17 of the Act of 1897), there is no necessity for any change to be made in the register of proprietors. Conveyancing may proceed just as if the Acts of 1875 and 1897 had not been passed. Self interest and the desire for security will doubtless induce persons, whether purchasers or mortgagees or lessees.

to make use of the registers. But the legal operation and effect of common law assurances will remain untouched by the want of registration. I have not forgotten that there are special powers conferred upon the registered proprietor to create charges in the prescribed manner which will not pass the legal estate, but which give a right of entry, a power of sale, and the right to foreclose, with an ultimate right after foreclosure absolute, to apply to be registered as proprietor of the land (sections 22-28 of the Act of 1875). But these provisions do not seem to me to negative or exclude the operation and effect of a common law unregistered mortgage. If it be urged that there is no express provision to enable a person claiming under or through an unregistered conveyance to procure himself to be registered as proprietor, I think the answer is supplied by sections 93, 95, and 96 of the Act of 1875: If the registered proprietor refuses to do what is right, the court has full power to direct the register to be rectified in such manner as it thinks just. I may add there is no express provision for the case of a nominee refusing on the request of the proper persons to execute a registered disposition. But I cannot doubt that the sections above referred to, suffice to enable the court in all cases for which no express provision is made in the Act or in the rules, to cause the register of proprietors to be rectified so as to confer the statutory benefits of registration upon any person who, in the opinion of the court, is entitled to claim those benefits. It is important to observe that a mortgagee who desires to take advantage of the special statutory privileges conferred by a registered charge, must take a charge in the prescribed manner (section 22 of the Act of 1875). Rule 106 gives by reference to the schedule a form (39) by which the legal estate does not pass, with certain optional variations and special stipulations; any departure from this form is attended with some risk. I think it is clear that a mortgagee could not insist upon the registration of a deed in the statutory form with a conveyance of the legal estate, which is the form adopted in the present case. But by rule 107, "In addition to or in substitution for the stipulation permitted by form 39, any other stipulations of which the registrar shall approve may be added to a charge." The registrar has in fact approved of this particular addition, treating it as a "stipulation," and has entered the deed on the register. It is not, however, material for the purpose of the present appeal to consider whether the entry of the deed on the register as a statutory charge was or was not authorized, for in either case the legal estate passed. The result is that in my opinion the legal estate is vested in the appellants by virtue of the mortgage deed of the 28th of August, and that they have a legal right of re-entry for non-payment of rent under the still subsisting lease, vested in Rhodes or persons claiming through him. It follows that the appeal must be allowed.

Solicitors, *Cameron, Kemm, & Co.; Frank Osbaldeston, & Co.; Crossman, Prichard, & Bloch.*

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## High Court of Justice.

Chan. Div. Farwell, J. — March 28.

*In re* ERMEN.
TATHAM *v.* ERMEN. (*a.*)

*Practice—Costs—Taxation—Instructions for originating summons—Discretion of taxing officer—Rules of the Supreme Court, Appendix N, No 65, ord. 65, rr. 8, 27, sub-rules 29, 37—Practice Notes on Taxation of Costs settled by the Masters in Hilary Sittings,* 1902.

*In taxing the costs for instructions for an originating summons the taxing officer is not bound by the limit of £1 1s. in R. S. C., Appendix N, No. 65, but has a discretion to allow a larger amount under ord. 65, r. 27, sub-rule 29.*

McIver & Co. *v.* Tate Steamers (Limited), 50 W. R. 642, [1902] 2 K. B. 184, *discussed and followed.*

This was an application to review taxation of costs.

The proceedings out of which the application arose were commenced by originating summons for the purpose of determining certain questions under the will of F. J. Ermen, deceased.

By an order of the 15th of August, 1901, the costs of all parties were directed to be taxed as between solicitor and client.

The plaintiffs included in their costs the sum of £5 5s. for instructions for the originating summons. On taxation by the district registrar a sum of £4 4s. was disallowed.

The district registrar was of opinion that if he had any discretion to increase this item beyond £1 1s. he considered that the fee of £5 5s. charged was quite reasonable. But he held that he had no such discretion, and that under the Rules of the Supreme Court, Appendix N, No. 65, and the Practice Notes on Taxation of Costs settled by the Masters in Hilary Sittings, 1902, the maximum of £1 1s. was not to be exceeded.

The Rules of the Supreme Court, ord. 65, r. 8, provide: "In causes and matters commenced after these rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'lower scale' in Appendix N in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this order otherwise provided for. . . ."

Appendix N, No. 65: "For originating summons, 6s. 8d., or not to exceed £1 1s."

Ord. 65, r. 27: "Special allowances and general regulations." "The following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature."

Sub-clause 29 provides: "On every taxation the taxing-master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party . . ."

Sub-clause 37 provides: "The rules, orders, and practice of any court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowances of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the principal Act, shall, in so far as they are not inconsistent with the principal Act and these rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowances of the fees of solicitors of the Supreme Court and the taxation of costs in

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

the High Court of Justice and Court of Appeal. [But the taxing-masters shall have power to revise and regulate the practice in regard to taxation of costs, and to the allowance of fees so as to assimilate the allowances for costs, and to secure uniformity upon all taxations so far as may be practicable and expedient.]"

The Practice Notes on Taxation of Costs settled by the Masters in Hilary Sittings, 1902, termed the Blue Book, provide on p. 19 that under the heading "Instructions for Originating Summons, the maximum of £1 1s. under Appendix N, No. 65, will not be exceeded."

*Haldane, K.C.*, and *A. G. Roby*, for the plaintiffs, cited *McIver & Co.* v. *Tate Steamers* (*Limited*), 50 W. R. 642, [1902] 2 K. B. 184; and *In re Harrison*, 33 Ch. D. 52.

*G. Lawrence*, for the defendants.

FARWELL, J., in giving judgment, said: In this case the learned registrar, after consulting the taxing-masters in London, has considered he has no jurisdiction or no discretion to allow more than the maximum of £1 1s. prescribed by Appendix N, No. 65, or by the "Blue Book"—which I will use as a short and convenient phrase—although if he had had such a discretion he considered that the fee of £5 5s. claimed was a proper and reasonable one to be allowed. In my opinion, on the construction of the rules, apart from any question of authority, the learned registrar or the taxing-master has not taken the right view.

Now, ord. 65, r. 8, is a rule of old standing, and contains negative words: "In causes and matters commenced after these rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'lower scale' in Appendix N in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this order provided for." Turning to find what are otherwise provided for, I find a fasciculus of clauses headed "Special allowances and general regulations," and rule 27 with, I think, fifty-eight sub-clauses. One of those sub-clauses is No. 29. In the old rules, before January, 1902, rule 29 was simply expressed in the negative form. You have in rule 8 a regulation commencing with the negative words that "no higher fees shall be allowed in any case except such as are by this order otherwise provided for." And by the old rule 29: "As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper," and so on. In January of last year it was thought fit to alter that rule, and the rule has now been put into the affirmative form. I think it is a fair statement to say that when eminent persons like the Rule Committee alter the phraseology of a rule they intend to alter the substance also. When you find that you are dealing with a set of sub-clauses under the head "special allowances and general regulations," which involve or may involve an exception to the negative words in rule 8, "No higher fees shall be allowed," and when you find only a negative clause that such and such a thing shall not be allowed, it is impossible to hold (and in fact the contrary was held) that you could under that exceed the maximum limit fixed in Appendix N. But when you alter those negative words into the affirmative and make it an express power, then, having regard to the collocation in which you find it, it appears to me that the Rule Committee did intend to give that general discretion which the words import: "On every taxation the taxing-master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice," and so on, with certain exceptions which are not now material. If I am to adopt the taxing-master's view, I have to read in there, after "shall allow all such costs, charges, and expenses as shall appear to him," and so on, the words "not exceeding the limit fixed in Appendix N." But this in itself is one of the set of sub-clauses which are themselves the exceptions referred to in rule 8, "except such as are by this order otherwise provided for." I see no difficulty in giving the general discretion to the officers of the court, although it be coupled with the ordinary application of a maximum and minimum. I see no reason why the taxing-master should not have in effect what is a two-fold discretion; first of all to allow the maximum or minimum or something between, and, in addition to that, have in special cases a general discretion to allow "all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." On these two clauses, that appears to me to be the true construction; nor do I find anything to my mind contrary to that in sub-rule 37. The object of the rule—I suppose one is entitled to state what one knows to have been the views of the mischief which was aimed at and intended to be abrogated by the rule—was this. It was said that the costs allowed in the King's Bench Division were allowed on a less liberal scale than in the Chancery Division, and it was desirable that both should be assimilated, so that the suitors should not have any particular preference for one division than another, and accordingly rule 37 having prescribed the old original rules and practice of the old courts, the new words were added: "But the taxing-masters shall have power to revise and regulate the practice in regard to taxation of costs and to the allowance of fees so as to assimilate the allowance for costs, and to secure uniformity upon all taxations as far as may be practicable and expedient."

In the first place there are no words there authorizing the taxing-masters to fix an absolute minimum or maximum so as to deprive themselves of the discretion which I have already held they have received under rule 29, and it would be somewhat extraordinary if this had given the taxing-master power beyond that, and in abrogation of that contained in the rule itself, and a greater power than contained in Appendix N. In my opinion the intention of that was to enable the taxing-masters, for the sake of uniformity, as a general rule to follow the same lines, to enable them to settle rules which would be the ordinary rules by which they would be guided, but leaving them in special cases the unfettered discretion given by regulation 29. That is my own opinion on the construction.

It was perhaps unnecessary for me to give this judgment, because I consider that I am bound by the decision of the Court of Appeal of *McIver & Co.* v. *Tate Steamers* (*Limited*), 50 W. R. 642, [1902] 2 K. B. 184. I am not sure that the decision is not open to some of the criticisms that Mr. Lawrence has bestowed upon it, but even if it were, the argument presented to the court there was exactly the same as the argument presented to me here. The question there turned on the allowance to a country solicitor for attending—it was No. 147, I think, in Appendix N—"Not to exceed £2 2s." The words were the same as the words relied on in the present case, and that was the point argued; whether or not other points were argued is not material for me to consider. Mathew L.J., says: "It is argued that under the rules the master had no discretion to allow these costs. According to the practice as to taxation of costs between party and party prior to the rules of

January, 1902, the scale given in Appendix N was no doubt binding on the master and this allowance could not have been made. But, on consideration of the objections to this rule, it was thought desirable to modify it to some extent, and accordingly the new rule 10"—that is, regulation 29 that I have read, and which annulled the old regulation 29—"provides as follows"; then he read the new rule, and he goes on: "We are asked to construe this rule as meaning that the taxing-master shall allow no costs, charges, or expenses beyond those provided for by the scale given in Appendix N. The new regulation was framed with full knowledge of the terms of the old regulations and of the scale, and it cannot, I think, be doubted that it ought to be construed according to its terms—namely, as giving the master on 'every taxation' discretion to allow such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice," and so on. Mr. Lawrence seized on the words which are put in brackets—"every taxation." It is quite true that by the insertion of those words the old rule was altered, so that it extends now to every taxation and not merely to party and party taxations; but that is not to my mind the only part of the alteration in the rule, or, indeed, the gist of the alteration; the gist of the alteration was, as I have already said, making an affirmative power for the purpose of enabling the creation of an exception, within the exception of rule 8, in place of the old negative words which gave no such discretion at all. Then Cozens-Hardy, L.J., in the same case, gave judgment to the same effect.

I consider, in any case, I am bound by that decision. I do not follow the distinction which Master Baker has made. The result is that I allow the objection and the item, and there will be a declaration that the registrar had the discretion in question, and the item will be allowed.

Solicitors, *Wheatly, Son, & Daniel; Bower, Cotton, & Bower.*

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K. B. Div. (Walton, J.) March 4, 11.

PRICE & CO. v. UNION LIGHTERAGE CO. (LIMITED). (a.)

*Contract—Carrier—Lighterage—Negligence of lighterman—Barring clause—Duty of exercising reasonable skill and care—Loss or damage coverable by insurance.*

*A contract by the defendants to lighter a cargo contained the following clause: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman. We will not be responsible for any consequences arising from strikes or other labour disturbances."*

*A barge which was being used in carrying out the said contract was left moored to a jetty, and, owing to the negligence of the lighterman, became jammed under a projecting part of the jetty, resulting in a sinking of the barge and a loss of the plaintiffs' cargo.*

*Held, that although a carrier could by contract exempt himself and his servants from liability for negligence, yet he must use some express, plain, and unambiguous terms to express that intention, and that mere general words will not exempt a carrier from using reasonable skill and care.*

*Held, further, that the above clause meant that the defendants undertook no liability as insurers, but did not exempt them from the obligation of using reasonable care and skill; and consequently that the defendants were liable to the plaintiffs for the loss of the cargo.*

Action tried in the Commercial Court.

The plaintiffs claimed damages for breach of contract.

The defendants agreed to carry in one of their barges a quantity of petroleum, belonging to the plaintiffs, from a wharf at Thames Haven to Belvedere.

Whilst moored to the wharf the barge sank, owing, as the plaintiffs alleged, to the negligence of the defendants' lightermen or to the unseaworthiness of the barge, or to both causes, whereby the oil was lost.

The defendants alleged that there was no negligence on their servants' part, and further that the loss caused was such as came within the exemption of the terms of the contract.

The contract was subject to a clause printed on the stationery used by the defendants in their business, which was as follows:

"The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman. We will not be responsible for any consequences arising from strikes or other labour disturbances."

*J. A. Hamilton, K.C.*, and *Bailhache*, for the plaintiffs.

*Scrutton, K.C.*, and *Lochnis*, for the defendants.

*Cur. adv. vult.*

March 11.—WALTON, J.—In this case the plaintiffs seek to recover damages from the defendants for the loss of a quantity of oil which was shipped at a jetty at Thames Haven in a barge of the defendants, under a contract between them and the plaintiffs, by which the defendants agreed to receive and lighter the oil for the plaintiffs to Belvedere, up the River Thames. The oil was shipped about high water, early in the afternoon of the 31st of October, 1902, and the barge when loaded was allowed to remain moored to the jetty until after low water. As the barge rose with the rising tide its gunwale caught under a projecting part of the face of the jetty, against which it was lying, and as the tide rose the barge was held down, and so was submerged and sunk.

The plaintiffs allege that the loss was caused by the negligence of the defendants' lighterman in leaving the barge unattended during the rise of the tide, or by the unseaworthiness of the barge, or by both causes. In my opinion the plaintiffs have failed to prove that the barge was unseaworthy, and it follows that if they are entitled to succeed at all it must be on the ground that the loss was caused by the negligence of the defendants' servant. As to this, the defendants say that by the terms of the contract they are exempt from liability for a loss so caused, and they say further that there was no negligence. It is necessary, therefore, to ascertain what the terms of the contract were. The contract was not contained in any written document, but it is admitted that by the course of dealing between the parties the lighterage was subject to the terms of a clause which was printed on the forms of stationery used by the defendants in their business, and is as follows: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

stipulate that insurance is effected without recourse to lighterman. We will not be responsible for any consequences arising from strikes or other labour disturbances."

In dealing with the question of construction I shall assume that the loss was brought about by the negligence of the defendants' lighterman Upon the question of construction the controversy between the parties is as to whether the clause in question exempts the lighterage company from liability for a loss caused by the negligence of their servants. It is plain that such a loss as occurred in the present case is covered by an ordinary marine policy. The loss of cargo by the accidental sinking of a barge is a loss by perils of the sea, and is recoverable from underwriters as such whether brought about by the negligence of the lighterman or not. It may be, and probably is, true that when the clause speaks of losses which can be covered by insurance it means losses which can be covered by insurance in the ordinary course of business. Negligence of lightermen is not one of the risks named in the common forms of policies on goods; but there is no doubt it can be insured against specifically without any difficulty, and, as I have said, a loss such as occurred in the present case is covered even by the ordinary form of a marine policy on goods, whether the loss was brought about by negligence or not. It follows that the words of the clause, "loss of goods which can be covered by insurance," are wide enough to include the loss which occurred in this case, even assuming that it was caused by negligence. And if it were right or permissible to deal with this case without regard to the rules of construction which have been laid down in a well-known series of cases, and looking only at the language used, it might very well be said that its meaning was that the defendants were to be exempt from liability for insurable losses caused by negligence or not.

But there is, I think, a well-established rule of construction applicable to the present case. The law of England, unlike in this respect to the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but if the carrier desires so to exempt himself it requires that he shall do so in express, plain, and unambiguous terms. In *Phillips* v. *Clark*, 5 W. R. 582, 2 C. B. N. S. 156, the damage was by leakage and breakage, and by the bill of lading the shipowner was not to be "accountable for leakage and breakage," but it was held that if the leakage and breakage were due to the negligence of the servants of the shipowner he was not protected from liability by the exemption in the bill of lading. In that case Willes, J., said at p. 163, "The introduction of the words in the margin of the bill of lading is sufficiently accounted for by the fact that without them the defendant would have been bound to the strictest care, so as to deliver the goods at the end of the voyage in the same state and condition as they were in when he received them, without reference to the negligence. It appears from the observations of Lord Wensleydale in *Walker* v. *Jackson*, 10 M. & W. 161, that, in the absence of fraud, the carrier is bound as an insurer to carry and deliver the goods as they are when he receives them—as is pointed out by some members of the court in *Wyld* v. *Pickford*, 8 M. & W. 443. The defendant gets rid of that liability in the present case by the introduction of the words 'not accountable for leakage or breakage,' but not of the obligation which the law imposes upon him of taking reasonable care of the goods intrusted to him. . . . (2 C. B. N. S., p. 164). The true meaning of the contract is, 'I will take all reasonable care of the goods, but will not be accountable for a loss arising from leakage or breakage such as usually happens without the exercise of extraordinary care.' The owner engages only to abstain from negligence."

In *Steinman* v. *Angler Line*, 39 W. R. 392, [1891] 1 Q. B. 619, the exemption in the bill of lading was from liability for losses caused by "thieves of whatever kind whether on board or not," but the court held that this did not protect the shipowner from liability for a theft committed by his servants. The general rule is stated by Bowen, L.J., in his judgment as follows: "This question of construction must be decided on the broad principle which has been so long and so constantly invoked in the interpretation of contracts with carriers by sea as well as land—viz., that words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and upon the carrying of the cargo. Even in cases within the exceptions the shipowner is not protected if default or negligence on his part or that of his servants has contributed to the loss. Accordingly, in *Grill* v. *General Iron Screw Collier Co.* (*Limited*), 14 W. R. 893, L. R. 1 C. P. 600, on appeal, 16 W. R. 796, L. R. 3 C. P. 476, an exception in a bill of lading of 'accidents of whatever nature or kind soever' was held not to cover a collision caused by the negligence of master and crew: see also *Phillips* v. *Clark*; *Czech* v. *General Steam Navigation Co.*, 16 W. R. 130, L. R. 3 C. P. 14. It is the duty of the shipowner by himself and his servants to do all he can to avoid the excepted perils; the exception, in other words, limits the liability, and not the duty."

I understand the meaning of this to be that an exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as insurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words. I may refer to *Mitchell* v. *Lancashire and Yorkshire Railway Co.*, 23 W. R. 853, L. R. 10 Q. B. 256, as another illustration of this rule. There the carriers, who were the Lancashire and Yorkshire Railway Co., after the goods had arrived at their destination, gave notice to the consignees that the railway company held the goods to the order of the consignees "not as carriers but as warehousemen." But it was held that the words "at owners' sole risk" amounted to no more than a notice that the railway company after giving such notice undertook no liability as insurers, and did not relieve them from liability for a loss arising from the negligence of their servants.

It really comes to this—that if a carrier wishes to exempt himself from liability for the negligence of his servants, he must insert in his contract in one form or another something equivalent to what is well known as a negligence clause. I think that this view of the law as applicable to the present case is, at all events, supported by the judgment of the House of Lords in *Ciceri* v. *Sutton*, 15 App. Cas. 144, 38 W. R. Dig. 38. And I may point out, as Lord Herschell did in that case, that the clause in question in this case, as in that, seems to refer to conveyance in contradistinction to insurance. I think that, in obedience to the rule laid down in the cases which I

have cited, the clause must be read as meaning "I will use reasonable skill and care in the conveyance of the goods, but I will not undertake any liability as insurer for loss or damage which can be covered by insurance with underwriters." In my opinion, therefore, if the loss was in fact caused by the negligence of the lighterman, the defendants are liable. It may be convenient to add a reference to the case of *Compania de Navigacion La Flecha* v. *Brauer*, 168 U. S. S. C. Rep. 104, in which the Supreme Court had to consider the effect of the English authorities upon this question.

I have now to consider whether there was negligence in fact. I have considered the evidence given on each side and have arrived at the following conclusions. There were projections from the face of the jetty against which the barge was moored which in my opinion made it dangerous to leave the barge unattended after low water to rise with the tide. I think the danger was apparent. It is true that there was a floating boom attached to the jetty which was intended to act as a fender to prevent barges whilst loading from striking against the wood work of the jetty. But it is clear that this boom was insufficient to prevent barges, if unattended, from getting caught as they rose with the tide under the projecting parts of the jetty. I am satisfied from the evidence that it was not reasonable or proper to leave the barge unattended, relying on the boom to prevent such an accident as in fact occurred. It is said that no such accident had occurred before. But there is no evidence to show that it was usual to leave loaded barges unattended and moored to the jetty to rise with the tide. On the contrary there were buoys provided just above and just below the jetty for loaded barges to moor at whilst waiting for their tugs. And in the present case after the barge was loaded the lighterman was told to take the barge to one of the buoys, but he neglected to do so because, in my opinion, he did not care to take the trouble to move the barge and thought that his tug might perhaps come at or about low-water.

I am satisfied also upon the evidence that the lighterman did leave the barge without sufficient or proper attendance. He says that after leaving the jetty in the afternoon he returned two or three times to look after the barge. I cannot accept his evidence as to these visits as accurate. And I have no doubt that he neglected to attend to the barge reasonably and properly under the circumstances. I agree that it is not in all cases necessary that a lighterman shall be in attendance upon a barge moored in the river. If, for instance, this barge had been moored at one of the buoys it might, I think, have been left unattended without danger. But I am satisfied that it was not reasonably safe or proper, at all events after the tide began to rise, to leave this barge moored as she was without attendance. In consequence of the barge being so left her gunwale caught under a projection of the jetty and she sank. I think that the defendants are liable for the loss thereby occasioned. There will be judgment for the plaintiffs for £370 3s. 7d., with costs, except costs of issue of unseaworthiness, which are to be paid by plaintiffs.

*Judgment for plaintiffs.*

Solicitor for plaintiffs, *Farnfield.*

Solicitor for defendants, *E. C. Harvey.*

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K. B. Div. (Walton, J.) March 4, 9.

SHILLITO v. BIGGART & FULTON. (a.)

*Ship — Mortgage of ship — Assignment of freight — Freight due and payable before possession taken — Interpleader.*

*Balance of freight was earned and became due and payable on the 17th of June, 1902, in respect of a cargo carried by a vessel. The sum so due was assigned by the shipowners to the plaintiff. The defendants, who were mortgagees of the vessel under a mortgage deed dated the 11th of October, 1900, took possession of the vessel on the 14th of August, 1902. The freight, which had become due on the 17th of June, 1902, remained unpaid at the date when the defendants, as mortgagees, took possession of the vessel.*

*Held, that as the freight became due and payable before the defendants, as mortgagees, took possession, the plaintiffs were entitled to the sum so due.*

Interpleader issue tried in the Commercial Court.

The plaintiff claimed as assignee of the shipowners a sum of £527 9s. 11d., balance of freight which became due from the Brazilian Coal Co. (Limited) to Messrs. Woodruff, Shillito, & Co., the owners of the steamship *Craigearn*, in respect of a cargo carried by the said vessel.

The defendants were the mortgagees of the vessel under a mortgage deed dated 11th of October, 1900, and claimed the sum due as such.

The sum in question was earned, and became due and payable on the 17th of June, 1902.

After discharging a cargo at Santos the steamship *Craigearn* loaded another cargo in the River Plate for Hull, and arrived at the latter place on the 14th of August, 1902.

On arrival the defendants, as mortgagees, took possession of the vessel. In fact, the freight which was due and payable on the 17th of June had not been paid when the defendants took possession.

For the plaintiff it was contended that though the defendants were entitled to freight which became due after they had taken possession, they could not claim freight which became due and payable before they took possession, even though it had not been paid until after possession was taken.

For the defendants it was contended that all freight earned by the ship and unpaid at the time when possession was taken could be claimed.

*J. A. Hamilton, K.C.*, and *Lochnis*, for the plaintiff.

*Pickford, K.C.*, and *Joseph Hurst*, for the defendants.

*Cur. adv. vult.*

March 9.—WALTON, J.—In this interpleader issue the question is whether a sum of £527 9s. 11d., which is in court, is the property of the plaintiff or of the defendants. The sum in question is a balance of freight which became due from the Brazilian Coal Co. (Limited) to Messrs. Woodruff, Shillito, & Co., who were the owners of the steamship *Craigearn*, in respect of the carriage of a cargo of coals to Santos by such steamship. This balance of freight was earned and became due and payable on the 17th of June, 1902. The plaintiff claims it as the assignee of the shipowners, Messrs. Woodruff, Shillito, & Co. The defendants dispute his claim and contend that they are entitled to the money in question as mortgagees of the steamship by a mortgage dated the 11th of October, 1900.

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

After discharging her cargo of coals at Santos the steamer loaded a cargo in the River Plate for Hull, where she arrived on the 14th of August, 1902, and on her arrival the defendants entered into possession of the steamship as mortgagees. Although the freight in question had become due on the 17th of June, it had not been paid when the mortgagees entered into possession on or about the 14th of August, 1902. The defendants contend that they are entitled to all freight earned by the vessel and unpaid at the time when they entered into possession. The plaintiff, on the other hand, contends that, although the defendants are entitled to freight which became due after they took possession, they are not entitled to freight which became due and payable before, although it may not have been paid until after they took possession. It is somewhat surprising to find that the question which arises in the present case has not been settled by an express decision in some reported case. I am not satisfied that *Chinnery* v. *Blackburne*, 1 H. Bl. 117*n*, is precisely in point. The judgment of Parker, V.C., in *Cato* v. *Irving*, 5 De G. & Sm. 210, proceeds upon the assumption that the mortgagee of a ship is not entitled to freight unless he takes possession before the freight has accrued due. The Vice-Chancellor there says (p. 224): "The authorities referred to in the argument establish that the mortgagee of a ship, who takes possession before the conclusion of the voyage, is entitled to the then accruing freight. It was contended by the defendants that the present case does not come within this rule because the plaintiffs did not take possession until the ship was in the docks, and the voyage therefore concluded. I consider that a mortgagee who takes possession of the ship at any time before the cargo is discharged comes within the rule. The right to the freight does not accrue until the goods are not only conveyed to their destination, but are also delivered; and a mortgagee who takes lawful possession of the ship while the goods are still on board, and is thereby entitled to deliver the goods and receive the freight, to the exclusion of the mortgagor, must be as much within the reason of the rule when the ship is in the docks as when she is only on her way to the docks at the time when possession is taken." This was in the year 1852

In *Brown* v. *Tanner*, 16 W. R. 882, L. R. 3 Ch. App. 597, the Lords Justices in the year 1868 had to deal with a question as to a mortgagee's right to freight In delivering the judgment of the court, Page-Wood, L.J., said: "But it appears to us that this case must be determined in the appellant's favour on the ground of his having taken possession of the ship before the freight under the charter-party had become due. It is now settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights and liable to all the duties of an owner from the time of his taking possession. Amongst the rights so accruing to him is that of receiving all freight remaining due when possession is taken."

The defendants rely upon the last sentence in this passage of the judgment as indicating that in the opinion of the Lord Justice the mortgagee on taking possession became entitled to all freights then due and unpaid. I think, however, that the Lord Justice meant no more than that the mortgagee on taking possession became entitled to all unpaid freight which the ship was then in the course of earning. This seems clear from what follows in the judgment At p. 603, 2 L. R. 3 Ch. App., the Lord Justice says: "The only question then really is, had the freight become due when the appellant took possession? and this point we wished to have re-argued, the matter not appearing to have been fully discussed either in the court below or at the first hearing before us." And the Lord Justice proceeds to consider this question, and comes to the conclusion that the freight had not been earned before the mortgagee took possession, and that therefore the mortgagee was entitled to it.

In *Liverpool Marine Credit Co* v. *Wilson*, 20 W. R. 665, L. R. 7 Ch. App. 507, at p. 511, James, L.J., in delivering the judgment of himself and Mellish, L.J., stated the law upon the subject as follows: "He (the mortgagee) had no absolute right to the freight as an incident to his mortgage; he could not intercept the freight by giving notice to the charterer before payment; but if he took actual possession or, according to a recent decision in the Court of Exchequer, if he took constructive possession of the ship before the freight was actually earned, he thus became entitled to the freight as an incident of his legal possessory right, just as a mortgagee of land taking actual possession of the land before severance of the growing crops would have the right to sever and take the crops."

In *Keith* v. *Burrows*, 25 W. R. 831, 2 App. Cas. 636, at p. 646, Lord Cairns, as I understand him, states the law to the same effect, and also Lord Blackburn at 2 App. Cas., p. 660; and in *Anderson* v. *Butler's Wharf Co.* (*Limited*), 48 L. J. Ch. 824, Hall, V.C., stated the result of the decisions as follows: "In the case of the mortgagee of a ship, which was referred to in the argument, the mortgagee is not entitled to the earnings of the ship, except the earnings thereof after the time of his taking possession."

The defendants relied upon certain *dicta* of Malins, V.C., in *Wilson* v. *Wilson*, 20 W. R. 436, L. R. 14 Eq. 32, but when carefully considered the language of the Vice-Chancellor does not appear to me to be really inconsistent with the statements of the law to which I have already referred. In the present case it is admitted that the freight in question became due and payable before the defendants entered into possession and for this reason I think the defendants' claim fails and that the plaintiff is entitled to judgment.

Solicitors for plaintiff, *Botterell & Roche*, for *Vaughan & Roche*, Cardiff.

Solicitors for defendants, *E. F. Turner & Son*.

## Court of Appeal.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) May 4.

SHARPE v. MIDLAND RAILWAY CO. (a.)

*Master and servant—Employers' liability—Accident—Compensation—"Earnings"—Lodging allowance for goods guard—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *Schedule I., par.*1 (a) (*i.*).

*A goods guard in the employment of a railway company received, in addition to his ordinary wages, a certain sum per night for "lodging allowance" when he was obliged to sleep away from home on the company's business. The object of the allowance was to cover out-of-pocket expenses to which the guard was put through having to sleep away from home, and the amount of the allowance was about equal to the reasonable cost of board and lodging for the time covered by the allowance. No inquiry was ever made by the company as to the actual expenses incurred by a guard for board and lodging, and if he boarded and lodged with a friend he would still be entitled to the allowance, and would thus make a profit out of it; but there was no evidence that any guard ever did in fact make any such profit. A guard having been killed by an accident arising out of and in the course of his employment, his widow claimed compensation under the Workmen's Compensation Act,* 1897, *as being wholly dependent on his earnings.*

*Held, that in assessing the amount of compensation the "lodging allowance" must be taken as part of the "earnings" of the deceased man, within the meaning of Schedule I., par.* 1 (a) (*i.*), *to the Act.*

Appeal from an award of his Honour Judge Lindley, the county court judge of Derby, under the Workmen's Compensation Act, 1897.

The following facts are taken from the judgment of the county court judge: The applicant for compensation was the widow and administratrix of a man named Sharpe, who at the time of the accident causing his death was in the employment of the Midland Railway Co. as a goods guard. It was admitted that Sharpe was killed by an accident on the 9th of September, 1902, in such circumstances that the company were liable to pay compensation, and that his widow and children were wholly dependent upon his earnings. His wages for the three years immediately preceding his fatal injury amounted to £236 9s. 10d., and during those three years he also received from the company in addition to his wages various sums amounting in the whole to £23 2s. for what was termed "lodging allowance." The only question was whether these latter sums formed part of the deceased man's "earnings" within the meaning of Schedule I., par. 1 (*a*) (i.), to the Workmen's Compensation Act, 1897. The terms of the employment of a goods guard in the service of the Midland Railway Co. were as follows: The regular day's work for a guard was ten hours a day and sixty hours a week, and for this he was paid a fixed wage. If his week's work exceeded sixty hours he was entitled to extra pay. After being on duty for ten hours a guard was entitled to nine hours' rest, and this was the regular rest time between long outward and return journeys. Guards in the course of their duty frequently had to lodge away from home, and on those occasions they were entitled, under the terms of their employment, to receive a lodging allowance. The scale of allowance was as follows: 1s. per night in the provinces and 1s. 6d. in London, if the company's lodging-house was used; 3s. in London and 2s. elsewhere for private lodgings. The minimum time for which a lodging allowance might be drawn was nine hours. In exceptionally long periods of rest for the company's convenience—*i.e.*, where a guard could not return at the end of nine hours and had to remain longer—where the guard had to lodge over fifteen hours, an extra 1s. was allowed, and 2s. where over twenty hours' rest had to be taken, except in London, where the extra allowances were 1s. and 1s. 6d. respectively. This extra allowance was not given unless the time occupied on the outward and return journeys together equalled twenty hours. For the purpose of ascertaining the time during which a guard was on duty with his train and during which he was off duty and entitled to lodging allowances, a guard when he took his train from a home station "signed on." When he rejoined his train for the return journey he "signed on" again, and "signed off" on his arrival home. At the end of his journey he made a return of the hours during which he had been at work—that is, during which he had been "signed on"—and his wages were regulated by those hours. He also separately made a claim for lodging allowance in respect of the hours during which he had been "signed off." The object of this allowance was to cover out-of-pocket expenses to which a guard was put through having to sleep away from home, and the county court judge found as a fact that the amount of the allowance was about equal to the reasonable cost of board and lodging (or board only if the company's lodgings were used) for the time covered by the allowance. It was, however, proved that no inquiry was ever made as to the actual expenses incurred by a guard for board and lodgings; and it was admitted that, if a guard boarded and lodged with a friend and at the friend's expense, or if he took his own food with him, he would nevertheless be entitled to his lodging allowance. A guard might, therefore, make a distinct profit out of his allowance; but there was no evidence before the county court judge that the deceased or any other guard ever did, in fact, make any such profit; and the guards who gave evidence stated that at times the cost of their board and lodgings exceeded the allowance, and always was as much as it, and that they made no profit, and that they never stayed with friends. The deceased man never lodged in the company's lodgings, but always found his own lodgings; and during the three years previous to his death he lodged out on 214 occasions, and drew for his lodging allowance on these occasions various sums amounting to £23 2s. No witnesses were called on behalf of the applicant.

The county court judge, in giving judgment, said that in his opinion the sum in question formed part of the deceased's earnings within the meaning of the Act. The nature of a guard's duties rendered it necessary for him to be away from home from time to time, and such absences could not be fairly regarded as unusual or exceptional. They were, in his opinion, of the incidents of the service. This was shown by the number of occasions on which the deceased guard was absent from home during the three years preceding his death—viz., 214 times, or, on an average, between five and six times a week. Further, he did not think that the allowance in this case could be regarded as a mere repayment of out-of-pocket expenses. It was not so in fact, for the allowance was fixed, and the expenses doubtless varied, and the payment of the allowance was independent of what (if anything) the guard had actually expended on his board and lodging. Moreover, the guard must sleep and eat whether at home or away from home, and whether he had a

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

special allowance for this purpose or not, and the fact that he did this when away from home at the expense of his employers was some pecuniary benefit to the guard himself and indirectly also to his family, if he had one. Though in one sense it was true that the lodging allowance was paid in respect of the time during which the guard was off duty and was rendering no active service to the company, yet the guard when off duty was still in the service of the company, and by the very terms of his employment, so long as he was in that service, he was as clearly entitled as of right to this allowance when the occasion arose as he was to his regular wages. He (the county court judge) also thought it material to observe that the allowance in fact made a very substantial addition to a guard's wages. The deceased man drew on an average about 3s. a week for lodging allowance, and if guards had no lodging allowance the expenses incurred by them in providing their board and lodging when absent from home could not be deducted from their wages in calculating their earnings: see *Houghton* v. *Sutton Heath and Lea Green Collieries Co.*, 49 W. R. 196, [1901] 1 K. B. 93. Without, therefore, attempting to define the word "earnings," in his opinion this allowance came within the meaning of the word, and he found as a fact that the deceased's earnings during the three years preceding his injury amounted to £259 11s. 10d., and he ordered the company to pay this sum to the deceased man's dependants.

The railway company appealed.

*Hugo Young, K.C.*, and *J. D. Crawford*, for the appellants.—The "lodging allowance" is not "earnings" within the meaning of Schedule I., par. 1 (*a*) (i.), to the Workmen's Compensation Act, 1897. The allowance is given to a goods guard who is obliged to sleep away from home, and it is given merely to cover the out-of-pocket expenses to which he is thereby put. The evidence of the guards who were called on behalf of the railway company—and their evidence was uncontradicted, the applicant calling no witnesses—showed that no profit was ever made out of this allowance, and the county court judge found as a fact that the object of the allowance was to cover out-of-pocket expenses, and that the amount of the allowance was about equal to the reasonable cost of board and lodging for the time covered by the allowance. It is a misnomer to call it "earnings" upon which his family were dependent, and therefore it should be struck out of the calculation.

*S. T. Evans, K.C.*, and *Clement Edwards*, for the respondent.—This sum is an allowance to the guard, and the mode in which he spends it is immaterial. The court will not enter upon an inquiry as to how he spent it. If a guard boards and lodges with a friend he saves the allowance, and it becomes a source of profit to him, and no inquiry is ever made by the railway company as to the actual expenses incurred by a guard for board and lodging. It is quite clear that the allowance, so far as it represents board, is a source of profit, because the food which the guard would otherwise eat at home is saved. So, too, the court cannot say that the lodging allowance may not be profit. It must therefore be reckoned as part of his "earnings."

They referred to *Noel* v. *Redruth Foundry Co.*, 44 W. R. 407, [1896] 1 Q. B. 453; *Pomphrey* v. *Southwark Press*, [1901] 1 K. B. 86, 49 W. R. Dig. 114; *Houghton* v. *Sutton Heath and Lea Green Collieries Co.*, 49 W. R. 196, [1901] 1 K. B. 93; *Nelson* v. *Kerr*, 3 Ct. Sess. Cas. (5th ser.) 893.

*Hugo Young, K.C.*, replied.

*Cur. adv. vult.*

May 4.—STIRLING, L.J., read the following judgment: This is an appeal by the Midland Railway Co. from the decision of his Honour Judge Lindley as arbitrator under the Workmen's Compensation Act, 1897, holding that the earnings of a deceased railway guard in the employment of that company included certain sums paid to him in addition to his ordinary wages under the name of "lodging allowance." The facts are very clearly stated in an excellent written judgment of the learned judge, and it is unnecessary to state them in detail. It appears that railway guards in the course of their duty have frequently to lodge away from home, and on these occasions are, under the terms of their employment by the Midland Railway Co., entitled to receive the allowances in question, which are made on the following scale: If the guard lodges in lodgings provided by the company he is allowed 1s. in the country or 1s. 6d. in London. If he finds his own lodgings he is allowed 2s. in the country or 3s. in London. The object of the allowance is to cover out-of-pocket expenses to which a guard is put through having to sleep away from home; and the judge finds as a fact that the amount of the allowance is about equal to the reasonable cost of board and lodging (or board only if the company's lodgings are used) for the time covered by the allowance. But it also appears that no inquiry is ever made by the railway company as to the actual expenses incurred by a guard, and it was admitted that, if a guard lodged with and was boarded by a friend or relative without incurring any expense, he would be entitled to the lodging allowance. The question whether in these circumstances the allowance is to be treated as a repayment of out-of-pocket expenses or as an addition to wages is one of some nicety, but I find myself unable to differ from the reasoning and conclusions of the learned judge. The allowance is a payment to which the guard becomes entitled (no less than to his weekly wages) upon the happening of certain events, whether he has incurred out-of-pocket expenses or not. He is in no way liable to account to the company in respect of the money he receives, which is as much his own as his weekly wages. The bargain between the guard and the company is that the former is at his own expense to provide himself with the ordinary necessaries of life, and, so far as the allowance is made in respect of food, it constitutes an addition to his resources; for, as I understand the finding of the judge, the amount of allowance covers the whole of the reasonable cost of board while the guard is away from home, and not merely any extra cost occasioned to him during that period, so that the domestic establishment is thus relieved from the expense of providing food for the guard in his absence. The allowance, therefore, appears to me to form part of the workman's earnings, although the amount of it may have been calculated by reference to the probable amount of his expenditure on board and lodging. It was strongly urged upon us that the whole of the allowance ought not to be treated as earnings, but only so much as might be shown to constitute profit in the hands of the workman; but to give effect to this contention would be to embark on an inquiry not contemplated by the Act, which prescribes that the compensation shall be assessed simply by reference to the amount of the workman's earnings at the time of his death, without any investigation as to the mode in which he applied them when received. For these reasons, and also for those given by the learned judge, I think that the appeal fails and ought to be dismissed. The Master of the Rolls agrees with this judgment.

MATHEW, L.J.—I have had an opportunity of reading the judgment of Stirling, L.J., and I entirely agree with it.

*Appeal dismissed.*

Solicitors for the applicant, *A. Toovey*, for *Flint & Son*, Derby.

Solicitors for the railway company, *Beale & Co.*

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From K. B. Div. (In Bkcy.) (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.) May 1.

*In re* POLLARD. (*a*.)

*Bankruptcy—Administration action—Order on executor to pay money into court—Non-compliance—Writ of sequestration—Bankruptcy of executor—Title of trustee in bankruptcy to property sequestered—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45, 54.

*An order of sequestration directing certain moneys to be paid into court to the credit of the sequestrator's account does not create a charge on the property sequestered, and the trustee in bankruptcy of the person against whom the sequestration order was made has, accordingly, a good title to such property.*

*Judgment of* Wright, J. (ante, *p.* 432), *affirmed.*

This was an appeal from a decision of Wright, J. (reported *ante*, p. 432).

The question involved was whether a trustee in bankruptcy could claim property of the bankrupt which had been sequestered by an order of the court in consequence of the bankrupt's refusal to pay a judgment debt.

The facts were as follows:

In 1899 Mrs. Pollard died, leaving three sons, one of whom was the bankrupt. She left the residue of her estate to these three sons and appointed them her executors. The bankrupt was indebted to the estate, and in 1900 an administration action in the Chancery Division was begun, in which the first two brothers were the plaintiffs and the bankrupt the sole defendant.

On the 10th of March, 1902, an order was made in the action that the defendant—viz., the bankrupt, was to bear two-thirds of the plaintiffs' costs and was to bring into court within seven days the sum of £136 13*s*.

On the 18th of April, 1902, the bankrupt committed an act of bankruptcy by failure to comply with the terms of a bankruptcy notice.

On the 20th of May, 1902, the plaintiffs issued a writ of sequestration, and on the 5th of July an order was made thereon directing the London and County Bank (with whom the bankrupt had a banking account) to pay into court to the credit of the sequestrators' account the sum of £137 7*s*. 5*d*.

On the 16th of July a bankruptcy petition was filed against the bankrupt; and a receiving order was made thereon on the 6th of August. Upon the same day, but prior in time to the making of the receiving order, the London and County Bank complied with the order of the court by paying into court the sum of £98 9*s*. 9*d*., which was all the money of the bankrupt then in their possession.

The trustee now brought a motion claiming a declaration that the sum of £98 9*s*. 9*d*. standing in the books of the Paymaster-General to the credit of the sequestrators' account in the action of *In re Pollard, Pollard* v. *Pollard*, in the Chancery Division, formed part of the property of the bankrupt divisible among his creditors; and an order that the respondents, B. Pollard and S. R. Pollard, be restrained from proceeding further under the writ of sequestration or from dealing with the said sum of £98 9*s*. 9*d*. otherwise than by procuring the same to be paid to the trustee; and for an order directing the respondents to take all steps necessary to procure the payment of the said sum to the trustee.

Wright, J., held that the case was governed by *In re Hastings, Ex parte Brown*, 9 Morr. 234, 41 W. R. Dig. 18, and that the trustee was entitled to the money.

The respondents (the sequestrators) appealed.

*Danckwerts, K.C.*, and *Muir Mackenzie*, for the appellants. — Apart from any provisions in the Bankruptcy Act, the trustee has no greater right than the bankrupt to these moneys, and the right of the bankrupt is *nil*; he cannot get the money out of court. The trustee's title depends on the relating back section—viz., section 54. But the appellants at the date of the receiving order were secured creditors by reason of the sequestration order. On the 6th of August a receiving order was made, but not an adjudication of bankruptcy. But even though the appellants did not obtain a charge on the property by reason of the sequestration order, still they come within section 45. They have completed their execution, they have seized a *chose in action*, and the property has passed away from the bankrupt just as it passes from the debtor when a sheriff has "seized and sold."

*Hansell*, for the trustee, was not called upon.

VAUGHAN WILLIAMS, L.J.—It cannot be denied that in the state of circumstances we find here this money was money still in the pockets of the sequestrators. The money was in court standing to the credit of the account which the sequestrators had opened. It had been paid to the sequestrators' account. Mr. Danckwerts has failed to make out that in this state of things his clients became secured creditors either within the 9th or 45th section of the Bankruptcy Act, 1883. A receiving order having been made the result is that no creditor has any remedy against the person or property of the debtor unless he is secured. In my judgment the present plaintiffs are not secured creditors, and have no ground for saying that the debtor's property has been seized or sold, or that anything has happened whereby the property has been appropriated by them.

ROMER, L.J.—With regard to the argument we have just heard, it may be useful if I make a few points obvious. As a rule a sequestration order is only issued as a process against some person who has been guilty of contempt in order that he may purge his contempt. In special cases, no doubt, when the contempt consists in non-payment to a judgment creditor, the creditor may get an order of sequestration against the debtor. But where a sequestration issues and the sequestrator seizes property, what result follows? Even though the sequestration issues at the instance of the creditor, the seizure does not turn the property seized into property of the creditor. Does a mere sequestration give a charge to the creditor upon each part of the property sequestrated? Clearly not. In order for a creditor to get a special charge, he must get some order which will give him a special right. Here the creditor could only have got a special charge by filing a special order. Did the payment into court give the creditors a special right to the moneys paid in? For the reasons I am about to state the order did not turn those moneys into the property of the creditors or give them any special charge. The order was to pay the moneys into court, not to the credit of the action, but to a special account—namely,

(*a*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

the account of the sequestrators. That did no more than leave the money, as part of the debtor's property, at the disposal of the sequestrators. Had the order gone on that after payment of the sequestrators' costs the balance should have been paid to the credit of the action, it is possible that the appellants might have succeeded. As it was, no special charge was obtained. Under these circumstances, the funds remained the property of the debtor, and upon his bankruptcy vested in his trustee.

COZENS-HARDY, L.J.—I agree. It is settled that a sequestration of this kind does not of itself create a charge upon property. That sequestration was a process of contempt, and did not create a charge in favour of the person who obtained it, was, I think, settled even before the case of *In re Hastings*. That being so, there is an end of the case. I may add that it is mere accident that the money happened to be paid to the credit of the sequestrators' account and not to the credit of the action; that it is mere accident, again, that the money paid in corresponded to the debt owed.

*Appeal dismissed.*

Solicitors, *S. R. Pollard; Hicks, Arnold, & Co.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) March 30.

THOMSON AND ANOTHER *v.* GILL. (*a.*)

*Practice—Judgment—Scotch decreet—Registration in England—Enforcement—"Execution"—Appointment of receiver—Judgments Extension Act,* 1868 (31 & 32 *Vict. c.* 54), *ss.* 3, 4.

*Where the certificate of an extracted decreet of the Court of Session in Scotland has been registered in the High Court of Justice in England under section* 3 *of the Judgments Extension Act,* 1868, *it can be enforced in England by the appointment of a receiver, as being a mode of "execution" within the meaning of section* 4 *of the Act.*

Appeal from an order by Bigham, J., at chambers, appointing a receiver by way of equitable execution upon a decreet recovered in Scotland, a certificate of which was registered in England. On the 7th of August, 1902, the plaintiffs, who were resident in Scotland, obtained a decreet against the defendant, who was a domiciled Scotchman, in the Court of Session in Scotland for £205 13s. 3d., and on the 22nd of January, 1903, a certificate of the extracted decreet was registered in England under the Judgments Extension Act, 1868. The defendant, who was now resident in England, was entitled under a Scotch marriage settlement dated the 17th of March, 1858, to a life interest in a sum of money, which was assigned to trustees to hold upon trust to pay the annual income thereof to him during his life. The present trustees of the settlement were resident in England. Upon the application of the plaintiffs, Bigham, J., at chambers made an order for the appointment of a receiver of the annual income of this sum of money for the purpose of satisfying the judgment.

The defendant appealed.

By the Judgments Extension Act, 1868, s. 3, on production to the senior master of the Court of Common Pleas at Westminster of the certificate of any extracted decreet of the Court of Session in Scotland which shall hereafter be obtained for the payment of any debt, damages, or expenses, such certificate shall be registered by such master in a register, "and such certificate, when so registered, shall from the date of such registration be of the same force and effect as a judgment obtained or entered up in the court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decreet of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the court in which it is so registered. . . ." By section 4, "the Courts of Common Pleas at Westminster and at Dublin, and the Court of Session in Scotland, shall have and exercise the same control and jurisdiction over any judgment or decreet and over any certificate of such judgment or decreet, registered under this Act in such courts respectively, as they now have and exercise over any judgment or decreet in their own courts, but in so far only as relates to execution under this Act."

*E. M. Pollock*, for the defendant.—The court has no power to appoint a receiver in respect of a Scotch or Irish judgment registered in England under the Judgments Extension Act, 1868. The wide language of sections 1 and 3 is to be read as limited by section 4 of the Act: *In re Watson*, 41 W. R. 34, [1893] 1 Q. B. 21; *In re A Bankruptcy Notice*, 46 W. R. 325, [1898] 1 Q. B. 383. By section 4 the court has the same control over a decreet when registered as over its own judgments, "but only in so far as relates to execution under this Act." The appointment of a receiver is not "execution." It has been commonly called equitable execution, but as all the Lords Justices pointed out in *In re Shephard*, 38 W. R. 133, 43 Ch. D. 131, it is not execution, but merely equitable relief, which is given where there is an impediment to the issuing of execution at law. [*Norburn* v. *Norburn*, 42 W. R. 127, [1894] 1 Q. B. 448; *Harris* v. *Beauchamp Brothers*, 42 W. R. 451, [1894] 1 Q. B. 801; *Anglo-Italian Bank* v. *Davies*, 27 W. R. 3, 9 Ch. D. 275, and *Ex parte Evans*, 28 W. R. 127, 13 Ch. D. 252, were also referred to upon this point.] Secondly, even if the appointment of a receiver is "execution," section 4 of the Act of 1868 only gives the court the same control and jurisdiction which the Court of Common Pleas "now," that is, in 1868, had and exercised over a judgment in its own court, but only in so far as relates to execution "under this Act." In 1868 the Court of Common Pleas could not have appointed a receiver, nor could the Court of Chancery have appointed a receiver upon a bill being filed for that purpose in execution of a registered judgment, because the execution could only be such as could be granted under the Act of 1868. Section 25, sub-section 8, of the Judicature Act, 1873, does not extend the power of the court to appoint a receiver to a case in which, before the Judicature Act, it could not do so: *Holmes* v. *Millage*, 41 W. R. 354, [1893] 1 Q. B. 551; *Harris* v. *Beauchamp Brothers*. It merely enables the court to appoint a receiver in the original action, whereas before then it was necessary to file an independent bill in Chancery for that purpose: *Smith* v. *Cowell*, 29 W. R. 227, 6 Q. B. D. 75. The order was therefore wrong.

*Colam*, for the plaintiffs, was not called upon.

VAUGHAN WILLIAMS, L.J.—In my opinion this appeal fails. The real question which we have to decide is, what is the meaning of the word "execution" as used in the Judgments Extension Act, 1868, and in particular the meaning of that word at the end of section 4 of the Act? With regard to section 3, it is not denied that if a judgment is registered

(*a.*) Reported by W. F. BARRY, Esq., Barrister-Law.

under the Act it becomes an English judgment for purposes of execution. Under the Act the judgment has to be registered in the Court of Common Pleas, but is admitted that the High Court has now succeeded to the position formerly occupied by the Court of Common Pleas. We have to consider the meaning of the word "execution" in section 4 of the Act. What is sought for here by the appointment of a receiver is, at all events in popular language, to obtain execution, and to obtain execution by receiving certain moneys coming to the judgment debtor in satisfaction of the judgment debt. Certain objections have been taken to the appointment of a receiver. First of all, two cases have been cited, *In re Watson* and *In re A Bankruptcy Notice*. In the first of those cases it was held that a judgment creditor who had registered in England an Irish judgment under the Act of 1868 (and the Act draws no distinction between an Irish and a Scotch judgment) could not obtain a judgment debtor's summons upon a judgment so registered. Why? Because the object of a judgment debtor's summons is not execution—that is to say, it is not a mode of enforcing payment of the debt out of the judgment debtor's goods or otherwise, but it is a proceeding to punish the judgment debtor for his contumacy in not having paid the debt when he was able to do so. It is in its nature a punitive proceeding, and does not operate as a satisfaction of the debt. By the express provision of section 5 of the Debtors Act, 1869, imprisonment under that section is not to operate as a satisfaction of the debt, or to deprive the judgment creditor of the right to take out execution. In the second case, *In re A Bankruptcy Notice*, the issue of a bankruptcy notice founded on a Scotch judgment which had been registered in England under the Act of 1868, it being a step towards making the judgment debtor bankrupt, was held not to be "execution" within the meaning of section 4. There is nothing in either of those two cases to prevent us from giving a wide meaning to the word "execution" in section 4 of the Act. It is then said that the court could not give a wide meaning to the word so as to make it include what has been called equitable execution because of the decision in *In re Shephard*. I do not think so. I do not think that *In re Shephard* prevents us from giving a wide meaning to the word "execution" as used in the Act. That case decides primarily this, that there is nothing in ord. 42, r. 23, which enables the court to apply that rule to the appointment of a receiver by way of equitable execution. When one looks at rule 23 one sees that it is limited to the cases of execution which have been mentioned in the earlier rules of the order; and on looking back at rule 8 I find it there stated that "in these rules the term 'writ of execution' shall include writs of *fieri facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto." On looking back at the preceding rules, one finds the forms of execution referred to. It is sufficient to say, as I understand that case, that the decision was that the case did not come within rule 23. But apart from form, there is a substantial difference between that case and the present. In that case after judgment the judgment debtor had died, and this court, in considering the mode in which the appointment of a receiver by way of equitable execution was obtained before the Judicature Act, pointed out that a receiver was only granted in aid of a legal judgment where there was a hindrance to execution at law, and after due notice to the parties. It was contended in that case that the court ought to follow the analogy of legal execution, and that legal execution could be issued *ex parte* after the death of the judgment debtor. In that case no notice of the application for a receiver had been served on the personal representatives of the judgment debtor, and it was held that a receiver could not be appointed *ex parte* over property which belonged to the judgment debtor in his lifetime, but which vested on his death in another person. Cotton, L.J., in dealing with the question whether there was any jurisdiction to make an order affecting the estate of a dead man, when no person interested in it was before the court, said that it was urged that there was, for that this was equitable execution and must follow the analogy of legal execution, that legal execution could be issued *ex parte* after the death of the judgment debtor, and that therefore there was no reason why equitable execution should not. He then asked whether this was to be considered as equitable execution, and as subject to the same rules as legal execution, and assuming that legal execution could be issued against the estate of a dead man *ex parte*, could equitable execution be so issued. In his opinion it could not. He went on to state that the judgment creditor who obtained the appointment of a receiver did not get execution, but equitable relief, which was granted on the ground that there was no remedy by execution at law, and that the obtaining a receivership order was not taking out execution, but was obtaining equitable relief by a subsequent order, which must be made against someone against whom the court had jurisdiction to make an order. He entered into that question for the purpose of showing that, having regard to the nature of the proceedings, upon the death of the judgment debtor it is impossible to get equitable execution without bringing before the court his personal representative in whom the estate is vested. It seems to me, therefore, that, if that case is properly looked at, there is nothing in it which prevents us from giving a wide meaning to the word "execution" in section 4 of the Act of 1868.

It is next said that there is something in the judgment of this court delivered by Lord (then Lord Justice) Davey in *Harris* v. *Beauchamp Brothers*. There again I do not myself find anything in it which compels us to give a narrow meaning to the word "execution" in section 4 which would have the effect of excluding equitable execution. It is quite true that Lord Davey in that case cites with approval the observations in *In re Shephard*, but he does so for the purpose of showing that upon an application for the appointment of a receiver the court must have regard to the mode in which an order for the appointment of a receiver would have been obtained in the Court of Chancery before the Judicature Act. In *Ex parte Evans* James, L.J., said "Beyond all question it was held in *Hatton* v. *Haywood*, 22 W. R. 356, L. R. 9 Ch. App. 229, and *Anglo-Italian Bank* v. *Davies*, that an order appointing a receiver amounted to equitable execution. A judgment creditor, not being able to obtain relief at law under the old system, because his debtor had nothing but an equitable interest in the land, came into a court of equity to obtain that relief which he could not obtain at law; and the moment he established the difficulty in his way at law, and the court made the order giving the right to the possession of the land to the receiver, appointed on his behalf; that order giving the right to possession to the creditor through the receiver was as much a delivery in execution of land in which the debtor had only an equitable interest, as was the sheriff's return to the writ of *elegit* at law, that he had extended the land, a delivery in execution of land in which the debtor had a legal interest." James, L.J., there regarded the appointment of a receiver as equitable execution. I am not saying one word contrary to what was said in *In re Shephard* and *Harris* v.

*Beauchamp Brothers* as to regulating the manner and form of obtaining equitable execution. What I do say is that James, L.J., regarded the appointment of a receiver as in reality equitable execution. It is execution which a court of equity enables a judgment creditor to obtain, and which could not have been obtained at law. I do not see why the word "execution" in section 4 of the Act of 1868 should not be so construed as to include this kind of execution. With regard to the argument founded upon the word "now" in section 4, I am not satisfied that the plaintiff could not at that date have taken proceedings in a court of equity upon a Scotch or Irish judgment registered in England and obtained the appointment of a receiver, just as in the case of an ordinary English judgment. Indeed, upon looking at section 6—which enacts that in any action brought in any court in England, Scotland, or Ireland on any judgment or decreet which might be registered under this Act in the country in which such action is brought, the party bringing such action shall not recover or be entitled to any costs or expenses of suit unless the court in which such action shall be brought, or some judge thereof, shall otherwise order—the intention of the Act seems to me to be to place a Scotch or Irish judgment registered in England in the same position, speaking generally, as a judgment obtained in England. For these reasons I think that the appeal should be dismissed.

STIRLING, L.J.—I am of the same opinion. This is an appeal from an order appointing a receiver in respect of a judgment obtained in Scotland, and registered in England under the Judgments Extension Act, 1868. The facts of the case are such that if the judgment had been originally obtained in England the making of the order for a receiver would be almost a matter of course. In one sense the appointment of receiver by way of equitable execution is not a matter of course, because facts must be shown to justify the appointment. Facts, however, exist which would entitle an English judgment creditor to the appointment of a receiver. It is said, however, that the Act of 1868, as interpreted by the courts, does not enable a plaintiff to get the appointment of a receiver. Section 3 of that Act is framed in as wide terms as possible. It provides for the registration (*inter alia*) of the certificate of an extracted decreet of the Court of Session in Scotland in the Court of Common Pleas at Westminster, "and such certificate when so registered shall from the date of such registration be of the same force and effect as a judgment obtained or entered up in the court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decreet of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the court in which it is so registered." If that section stood alone no question could possibly have arisen as to the right of the plaintiff to have a receiver appointed. But regard must be had to section 4, which provides that "the Courts of Common Pleas at Westminster and at Dublin and the Court of Session in Scotland shall have and exercise the same control and jurisdiction over any judgment or decreet, and over any certificate of such judgment or decreet, registered under this Act in such courts respectively as they now have and exercise over any judgment or decreet in their own courts, but in so far only as relates to execution under this Act." It is said, and truly said, that in two cases—*In re Watson* and *In re A Bankruptcy Notice*—it has been held by this court that the effect of section 4 is to limit the wide words of section 3 to proceedings which relate to execution. In the first case it was held that a judgment summons under the Debtors Act, 1869, was not such a proceeding, and in the second case it was held that the issue of a bankruptcy was not such a proceeding. The question we have to determine is whether the words "but in so far only as relates to execution under this Act" are to be construed so as to exclude the power of appointing a receiver by way of equitable execution. The effect of so holding would be to confine the words to proceedings by way of legal execution. Having regard to the authorities, I do not think that we ought so to restrict the meaning. In 1874 the question arose whether the appointment of a receiver over land was a delivery of the land in execution under section 1 of 27 & 28 Vict. c. 112, and this court in *Hatton* v. *Haywood*, held that it was; and later on in *Anglo-Italian Bank* v. *Davies*, Sir George Jessel, M.R., said that the result of the decision in *Hatton* v. *Haywood* was that the words "or other lawful authority" in section 1 of 27 & 28 Vict. c. 112, referred to the order of a court having authority to give that which amounted to delivery in execution, although not technically a delivery in execution—in other words, to what was commonly called equitable execution, which was putting the land in the possession of a receiver. A construction was thus placed upon the words "delivery in execution" in that statute, and as the words received a wide interpretation there, I can see no reason why we should place a narrow construction upon the word "execution" here. Again, in *Blackman* v. *Fysh*, [1892] 3 Ch. 209, 41 W. R. Dig. 274, it was held by Kekewich, J., that the appointment of a receiver of the rents of certain property on behalf of a judgment creditor was a taking of the property in execution within the meaning of a forfeiture clause in a will. Considering those authorities, I think that we should read the word "execution" in the Act of 1868 as including the appointment of a receiver. I am not saying anything that is contrary to what is laid down in *In re Shephard*. All that the court there said was merely for the purpose of showing that so-called equitable execution, which they said was really equitable relief, is not governed by the same rules as govern legal execution. Our attention has also been called to the word "now" in section 4 of the Act of 1868, and the argument founded upon it is that at that time no equitable execution could have been obtained upon a Scotch judgment registered in England. I do not know whether it is necessary for us to decide that question, but I may say that I do not agree with it. It is admitted that if an action had been brought in England upon a Scotch judgment, and judgment recovered, the judgment creditor might have obtained the appointment of a receiver by bringing an independent suit in Chancery. It seems to me that the Act places the judgment creditor, who has registered his judgment in England, in the same position, speaking generally, as if he had originally obtained his judgment here. Section 6, which has been already read, supports this view. The object is to discourage the bringing of actions in this country upon Scotch or Irish judgments, instead of proceeding under the Act of 1868. I do not see why effect should not have been given by the Court of Chancery to such a judgment so registered, in the same way as effect would have been given by the court to an ordinary judgment obtained in England. I wish to add that the case of *Norburn* v. *Norburn* was decided entirely upon order 42 and does not affect our decision.

MATHEW, L.J.—I am of the same opinion. It is said that the right to apply for the appointment of a receiver by way of equitable execution 'does not

extend to an Irish or Scotch judgment which has been registered in England under the Judgments Extension Act, 1868. That contention seems to me to give the go-by to section 3 of the Act. The High Court is now the successor of the old Court of Common Pleas. It seems to me that before the Judicature Act the execution creditor in such a case could have obtained equitable execution by the appointment of a receiver in the Court of Chancery, and, the Judicature Act having now assimilated the proceedings, the King's Bench Division now gives all the relief which could formerly have been obtained in the Court of Chancery.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Emanuel & Simmonds*, for *Robert Stewart*, Edinburgh.

Solicitors for the defendant, *Balfour Allan & North.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) March 14.

ATTORNEY-GENERAL *v.* JOHNSON. (*a.*)

*Inland revenue—Estate duty—Succession duty—Gift in lieu of legacy to charitable society—Agreement for payment of annuity to donor—Donation with reservation—*Bonâ fide *purchase—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c); *s.* 3, *sub-section* 2—*Succession Duty Act,* 1853 (16 & 17 *Vict. c.* 51), *s.* 7.

*An unincorporated charitable society, in consideration of the payment by B. of the sum of* £500 *in lieu of a legacy, agreed to pay an annuity of* £25 *to B. during his life and to his wife during her life if she survived him. The commercial value of the annuity was* £210. *The annuity was not charged on the funds of the society, but was paid by the directors as one of the ordinary outgoings of the society to B. during his life and after his death to his widow during her life. B. died in* 1895, *and his widow in* 1900.

*Held, that the society were liable to pay estate duty on the whole sum of* £500 *on the death of B. under section* 2, *sub-section* 1 (c) *of the Finance Act,* 1894, *and were also liable to pay succession duty on the same sum on the death of the widow, under section* 7 *of the Succession Duty Act,* 1853.

*Judgment of* Phillimore, J. (50 *W. R.* 366, [1902] 1 *K. B.* 416) *varied.*

Appeal from the judgment of Phillimore, J., on an information by the Attorney-General claiming estate duty and succession duty from the London Missionary Society (50 W. R. 366, [1902] 1 K. B. 416).

The information stated as follows: "(1) The London Missionary Society is a body of persons not incorporated, but associated for certain charitable purposes of a religious character and possessed of considerable invested funds, which are held by trustees appointed by the society, and are dealt with and disposed of by directors, in whom the management of the affairs of the society is from time to time vested. (2) In the year 1889 the said society accepted from Mr. Charles Thomas Munday Burton, a director of the society, an offer of a sum of £500 in lieu of a legacy, subject to a contract of reservation for the payment of £25 per annum to the said Charles Thomas Munday Burton during his life, and after his death to his wife, Mrs. Martha Burton, during her life, in case she should survive him. (3) The said arrangement was confirmed and carried out by the following resolution passed at a meeting of the directors of the society on the 11th of February, 1889: 'That in consideration of the payment to the London Missionary Society of £500 in lieu of a legacy by a director (Charles Munday Burton, Esq.), who does not wish his name to appear in any published or announced list of subscriptions, the present trustees and their successors in the trusteeship of the society be and hereby are authorized to pay the sum of £25 per annum in quarterly payments . . . during the life of the said Charles Munday Burton, Esq., and a like payment to his present wife, Mrs. Martha Burton, during her life should she survive him.' (4) The said sum of £500 was given and paid by the said Charles Thomas Munday Burton to the society, and the funds of the society held by their trustees became and were, pursuant to the said arrangement, charged with the payment of the annual sum of £25 during the lives of the said Charles Thomas Munday Burton and his wife and the life of the survivor of them, and the said annual sum was duly paid thereout by the trustees accordingly. (5) Charles Thomas Munday Burton died on the 12th of May, 1895. His widow, Martha Burton, died on the 5th of May, 1900. (6) Upon the death of Charles Thomas Munday Burton estate duty became payable by the society and its trustees under the Finance Act, 1894, s. 2 (1) (c), incorporating section 38 (1) and (2) of the Customs and Inland Revenue Act, 1881, and section 11 (1) of the Customs and Inland Revenue Act, 1889, on the said sum of £500, being a gift to the society of which *bonâ fide* possession and enjoyment were not assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. (7) Upon the death of Martha Burton succession duty at the rate of 11½ per cent. became payable by the society and its trustees upon the said sum of £500, in respect of the determination of the said payment of £25 per annum to Mrs. Burton, under the Succession Duty Act, 1853, s. 7, and the Customs and Inland Revenue Act, 1888, s. 21. (8) The Commissioners of Inland Revenue have caused application to be made to the society and their trustees and to the defendant to deliver proper accounts in respect of the said sum of £500, and to pay the duties which ought to be paid in respect thereof as aforesaid, but they have refused and still refuse to deliver such accounts and pay such duties, and contend that no such duties are payable. (9) The defendant is the secretary of the society."

The society, in their answer to the information, pleaded as follows: The said sum of £500 was not given, but was paid by Mr. Burton to the society. None of the funds of the society became, pursuant to any arrangement, charged with the payment of the annual sum of £25. The said annual sum was in fact never paid by the trustees out of the funds of the society. It was paid by the directors as one of the ordinary outgoings of the society. Upon the death of Mr. Burton estate duty did not become payable by the society. If, contrary to the contention of the society, the sum of £500 passed on the death of Mr. Burton, it so passed by reason only of a *bonâ fide* purchase from him within the meaning of section 3 of the Finance Act, 1894, and is therefore exempted from taxation. The only property (if any) which passed on the death of Mr. Burton in reference to the arrangement between him and the society was the annual sum of £25, which is exempted from taxation by section 15 of the Finance Act, 1894. Alternatively, only such part of the said sum of £500 is to be deemed to have passed on the death of Mr. Burton as remained after deducting such sum as

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

when invested would satisfy the instalments of the annual sum of £25. Upon the death of Mrs. Burton no succession duty became payable by the society. The annuity was *bonâ fide* purchased by Mr. Burton from the society by payment of £500. If, contrary to this contention, there is any succession, it is taxable under the Succession Duty Act, 1853, s. 16, and therefore the rate of duty is 10 per cent. and not 11½ per cent. The actual commercial value of the annuity of £25, having regard to the respective ages of Mr. and Mrs. Burton in 1889, was £210.

Phillimore, J., found that the annuity of £25 was not charged on the funds of the society, but was paid by the directors as one of the ordinary outgoings of the society, and he accordingly held that the sum of £500 was a gift taken by the society without any reservation. But he held, on the authority of *Attorney-General* v. *Worrall*, 43 W. R. 118, [1895] 1 Q. B. 99, that the gift, being accompanied by an agreement to make an annual payment to the donor for life, was not exempt from taxation, and that the Crown was entitled to estate duty on the sum of £290, the amount of the benefit to the society from the transaction after deducting £210, the value of the annuity. With regard to succession duty, he gave judgment against the Crown.

The Crown appealed.

*Sir Robert Finlay, A.G., Sir Edward Carson, S.G.*, and *Vaughan Hawkins*, for the Crown.

*Micklem, K.C.*, and *Harman*, for the defendant.

*Cur. adv. vult.*

March 14.—VAUGHAN WILLIAMS, L.J., read the judgment of the court as follows: In 1889 Mr. C. M. Burton, a director of the London Missionary Society, paid to that society a sum of £500 upon the terms stated in a resolution of the directors, which is as follows: [His lordship read the resolution as set out above.] It was admitted by the Attorney-General that the payment was made in pursuance of a binding legal contract; and the case was argued, and is to be decided, on that footing. Mr. Burton died on the 12th of May, 1895; Mrs. Burton on the 5th of May, 1900; and the annual sum of £25 mentioned in the resolution was regularly paid out of the funds of the society, first to Mr. Burton during his life, and afterwards to Mrs. Burton during hers.

The Attorney-General, on behalf of the Crown, claimed that estate duty became payable on the death of Burton under the Finance Act, 1894, s. 2, sub-section 1 (*c*): and, further, that succession duty became payable upon the death of Mrs. Burton under the Succession Duty Act, 1853, s. 7. Phillimore, J., has held that estate duty was payable, but that under section 3, sub-section 2, of the Finance Act, 1894, the value in 1889 of an annuity of £25 for the lives of Mr. and Mrs. Burton and the life of the survivor of them (which value was admitted to be £210) was to be deducted, and consequently estate duty was only payable on £290. The learned judge further held that no succession duty was payable. From this decision the Attorney-General has appealed.

Section 2, sub-section 1, of the Finance Act, 1894, provides that "property passing on the death of the deceased shall be deemed to include" (amongst other property) "(*c*) property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom." Amongst the property required by section 11 of the Customs and Inland Revenue Act, 1889, to be included in an account is "property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." In *Crossman* v. *The Queen*, 35 W. R. 303, 18 Q. B. D. 256, a case decided with reference to section 38 of the Customs and Inland Revenue Act, 1881, Hawkins, J., in delivering the judgment of a Divisional Court (consisting of Denman, J., and himself), says: "In considering the question whether a settlement is voluntary or not according to the true construction of the Customs and Inland Revenue Act, 1881, we think it incumbent upon us to look at the real substance of the transaction and its object; and if so looking at it we come to the conclusion that in its origin it was intended to be a free gift to the transferees, but only upon the condition that the settlor should substantially retain to himself the interest in the property for his life, we ought to find the settlement to be voluntary within the meaning of the Act, even though on the face of the deed and in fact we may find that there was sufficient consideration to support a contract between the parties and to take it out of the operation of the statute of 27 Eliz. as regards a subsequent purchaser." In *Attorney-General* v. *Worrall*, decided on section 11 of the Customs and Inland Revenue Act, 1889, this view was in substance adopted by the Court of Appeal. It was there held that an assignment of a mortgage debt of £23,924 by a father to his son was a "gift" within the meaning of the enactment, although it purported to be made in consideration of a covenant by the son to pay to the father during his life the yearly sum of £735.

Having regard to the terms of section 11 of the Customs and Inland Revenue Act, 1889 (which speaks of a benefit to the donor by contract), and to the language of the Finance Act, 1894, s. 2, sub-section 1 (*c*), which incorporates the provisions of section 11 of the Customs and Inland Revenue Act, 1889, as if the words "voluntary" and "voluntarily" and "volunteer" were omitted, and to the decisions in *Crossman* *The Queen*, and *Attorney-General* v. *Worrall*, we come to the conclusion that the Legislature intended that property shall be treated as taken under a "gift," although such gift may have been made under a contract by which the donor takes a benefit. If, then, the substance of the transaction between Mr. Burton and the missionary society be looked at, it seems to us that it was intended not to be a matter of pure business, but one of bounty on the part of Mr. Burton. The facts that the payment was made "in lieu of a legacy" and that the amount paid largely exceeded the market value of the annuities agreed to be paid to Mr. and Mrs. Burton are sufficient to establish this. Consequently, the transaction must, in our opinion, be held to be a gift within the meaning of section 2, sub-section 1 (*c*), of the Finance Act, 1894. In truth this was not seriously disputed by the learned counsel for the missionary society, who urged that the gift ought not to be treated as consisting of £500, but of that amount less the deduction of £210. This contention was based partly on the language of the Customs and Inland Revenue Act, 1889, s. 11, sub-section 1, and partly on the terms of section 3 of the Finance Act, 1894. As to the first of these grounds, it is to be observed that by the terms of the Finance Act, 1894, property passing on the death of the deceased is to be deemed to include the property in question as being property which would be required "on the death of the deceased" to be included in an account.

The point of time to which regard must be paid is that of the death of the deceased—in this case Mr. Burton. If at that moment the £500 had remained in the hands of the society undiminished, then (subject to any question arising as to the effect of the annuity which was to be paid to Mrs. Burton) it would seem that the whole sum must be taken to have passed and to be subject to estate duty. This is in accordance with the decisions in *Attorney-General* v. *Worrall*, where no deduction was allowed in respect of the yearly sum of £735 covenanted to be paid by the donee to the donor during his life, and *Earl Grey* v. *Attorney-General*, 48 W. R. 383, [1900] A. C. 124, where no deduction was made in respect of an annual rent-charge reserved to the donor during his life. What the society actually did with the £500 does not appear; but it is contended that they ought not to be treated as having the whole of that sum in their hands at Mr. Burton's death, because no investment of that sum, proper to be made by trustees, would at the present time yield £25 (that is, 5 per cent. on £500) per annum; and consequently that for the purpose of paying the annuity the capital originally placed in their hands must be treated as having been encroached upon to a certain extent. We do not think that this contention ought to prevail, for if one looks at the real substance of the transaction and its object it is difficult to avoid the conclusion that it was intended to be a testamentary gift of £500. Suppose the transaction in this case had been that in consideration or upon the condition of the society paying to the donor the interest on £500 for his life he would make a present gift of £500. It seems to us that such a case would clearly have fallen within the operation of section 11 of the Act of 1889. Now what is the difference between that case and the present? It seems to be that, instead of the consideration being the interest on £500, it is an arbitrary annuity of £25 for the lives of the donor and his wife, and it is said that interest at this rate could not be obtained on an investment of trust moneys, which we assume to be true. This difference does not in our judgment convert the transaction into a purchase of an annuity. A consideration is given, whether the promise is to pay interest at the rate obtainable on trust investments or to grant an annuity exceeding that rate, and in either case the substance of the transaction is a testamentary gift. The donor gives the £500, less the profits to be made thereout, until his death and that of his wife. The fact that by the condition of the gift which the transferee accepts the rate of profit is fixed above the rate of interest which might be reasonably expected upon a trust investment does not seem to us to divest the transaction of its character as a gift, nor does the fact that the gift is subject to a life interest at the fixed rate in favour of the wife. The *corpus* of the gift is in no way encroached upon. It seems to us that to hold the contrary would be to disregard the decision in *Attorney-General* v. *Worrall*, for we do not think that consistently with that case one can take into account the *quantum* of the profits of the subject-matter of the gift which are retained by the donor. The profit retained in respect of the £500 presently paid may, of course, be so large that one cannot regard the £500 as a gift, and must regard that which is retained or reserved as an annuity for two lives purchased at the price of £500. But then there would be no gift and only a sale, and the section would have no application, but that does not seem to be the case here.

It remains to consider if the incorporation of section 11 of the Act of 1889, somewhat modified, into the Finance Act makes any difference. Is that which would have been payable as account duty under the Act of 1889 not payable as estate duty under the Finance Act? We do not think the Finance Act in this respect alters the account duty. Property passing on the death of the deceased is, by virtue of section 2, sub-section 1 (*c*), of the Finance Act, 1894, to include property which would be required on the death of the deceased to be included in an account under section 38 of the Act of 1881 as amended by section 11 of the Act of 1889, and really the only question, as pointed out by Phillimore, J., is whether the transaction in this case amounts to the purchase of an annuity, and is, therefore, exempt from estate duty under the provisions of section 3, sub-section 1, of the Finance Act, 1894, or to the grant of an annuity "for partial consideration in money or money's worth paid to the vendor or grantor or for his own use or benefit," so that the value of the consideration ought to be allowed as a deduction from the value of the property for the purpose of estate duty under sub-section 2 of section 3. Phillimore, J., has held that the whole £500 is, in the first instance, taxable, a conclusion in which we agree, but has further held that in this case £210, the value of an annuity of £25 a year for two lives, ought to be deducted from the £500, and that, therefore, only £290 remains to be taxed. This is a conclusion in which we cannot agree, because, in our judgment, this is not a case of a *bonâ fide* purchase of an annuity at all; it is a case of a testamentary gift effected by the machinery of a present donation, subject to a reservation of something intended to be the equivalent of a life interest in the subject-matter of the donation. The conclusions at which we arrive really dispose also of the question raised under section 7 of the Succession Duty Act, 1853, and dispose of that question in favour of the Crown. The case, we agree with Phillimore, J., comes within section 7, unless it is excepted therefrom as being a disposition of property by *bonâ fide* sale; but, for reasons which we have already given, we think that the case is not one of *bonâ fide* sale. We think that this appeal ought to be allowed and judgment on all points entered for the Crown.

*Appeal allowed.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendant, *Leonard & Pilditch.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 18.

HUNTER *v.* THE KING. (*a.*)

*Inland revenue—Income tax—Deductions—Premium on life insurance—Advance by insurance company of half premium—Income Tax Act,* 1853 (16 & 17 *Vict. c.* 34), *s.* 54, *Schedules D and E.*

*By the terms of a policy of life insurance it was provided that, if the assured should so desire, a portion of the premium—viz.,* £33, *should in each year be advanced by the insurance company, and that the money so advanced should, with interest thereon, be a first charge on the policy. The premium was expressed to be* £66 17*s.* 6*d. The assured paid in respect of premium each year* £33 17*s.* 6*d., and obtained a receipt for* £66 17*s.* 6*d., the balance of* £33 *being advanced as provided for by the policy.*

*Held, that, under section* 54 *of the Income Tax Act,* 1853, *the assured was not entitled to deduct from his*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

*assessment to income tax the sum of £66 17s. 6d., as the amount of the annual premium paid by him for life insurance, but only the sum of £33 17s. 6d.*

*Judgment of* Phillimore, J. (50 *W. R.* 618, [1902] 2 *K. B.* 255), *reversed.*

Appeal from the judgment of Phillimore, J., on a special case stated by consent in a petition of right (50 W. R. 618, [1902] 2 K. B. 255).

The suppliant, R. L. Hunter, by a policy of insurance dated the 30th of June, 1896, effected an insurance on his life with the London Life Association (Limited) for the sum of £1,500. The policy recited that the sum of £66 17s. 6d. (including an advance of £33), being the premium for such insurance until the 30th of June, 1897, had been paid to the association. By clause 1 of the policy it was provided that if the renewal premium was regularly paid, the sum assured would be paid on the death of the assured, and that a portion of the renewal premium—viz., £33—should, if the assured should so desire, be advanced by the association and should be, with the recited advance of £33, a first charge on the policy. Clause 4 of the policy provided that the association might at any time advance moneys for payment of any sum necessary to prevent the lapsing or avoidance of the policy, and that any such advances should bear interest at 6 per cent. per annum, reducible to 4 per cent. on punctual payment, and that any such advances and interest should be a first charge on the policy and the sum assured.

The form of receipt received by Mr. Hunter on the 30th of June, 1896, was as follows: "Received this 30th day of June, 1896, the sum of £66 17s. 6d. (including £33 advanced by the association), being the first premium on an insurance of £1,500 effected on the life of Mr. R. L. Hunter, for which a policy, numbered 30,540, and dated as above, will be issued in due course." The receipt for the next and following year acknowledged the receipt of "£66 17s. 6d., being the amount of one year's premium."

On the 19th of July, 1897, the suppliant entered into an agreement with the association, whereby, in consideration of the loan to him in the previous year of £33, and in consideration of five further sums of the same amount to be advanced to him under the terms of the policy of assurance, the suppliant charged the policy and all money and benefits thereby assured as security for repayment to the association of the principal sums advanced and to be advanced with interest at 6 per cent. per annum, reducible to 4 per cent. on punctual payment, and also covenanted to pay the premium and all other moneys required for keeping up the policy as the same should become payable.

No advance in cash was made by the association to the suppliant, and save so far as the same could be gathered from the suppliant having made a proposal for a half premium policy, from his having accepted the same, and from the terms of the charge, no specific request was made by the suppliant that the association would make an advance, and no receipt in respect of any alleged advance was given by the suppliant to the association.

The suppliant in each year paid interest at 4 per cent. upon the amount of the principal sums for the time being outstanding on the security of the charge.

The only money which passed from the suppliant to the association in respect of payment of premium was a payment in cash of £33 17s. 6d. in each year, and no other moneys were received by the association in respect of the same beyond those sums. The suppliant was debited in the loan register of the association with the amount of the principal sums secured by the charge, and credited in the renewal premium register with the full amount of the premium separately entered in two sums of £33 17s. 6d. and £33 respectively, the sum of £33 having against it the remark "On credit." The premiums were treated as having been paid in full under the heading "premiums" in the revenue account of the association published each year pursuant to the Life Assurance Companies Act, 1870, and in the calculation made for the reduction of the premiums subsequent to the seventh; and the principal sums secured by the charge were included in the balance-sheet published pursuant to the Act under the head "loans on the association's policies (with their surrender value)."

Section 54 of the Income Tax Act, 1853, provides that "any person who shall have made insurance on his life . . . shall be entitled to deduct the amount of the annual premium paid by him for such insurance from any profits or gains in respect of which he shall be liable to be assessed under either of the Schedules D or E of this Act."

The question for the opinion of the court was whether the suppliant was entitled in each of the three years from 1896 to 1899 to deduct from his assessment to income tax the sum of £66 17s. 6d. as being the annual sum paid by him in respect of premium within the meaning of section 54 of the Income Tax Act, 1853, the Income Tax Commissioners having allowed him to deduct only the sum of £33 17s. 6d. in each year.

The suppliant by his petition of right claimed repayment of the sum of £3 6s., being the income tax charged on the sum of £33 for the three years in question.

The Attorney-General consented, in order to obtain the decision of the court in the promptest way, to waive any objection that might be raised as a matter of law that a petition of right did not lie, but such waiver was not to be taken as a precedent in other cases.

Phillimore, J., gave judgment for the suppliant.

The Crown appealed.

*Sir Robert Finlay, A.G., Sir Edward Carson, S.G.,* and *S. A. T. Rowlatt,* for the Crown.

*Sir Edward Clarke, K.C., Danckwerts, K.C.,* and *R. B. D. Acland,* for the suppliant.

VAUGHAN WILLIAMS, L.J.—This case raises a short and simple point. Section 54 of the Income Tax Act, 1853, says that any person who has made an insurance on his life shall be entitled to deduct the amount of the annual premium paid by him for such insurance from the amount of any profits or gains in respect of which he shall be liable to be assessed to income tax under Schedules D or E. We have to say whether in the circumstances of the present case a sum of £33 has been paid or not, that £33 being the half of the total amount of the annual premium on a policy of insurance. One half of the total premium has been paid in cash, and as to that no question arises. The question is as to the other half, whether it is true to say that that has been paid by the assured. In my opinion it has not been paid within the meaning of the Act. I think that the true nature of the transaction was that one half of the premium should remain unpaid on the terms that the assured should pay interest upon it. In my judgment such a transaction does not fall within section 54 of the Income Tax Act so as to constitute the sum left unpaid an annual premium paid by the assured. I therefore think the appeal must be allowed.

STIRLING and MATHEW, L.JJ., concurred.

*Appeal allowed.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the suppliant, *Hunter & Haynes.*

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## High Court of Justice.

Chan. Div. } Byrne, J. } April 29.

*In re* WALKER & SMITH (LIMITED). (*a.*)

*Company—Reduction of capital—Certificate of registrar—"Conclusive"—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 15.

*The certificate of the registrar that the order of the court sanctioning a reduction of capital and the accompanying minute has been registered is conclusive evidence that the reduction has been duly carried out, behind which the court will not go even in a case where the company had no power in its articles of association to reduce its capital.*

Ladies' Dress Association *v.* Pulbrook, 49 *W. R.* 6, [1900] 2 *Q. B.* 376, *followed.*

This company had no power by its articles of association as originally framed to reduce its capital, and no special resolution had ever been passed altering the articles by giving it this power.

In 1882 special resolutions were passed purporting to reduce the capital, and these resolutions were duly confirmed by the court.

The order confirming the reduction was produced to the registrar and, together with the usual minute, was registered by him.

The registrar certified this registration under section 15 of the Companies Act, 1867, which provides that: "The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requisitions of this Act with respect to the reduction of capital have been complied with, and that the capital of the company is such as is stated in the minute."

The reduction had always been treated as duly carried out until 1898, when the company went into voluntary liquidation.

This was a summons taken out by the liquidator raising the question whether the reduction was valid. The main point in question was the meaning of the word "conclusive" in section 15 of the Companies Act, 1867.

*Whinney,* for the liquidator.

*Vernon,* for one class of shareholders, argued that the court could not go behind the registrar's certificate.

*Peterson,* for another class, contended that there had been no valid reduction, and that he was entitled to raise this contention notwithstanding the certificate.

BYRNE, J., held that the case was governed by the decision of the Court of Appeal in *Ladies' Dress Association* v. *Pulbrook,* 49 W. R. 6, [1900] 2 Q. B. 376, which could not be distinguished from the present case, and decided that the registrar's certificate was conclusive evidence, behind which the court could not go, that the reduction had been duly carried out.

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

The contention had been raised that it was *ultra vires* the company to reduce its capital in this manner, and the case of *In re National Debenture and Assets Corporation,* 39 W. R. 707, [1891] 2 Ch. 505, was relied on. That case was decided under a different section and was distinguishable from the present. There the question discussed was whether a certificate of incorporation was conclusive when there were only six signatories to the memorandum of association; a company could not under any circumstances have acquired power so to register, and the defect could not possibly have been cured by any resolution of the company. In the present case there was no statutory prohibition against the reduction of capital, and if the company's constitution were defective in containing no power to reduce, that defect could be cured in the manner laid down in the Companies Act, 1867.

Under the circumstances it became unnecessary to consider either the effect of the conduct of all parties in treating the reduction as valid for upwards of fifteen years, or the result of the decision in *Ho Tung* v. *Man On Insurance Co. (Limited),* [1902] A. C. 232, 50 W. R. Dig. 68.

Solicitors, *Geare & Pease,* for *Champney & Forward,* Hull.

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Chan. Div. } Buckley, J. } Feb. 21, 25.

*In re* WHITEFORD.
INGLIS *v.* WHITEFORD. (*a.*)

*Will — Advancement — Hotchpot — Annuity — Period of distribution—Rate of interest—Simple or compound interest—Method of computation.*

*The period of distribution is, for the purposes of calculation, the date from which interest is to be charged upon advances made by a testator in his lifetime to one of his residuary legatees; and such period of distribution is not the less the death of the testator because he has given to his widow an annuity which has prevented a large part of the residue from being divided during her lifetime.*

*In calculating the interest to be charged upon advances from time to time made residuary legatees between the testator's death and the time of division of the fund, simple interest is to be charged upon the advances from the dates of payment, and it is not proper to distinguish between the capital and income of the sums advanced and charge interest upon the capital only with annual rests.*

*The rate of interest to be charged upon advances should now be three, and not four per cent. per annum.*

In re Lambert, 45 *W. R.* 661, 17 *Ch. D.* 169, *followed.*

Originating summons.

The questions raised in this summons were as to the interest to be charged upon advances made to residuary legatees of part of their shares before the period of final division.

By his will made in 1889 C. C. Whiteford, after bequeathing certain legacies, and an annuity of £250 (which was increased to £350 by a codicil) to his wife during her life, gave his real and residuary personal estate to trustees upon trust for sale and conversion, and as to one third part (referred to as "Hamilton's portion") upon the trust thereinafter mentioned. As to another third part upon trust for his son Sidney Whiteford, and as to the remaining third part for his son Baldwin Whiteford. And the testator directed that, subject as thereinafter mentioned, "Hamilton's por-

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

tion" should be held upon trust to pay the same to the trustees of the marriage settlement of his son Hamilton Whiteford upon the trusts of the settlement, and reciting that upon the marriage of Hamilton Whiteford he had settled a freehold estate and dwelling house (subject to the life interests of himself and his wife therein) upon trusts for the benefit of Hamilton Whiteford, his wife, and children, and that the property so settled was estimated to be of the value of £4,000, and that upon the marriage he (the testator) covenanted to pay within six calendar months after the decease of the survivor of himself and his (then) late wife £6,000 to the trustees of the settlement, the testator declared that after payment of the £6,000 the sum of £10,000 should be considered to have been received and advanced out of his residuary estate in respect of "Hamilton's portion," and should for the purpose only of ascertaining the amount of that portion be considered as forming part thereof, and should be accounted for by way of hotchpot accordingly.

The testator died in June, 1893, leaving his widow and sons Sidney and Baldwin surviving. Hamilton had died in his lifetime, Baldwin died in August, 1893. Under Baldwin's will his widow was entitled to the income of his estate for her life.

On the 6th of December, 1893, the trustees of the testator paid the £6,000 to the trustees of the settlement of Hamilton Whiteford. A sum was set apart to produce the annuity payable to the widow of the testator, but no division of the residuary estate was made.

In the years 1894 and 1895 respectively, the trustees of the testator began to make advances to Sidney Whiteford and to the trustees of Baldwin Whiteford, which were continued from time to time, and which amounted in the aggregate in each case to £6,555 5s. 8d. In making these payments the trustees considered the sum of £5,770 5s. 8d. as derived from capital and £785 as derived from income in each case, the income of the share of Baldwin Whiteford being paid to his widow.

The widow of the testator died in September, 1902, and thereupon the capital sum set apart to produce her annuity became divisible among the residuary legatees, and the trustees had accordingly in their hands sufficient funds to bring the advances made to Sidney Whiteford and Baldwin Whiteford up to an equality with those to Hamilton's trustees.

The present summons was taken out by one of the trustees of the testator against Sidney Whiteford, who was the other trustee, and the trustees of Baldwin's will and Hamilton's settlement, for a declaration (1) whether in distributing the residue of the estate interest was to be charged upon the various advances, and if so from what dates; and (2) whether the interest charged was to be calculated at the rate of three per cent. or of four per cent. per annum.

*H. M. Humphry*, for the trustee of the testator, the plaintiff in the summons.

*F. B. Fuller*, for Sidney Whiteford and the trustees of Baldwin Whiteford.—The division of the residue must be made so as to produce equality between the legatees, and consequently interest must be charged upon the advances. Interest should be charged upon the £4,000 advanced to Hamilton as from the death of the testator, and upon the £6,000 as from the date of its payment: *Hilton* v. *Hilton*, L. R. 14 Eq. 468, 21 W. R. Dig. 281; *In re Rees*, 29 W. R. 301, 17 Ch. D. 701; *In re Lambert*, 45 W. R. 661, [1897] 2 Ch. D. 169. The gift of the annuity makes no difference: *In re Lambert*. The interest charged should be four per cent. and not three: *In re Rees*. Stirling, J., did not in *In re Lambert* intend to decide the contrary: per Joyce, J., in *Hargreaves* v. *Hargreaves*, 86 L. T. Rep. 43, 50 W. R. Dig. 189.

*Harman*, for the trustees of the marriage settlement of Hamilton Whiteford.—The period of distribution is not the death of the testator, but that of the widow (*In re Dallmeyer*, 44 W. R. 375, [1896] 1 Ch. 372), and interest is only payable upon the advances as from that date. In any case no interest is payable upon the sum of £4,000 until the 6th of December, 1893, when the sum of £6,000 was paid, as the testator directs that only after then should the sum of £10,000 be considered as advanced. The rate of interest should now be not four but three per cent: *In re Goodenough*, 44 W. R. 44, [1895] 2 Ch. 537; *In re Barclay*, [1899] 1 Ch. 674, 47 W. R. Dig. 195; *Rowlls* v. *Bebb*, 48 W. R. 562, [1900] 2 Ch. 107; *In re Lambert*.

BUCKLEY, J.—The question is, what is the proper amount of interest to be charged so as to produce equality between the shares of the three sons? Ought Hamilton's share to be charged with interest upon the £4,000 advanced him from the date of the death of testator, or ought that sum, together with the £6,000, to be charged with interest only as from the 6th of December, 1893? It is clear that the former date is the right one unless the will provides otherwise. I do not, however, think that it does provide otherwise. The testator did not intend that any direction which he gave should operate to affect the method adopted by the court to produce equality between the residuary legatees. He did not mean that the £4,000 was not to be taken as received until the £6,000 was paid, but only that when the £6,000 was paid it also should be considered an advance to be brought into hotchpot. I hold that Hamilton's share is to be charged with interest upon the footing that he received the £4,000 in the lifetime of the testator, and that he must consequently pay interest upon that sum as from the death of the testator.

Next, assuming that Hamilton's share is treated in this way, what interest is to be charged upon the sums paid in respect of the shares of Sidney and Baldwin? It has been contended that, each having received certain sums of money, I ought to ascertain what parts of these sums are capital and what parts are income, and that interest should be charged only upon the corpus. This is not the right way of working out the matter. The principle to be followed is shown in three cases—*In re Rees*, *In re Dallmeyer*, and *In re Lambert*. It is, first to ascertain the date of distribution, which is here the death of the testator; and not the less so because there is a gift of an annuity taking effect immediately upon the testator's death, and the estate is increased when the annuity falls in. Then, taking the date of distribution, not for the purpose of payment, but for that of calculation, you charge interest from that date upon advances made in the lifetime of the testator, and upon advances made subsequently you charge interest from the dates when they were made. By so doing you work out equality amongst the children. If the calculation were to be worked out with technical accuracy, I agree that on each occasion of a payment to a child you ought to distinguish capital from income and charge interest with annual rests. This method was suggested by Rigby, L.J., in *In re Dallmeyer*. But Stirling, J., in *In re Lambert* did not follow that suggestion. He says, referring to the above suggestion: "I have come to the conclusion that that is not the fair mode of working equality according to the rule laid down in *In re Rees*." That is to say, you do not according to

the decision of the Court of Appeal condescend upon details and calculate exactly, with compound interest, but you employ a rough and ready method. You treat each payment as made on account of the share, and charge interest on that; and that is considered sufficient equality. Consequently here you debit Hamilton's share with interest on the £4,000 from the testator's death, on the £6,000 from the 6th of December, 1893, and you debit the shares of Sidney and Baldwin with interest upon the advances from the respective days of payment.

The question then arises, what is the proper rate at which interest is to be charged? The principle in determining the rate is that when one person has received an advance before another you charge him with the return of so much money as he may reasonably be expected to have obtained if he had invested the money advanced, and in doing so had acted with prudence and caution. You consider what interest the money would have commanded if invested without undue risk. The person advanced is not to be treated as a malefactor, and charged with more interest than he could have got if he acted with reasonable prudence. That amount is now, I think, to be taken as three per cent. This rate has been adopted in analogous cases, as in *In re Goodenough*, *In re Barclay*, and in *Rowlls* v. *Bebb*. In *In re Rees* the rate adopted was four per cent. But Stirling, J., in *In re Lambert*, after referring to the rate of interest payable on debts, says: "But as regards other applications of the rule charging four per cent. it has in recent times been thought excessive, inasmuch as in these days trust investments do not yield anything like four per cent." It is true that in that case there was no desire on the part of the residuary legatees that more than three per cent. should be charged, but I think that the learned judge intended to lay down the principle upon which interest should be charged. In *Hargreaves* v. *Hargreaves*, Joyce, J., commenting upon this judgment of Stirling, J., says, 86 L. T. Rep. at p. 46: "Nor do I think that Stirling, J., did decide, or intended to decide, that the rate of interest intended to be debited between the death of the testator and the period of actual distribution, was to be three instead of four per cent. as formerly." I cannot agree with that view. I think that Stirling, J., did in that case intend to decide upon the general principle to be followed in determining the rate of interest. I hold, therefore, that interest at the rate of three per cent. is to be charged upon the sums advanced. My attention has been called to *Hilton* v. *Hilton*, where Malins, V.C., is reported as saying that interest should be charged upon sums received by children by way of maintenance or advancement, but the order as drawn up only charges interest on the sums advanced, and not on those given by way of maintenance. I think that the explanation must be that the order discriminates between sums allowed to a child solely for maintenance, which must, as regards the child's share, be taken as paid out of income, and sums paid in respect of the corpus of the estate so as to operate by way of advancement. I do not think that that case decides anything inconsistent with what I have now decided.

Solicitors, *Gribble, Oddie, Sinclair, & Johnson*, for *Whiteford & Bennett*, Plymouth.

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Chan. Div. Buckley, J. — Feb. 5, 6.

KIRBY SMITH v. PARNELL. (*a.*)

*Will—Construction—Residuary gift and bequest—Subsequent trusts—Real estate—Resulting trust.*

*A testator gave and bequeathed the residue of his estate and effects to trustees on certain trusts. There was no express trust for sale and conversion of real estate, and* primâ facie *the trusts were applicable to personal estate.*

*Held*, (1) *on the principle of* D'Almaine v. Moseley, 1 *W. R.* 475, 1 *Drew.* 629, *that the words of bequest were sufficient to pass real estate; and* (2) *on the principle of* Saumarez v. Saumarez, 4 *My. & Cr.* 331, *that, inasmuch as the testator had shown an intention to dispose of all his property, and the succeeding trusts did not show an intention only to deal with his personal estate, there was no resulting trust of the real estate.*

Dunnage v. White, 1 *Jac. & W.* 583; Coard v. Holderness, 3 *W. R.* 311, 20 *Beav.* 147; *and* Longley v. Longley, 20 *W. R.* 227, *L. R.* 13 *Eq.* 133, *distinguished.*

Action without witnesses.

The question to be determined in this case was whether certain real estate belonging to a testator at the date of his death passed under his will, or whether, in respect of it, he died intestate.

By his will, dated the 19th of December, 1839, George Smith, as to all his ready money, securities for moneys, stock in any of the public funds of Great Britain, and all the rest, residue, and remainder of his estate and effects, whatsoever and wheresoever, gave and bequeathed the same to trustees, their executors, administrators, and assigns, upon trust to pay the interest, dividends, and annual proceeds of the said trust moneys, stocks, funds, and securities to his widow during her life, and after her death he directed that the said trust moneys should be upon trust for all his children by her who should attain twenty-one. There was a power of maintenance out of the interest, dividends, and annual produce of each child's expectant share, and a power to advance to each child any part of his presumptive portion or share. In case the widow remarried, there was a provision directing the settlement of the "interest, dividends, and annual produce of the said trust moneys, stocks, funds, and securities" to accrue during her coverture. He ultimately bequeathed "the said trust moneys" to his brother, "his executors, administrators, and assigns." The will contained a power to "change and vary the securities of the trust money," and a power in the case of the death of a trustee or of his becoming incapable of acting "in the trusts aforesaid" to appoint new trustees, with a direction that "the said trust moneys, stocks, funds, and securities shall be transferred, so as to be vested in the names of the trustees for the time being."

The testator died on the 14th of June, 1878, without having altered his will, except by a codicil (not material to be here stated) bearing date the 5th of March, 1873.

The real estate in question was conveyed to the testator in 1860, and the several conveyances each contained a declaration to bar dower.

The widow remained in possession until her death on the 12th of July, 1901, having had one child only, who attained the age of twenty-one years, but died intestate on the 11th of May, 1884, without issue.

By her will dated the 23rd of January, 1890, the widow appointed the defendant her sole executor and

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

trustee, and after making certain specific bequests, devised and bequeathed to him all the residue of her real and personal estate.

The plaintiff, as the heir-at-law of the testator's son, claimed the real estate. The defendant, on the other hand, who was in possession, claimed that the testator died intestate as to the real estate, that the widow had acquired (as against the son) a title by adverse possession, and that it therefore passed under her will.

The questions argued were whether, on the construction of the will of the testator, the real estate passed to his trustees, and if it did so pass, whether the succeeding trusts showed such an intention to deal only with personal estate as that there ought to be inferred a resulting trust in favour of the testator.

*Astbury, K.C.*, and *W. A. Peck*, for the plaintiff.—The words "estate and effects" are sufficient to pass real estate; Theobald on Wills, p. 192. There is no resulting trust in favour of the heir of testator. *Dunnage* v. *White*, 1 Jac. & W. 583, the case most against us on that point, is no longer law. In the present case there would be no doubt on the subject had not the usual trust for sale and conversion of real estate been accidentally omitted. In any case an implied trust for sale is conferred by the power to vary investments: *In re Garnett Orme and Hargreaves' Contract*, 32 W. R. 313, 25 Ch. D. 595, at p. 599. Apart from that, even though the trusts are more applicable to personalty than to realty, there is no resulting trust: *D'Almaine* v. *Moseley*, 1 W. R. 475, 1 Drew. 629; *Lloyd* v. *Lloyd*, 17 W. R. 702, L. R. 7 Eq. 458. *Longley* v. *Longley*, 20 W. R. 227, L. R. 13 Eq. 133, to the contrary effect, is wrong.

They also referred to *Fullerton* v. *Martin*, 1 W. R. 379, 22 L. J. Ch. 892.

*Buckmaster, K.C.*, and *J. M. Gover*, for the defendant.—The real estate did not pass to the trustees at all; first, because there is no word or phrase exclusively applicable to real estate; secondly, because there is no trust for sale. A power to vary investments, such as there is here, is not such a direction as will imply a trust for sale: *In re Holloway*, 37 W. R. 77, 60 L. T. Rep. 46. There are no words like "collect and call in" (*D'Almaine* v. *Moseley*), "call in" (*In re Garnett Orme*), or "invest" (*Fullerton* v. *Martin*). Such words are consistent only with a power of sale or a trust for sale, and therefore their presence shows that such a power or trust will be implied. Those cases are distinguishable on that ground. The old cases which are still regarded as binding (Theobald on Wills, p. 193) are in my favour: *Doe* v. *Buckner*, 6 T. R. 610; *Pogson* v. *Thomas*, 6 Bing. N. C. 337; *Coard* v. *Holderness*, 3 W. R. 311, 20 Beav. 147. [BUCKLEY, J.—*D'Almaine* v. *Moseley* gives me a principle; those cases do not] The principle of *D'Almaine* v. *Moseley* cannot be applied where the subsequent words of the will are applicable only to personal estate. The power to appoint new trustees does not help the plaintiff, because they are to act on the trusts "aforesaid," and none of the trusts aforesaid are applicable to real estate. Even if the real property passed to the trustees, there are no words showing that the succeeding trusts are applicable to it, and therefore, on the principle of *Dunnage* v. *White* and *Longley* v. *Longley*, there must be a resulting trust of it in favour of the heir of the testator. [BUCKLEY, J.—If you find that the testator meant to pass the real estate, then the fact that the trusts are applicable to personal estate is immaterial: *Saumarez* v. *Saumarez*, 4 My. & Cr. 331.] That case was considered in *Coard* v. *Holderness*, 20 Beav. 147, at p. 155

BUCKLEY, J., after stating the facts, continued: The principle to be applied is this. In the first place, I ought to read the whole of the will, and from it ascertain the testator's intention. Secondly, on so reading the will, and ascertaining his intention, I ought to a certain extent to lean against an intestacy. Thirdly, where the testator uses technical words, it is a true rule of construction to say that I must give them their due effect, unless I find that, in the mouth of this testator, he uses them in some other sense. Fourthly, I must apply any established rules of construction which I find have been adopted by the court.

Now, as regards that last head, it seems to me that the relevant rules of construction, or some of them, are to be found in what was said by Kindersley, V.C., in *D'Almaine* v. *Moseley*. The Vice-Chancellor (1 Drew., at p. 632) says this: "The general principles applicable to cases of this sort are well established; the difficulty is not in ascertaining the principles, but in their application. One rule is, that the word estate simply, is sufficient to pass real estate; but in most cases the word estate is not used simply; and another rule is, that supposing that there is nothing in other parts of the will to control the meaning of the gift, the effect of the word estate, coupled with other words, is this: If the other words would without the word estate not be sufficient to pass the whole personal estate, the word estate will be considered as used to effect a complete passing of the personal estate, but if the other words are sufficient to pass *all* the personal estate, then the word estate must be read as intended to apply to real estate. It is equally clear that, consistently with the general principles, there may be words in the will which show that the language used may have an interpretation different from their ordinary and proper interpretation; but the rule being that the word estate is sufficient to pass real estate, and the other word used in this case being effects, which is sufficient to pass *all* the personal estate, so far as the language is considered *primâ facie* the word estate here would comprise the real estate; and unless there is something in the will to show a clear indication of intention to use the word estate in a sense different from its ordinary legal sense, it must be read in that sense. The cases on this subject are very numerous and not very easy to be reconciled, but the tendency of modern decision is to give less effect to minute and trivial matters than was attributed to them in former times." And a little further down he says: "The next point made is that in the language used for giving the residuary property the word devise does not occur. I think that also is no indication of intention, the word give is quite as efficient as the word devise to pass real estate, and is of quite as frequent use. Next it is said that there are no words of limitation to the heirs, but neither are there to the executors, so that no particular intention can be gathered. It can no more be said that it was intended by omitting a limitation to heirs to exclude real estate than that by the omission of a gift to executors it was intended to exclude personal estate." When I come to the will before me it will be found that several of the observations there will be applicable to this case.

The other passage which I want to read is addressed rather to the second argument of the defendant—namely, that assuming that the word "estate" in the will passes the real estate, the succeeding trusts only apply to the personal estate, and that there is a resulting trust of the real estate. For that I wish to read an extract from Lord Cottenham's judgment in *Saumarez* v. *Saumarez*. At 4 My. & Cr., p. 339, he says: "In considering gifts of residue, whether of real or of personal estate, it is not

necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such ignorance is manifested upon the face of the will, unless the expressions manifesting it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense." And at p. 340 he says: "The circumstances of his using expressions and giving directions applicable only to the personal estate may prove that he did not at the time consider, or was not aware, that this fee would be part of his residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of the property."

Now, with those general statements of the principles, I turn to this will before going to the other cases which are said to have a bearing on it. The will is one by which the testator "as to all his ready money, securities for money, stock in any of the public funds of Great Britain, and all the rest, residue, and remainder of his estate and effects, whatsoever and wheresoever," gives and bequeaths the same to trustees. Pausing there, and without going on to the trusts at all, those words would certainly be sufficient to pass the real estate. Referring to the passage I have just read, you will find that without the word "estate" you have sufficient to pass all the personal estate. Then you find the word "estate." You do not find the verb "devise," but you do find the verb "give," and therefore you find a gift of "all my estate whatsoever and wheresoever." Unless the testator shows somewhere that he does not use the technical word "estate" in its proper meaning, that, I conceive, on what I have read from the judgment of Kindersley, V.C., shows that he has devised all his real estate. But that may be cut down by what follows. We have got to see. So far that is a devise of all his real estate. I am not going to read the trusts at length, for the moment. The words of the description of the trust property vary from time to time. [His lordship then read the will with reference to this point, and continued:] I want to make this general observation on the will. I cannot read this will without arriving at the conclusion that this testator meant (whether he has done it or not is another question) to dispose of everything he had to dispose of. It seems to me that the dominant intention of this will is to dispose of everything. If so, then applying the true principles of construction, I have to see whether, upon the language of his will, he has given effect to that intention or not. Now it is said that he has not given effect to it, by reason of the fact that in the description, or definition, of the subsequent trusts he has not used words wide enough. On the language of this will it appears to me that he has used words wide enough. I wish to make one other observation on the terms of the will as a whole. If the testator has, by his original gift, given his real estate to his trustees, then when he comes to the clause dealing with the appointment of new trustees, and the transfer of the trust property to the new trustees, you would expect that he would use words by which he would say "transfer to the new trustees all that was held by the old trustees." When you come to that clause you find that what he directs shall be transferred are "all the said trust moneys, stocks, funds, and securities." If, therefore, the trustees ever took the real estate, he must have intended there should be a transfer of the real estate, and the thing to be transferred he calls "trust moneys, stocks, funds, and securities." That is a reason for saying that, in this testator's mouth, those words were understood to mean, not personal estate only, but real estate also. Let me say one other word on the will. There is power to change and vary the securities of the trust money. That applies to trust moneys, stocks, funds, and securities. It is not confined to money, and, that being the case, why should it not extend to everything included in the disposition? If I am right in saying that it includes the real estate, it includes that.

Now I pass to some of the other cases which were cited. The two cases most bearing on the subject are two decisions of Kindersley, V.C., in 1853. The first case is *Fullerton* v. *Martin*. In that case the verbs used were "give and bequeath," and the gift was of "all the rest, residue, and remainder of my estate and effects, whatsoever and wheresoever, upon trust to invest." It was held that the real estate passed under that residuary gift. The Vice-Chancellor, after making some general observations on such a gift as this, and commenting on *Doe* v. *Buckner*, says of that case: "I apprehend that the case of *Doe* v. *Buckner* would be decided differently at the present day, and the grounds of Lord Kenyon's decision would not now be sufficient to warrant such a conclusion." Then in the last paragraph of the judgment he deals with the word "invest," and he says: "It has been argued that this shows an intention of giving only the personal estate, because real estate cannot be invested, and there is no power of sale contained in the will. I confess there does not seem to me to be any weight contained in this argument. It is quite true that you cannot invest real estate without first selling it, nor could you invest leaseholds without doing something to convert them into money, nor could you invest an annuity in the funds without doing the same thing. So, also, there are many other species of personal property which could not at once be invested without previously being sold. The true meaning of these words must therefore be considered as a direction to invest, and to take all proper and necessary means for effecting that object by first selling it and then investing the proceeds according to the trusts of the will. For these reasons I do not think there is anything on the face of the will to show an intention of confining the meaning of the word 'estate,' and I think that the real estate passed under the will." It is to be noticed there that the Vice-Chancellor sets himself to look for a reason why the word "estate" is cut down from what it *primâ facie* would mean, and the passage I read is material to this case when you consider this clause as to the variation of investments at the end of the will; because if one once attributes to the testator, by implication, that the real estate, if he has real estate, is to be, or may be, converted into money, of course the whole thing becomes simple. The other decision of Kindersley, V.C., is *D'Almaine* v. *Moseley*. The gift there was "as to all the rest and residue of my estate and effects, I give and bequeath the same" to trustees on trust to "collect, get in, and receive the same and to invest the same and every part thereof" in various stock, with power to vary and transfer the same at their discretion, and to pay the "interest and dividends" to certain beneficiaries. It was held that the real estate passed. At the foot of p. 633, after stating that the words no doubt would be strictly applicable to personal estate, the Vice-Chancellor goes on to say "but in strictness also they are not applicable to certain portions of personal estate, which beyond all question would

pass. If the testator had had leaseholds for years, or even for lives, they would be personal estate; and can I say that the use of words not properly applicable to real estate is an indication of an intention that real estate should not pass, when the very same words are applied to personal estate of a certain character, which clearly was intended to pass." It appears to me that this case falls within the considerations to which Kindersley, V.C., called attention in *Fullerton* v. *Martin* and *D'Almaine* v. *Moseley*. But on the other side *Dunnage* v. *White*, a decision of Sir T. Plumer, M.R., is cited. In that case it was held that the real estate passed, but that there were resulting trusts. The gift was this: "All the rest, residue, and remainder of my estate or effects, whatsoever and wheresoever, of what nature or kind soever, I give, devise, and bequeath unto my said trustees and executors." That plainly passed the real estate. Then the trusts were these—to make sale of "my household goods and stock-in-trade," and to collect all "debts due to me" and all "moneys" owing on mortgage, and when the same were collected, to divide the same and to "pay" the proceeds among certain people. All that the Master of the Rolls held was that the testator had specifically said "what I give away is what my household goods sell for, and what can be got in by collecting my debts and moneys owing on mortgage." That is the true explanation of *Dunnage* v. *White*, as it appears to me. From *Coard* v. *Holderness* I can get nothing, except that you must read the will all through, and if you find by the words which the testator has used he meant a particular thing, then you must give effect to it. The head-note substantially represents what Lord Romilly held. "The court, in this case, principally relied on the absence of the words 'heir,' 'devise,' and 'rent,' and the use of the expressions 'possession,' 'executors and administrators,' 'principal,' the 'balance,' 'the principal of the said legacies,' 'the direction to claim a share from his personal representatives,' and the power to appoint new trustees applicable to 'executors' and not to 'heirs.'" In other words, in that particular instrument, reading it all through, there were so many indications of an intention to deal only with personal estate that the court gave effect to it. No general principle is laid down in that case.

Then I may refer to *Lloyd* v. *Lloyd*, where Lord Romilly comments on his decision in *Coard* v. *Holderness*, and says he does not "use the words 'executors and administrators' which were relied on in *Coard* v. *Holderness*, and not only that, but he speaks of the income of his residuary estate." So that Lord Romilly takes the view that he only decided *Coard* v. *Holderness* on the particular expression there used. Then in *Longley* v. *Longley* he followed *Dunnage* v. *White*. He held from the use of the words "devise" and "heirs" that the real estate passed, but that the trusts were rigidly and exclusively applicable to personal estate, and therefore he followed *Dunnage* v. *White*; that is to say, he finds in the instrument that the trusts were confined, as in *Dunnage* v. *White*, to the trusts of particular property, which was personal property, and then nobody would dispute that the real estate would be undisposed of. I disclaim all intention to overrule any case. But *Coard* v. *Holderness* and *Longley* v. *Longley* were decided on the particular facts, while *D'Almaine* v. *Moseley* and *Fullerton* v. *Martin* were decided according to a principle perfectly well founded, and which binds me.

I think on the construction of this will that this testator did intend to pass his real estate, and I think he has used language which is capable of passing the real estate, and that the gift of the real estate takes effect, and therefore the plaintiff is entitled to succeed.

Solicitors, *Griffith & Gardiner*, for *Bignold & Pollard*, Norwich; *Crowders, Vizard, & Oldham*, for *Dennis & Faulkner*, Northampton.

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K. B. Div. (Wright, J.) — Jan. 12.

*In re* LAKE.
*Ex parte* HOWE. (*a*.)

*Bankruptcy—Proof—Security—Breach of trust—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Schedule II.*

*Where a trustee of a settlement has invested funds of the settlement upon an unauthorized security and subsequently becomes bankrupt, a proof against his estate for the amount of the funds so invested will not be admitted, unless the creditor proving is in a position to hand over the security on which they were invested to the trustee.*

In re Salmon, Priest *v.* Uppleby, 38 *W. R.* 150, 42 *Ch. D.* 351, *followed and applied.*

Semble, *a proof for damages for breach of trust may be admitted.*

Appeal of creditors against the rejection of proofs by the trustee in the bankruptcy.

The appellant creditors were the trustees of a settlement under which the firm of Lake & Lake had acted as solicitors, and of which B. G. Lake, one of the partners in the firm, had been a trustee. On the 18th of September, 1899, B. G. Lake dealt with a sum of £5,500 belonging to the trust fund in a way which the creditors alleged to amount to a misappropriation of the money, but which was held upon the evidence to have been merely an investment on an unauthorized security—namely, a loan to one Cavendish on a contributory mortgage.

A receiving order was made against Lake & Lake on the 27th of June, 1900, and in July of the same year the appellants, Mr. and Mrs. Howe, were appointed trustees of the settlement.

In 1902 Cavendish brought an action against the trustees of the Howe settlement to set aside the mortgage to which they had contributed. The trustees, being under the impression that they would have a difficulty in proving that the £5,500 ever got beyond the hands of Lake & Lake into those of Cavendish, compromised the action and gave up their claim as contributories to the mortgage on payment of £500. They then presented proofs against the estate of Lake & Lake, and alternatively against the separate estate of B. G. Lake, for the whole sum of £5,500. These proofs were rejected by the trustee and from his decision this appeal was brought.

*Muir Mackenzie* and *Champernowne*, for the appellants, contended that on the facts the sum of £5,500 had never been invested on the mortgage but had been misappropriated by Lake & Lake, and that in law they were entitled to have their proof admitted for the full amount without deducting the £500 obtained from Cavendish, as that sum was not derived from any security on the property of the bankrupt: *Ex parte West Riding Union Banking Co., In re Turner*, 30 W. R. 239, 19 Ch. D. 105; *In re Blakely*, 9 Morr. 173; *Ex parte Biddulph*, 3 De G. & Sm. 587.

*Younger, K.C.*, and *Northcote*, for the trustee, contended on the facts that the money had been actually invested by loan to Cavendish on contributory mortgage, and on this point they were stopped by the court. On the law they contended that the investment being upon an unauthorized security, the appel-

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

lants were bound either to accept it or reject it. If they accept the security they cannot ask for the fund to be replaced; if they reject it and claim that the fund be replaced, they must give up the security. Here the appellants by their compromise with Cavendish had elected to take the security, and having given it to Cavendish were no longer in a position to hand it over to Lake's estate. Consequently they could not be allowed to prove for the fund so invested: *In re Salmon, Priest* v. *Uppleby*, 38 W. R. 150, 42 Ch. D. 351; *Head* v. *Gould*, 46 W. R. 597, [1898] 2 Ch. 250.

WRIGHT, J.—I agree with Mr. Muir Mackenzie that securities which are not on the property of the debtor need not be valued in presenting a proof against the debtor's estate, but the real substance of this case is whether the £5,500 was ever invested at all or was simply misappropriated, and it seems to me quite clear that all the evidence goes to show that it was actually invested, though on a security not authorized by the terms of the trust. That being so, have not the Howe trustees so dealt with the security as to preclude themselves from proving. The law is indicated by the Court of Appeal in *In re Salmon, Priest* v. *Uppleby*, that where a trustee has invested on an unauthorized security he is entitled to take over that security if he has to make good the sum invested. I cannot see why the trustee in bankruptcy here should not be entitled to the same rights. *Primâ facie* when the Howe trustees compromised the action brought by Cavendish they disentitled themselves from proving against the estate of Lake. Whether they did it on perfect or imperfect information they took their chance and must abide by the result, which is that their proofs must be rejected. I think that a good proof might possibly be lodged against the separate estate of B. G. Lake for damages for breach of trust, as he was personally a trustee, but even then it might be necessary to go into the question of whether the compromise was reasonable or not. This application must be dismissed without prejudice to the presentation of a proof upon the lines I have indicated.

Solicitors for the appellants, *Wigan, Champernowne, & Prescott.*

Solicitors for the trustee, *Lee & Pembertons.*

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## Court of Appeal.

From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) April 28.

*In re* BRYDONE'S SETTLEMENT.
COBB *v.* BLACKBURNE. (*a.*)

*Settlement—Marriage settlement—Wife's property—"Die without having been married."*

*By a marriage settlement, made in* 1870, *certain property (the wife's) was settled on the usual trusts for the wife and husband and children of the marriage, and in the event (which happened) of the wife dying in the lifetime of the husband, upon such trusts in favour of the children as the wife should by will or codicil appoint, and in default of appointment and on failure of any child attaining the age of twenty-one or marrying, upon trust for such person or persons as under the Statutes of Distribution would have been entitled thereto if the wife had died intestate "and without having been married." The wife died intestate in the lifetime of her husband, without having exercised her power of appointment, and leaving two children, who died in their infancy. On the husband's death his executor claimed the property, as representing the deceased children.*

*Held, that there was nothing to prevent the court giving to the words "without having been married" their natural meaning, and that consequently the wife's next-of-kin (excluding the infant children) were entitled to the property.*

Wilson *v.* Atkinson, 4 *De G. J. & S.* 455, 13 *W. R. Ch. Dig.* 77, *considered.*

Originating summons.

By a marriage settlement dated the 8th of June, 1870, made between Henry Gray Brydone, the intended husband, of the first part, Sophia Marianne Crofton, the intended wife, then a spinster, of the second part, and trustees of the third and fourth parts, certain personalty belonging to the intended wife was settled upon trust during the joint lives of the husband and wife to pay the income to the wife for life for her separate use without power of anticipation, and after the decease of either of them upon trust to pay the income to the survivor for his or her life, and after the decease of the survivor in trust for the child or for all or any such one or more of the children of the marriage as the wife and husband should by deed jointly appoint, and in default of such appointment, and so far as no such appointment should extend, in trust for all the children or any the child of the said intended marriage who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry, and if more than one in equal shares, with the usual hotchpot clause. After the usual clauses for advancement, maintenance, and education, and accumulation of surplus income for the benefit of the children or child of the said intended marriage, the indenture proceeded as follows: "It is hereby declared that if there shall be no child of the said intended marriage, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then (without prejudice to the trusts hereinbefore declared) and from and after the decease of the said Sophia Marianne Crofton and such default or failure of children as aforesaid, the trustees or trustee for the time being of these presents do and shall hold the Crofton Trust Fund and the investments for the time being representing the same, or so much thereof respectively as shall not have become vested or been applied under any of the trusts, powers, or provisions herein contained, upon the trusts following—that is to say, if the said Sophia Marianne Crofton shall survive the said Henry Gray Brydone, then after his decease and such default or failure of children as aforesaid, in trust for the said Sophia Marianne Crofton, but if the said Sophia Marianne Crofton shall die in the lifetime of the said Henry Gray Brydone, then after her decease and such default or failure of children as aforesaid upon and for such trusts, intents, and purposes as the said Sophia Marianne Crofton shall, notwithstanding coverture, by will or codicil appoint, and in default of such appointment and so far as no such appointment shall extend, in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said Sophia Marianne Crofton if she had died possessed thereof intestate and without having been married."

The marriage was solemnized in June, 1870, and

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

on the 22nd of April, 1871, Mrs. Brydone died intestate, leaving two infant children (twins) surviving.

These children died about eight months after Mrs. Brydone's death.

In 1872 Mr. Brydone married again, and settled his life interest in the above fund on his second wife.

He died in December, 1901.

No appointment had been made under any of the powers contained in the settlement, and the trustees of the settlement now took out an originating summons for the determination of the question as to who were entitled to the fund under the ultimate trust, whether the wife's statutory next-of-kin (excluding the infant children) or the executor of the husband as representing the infant children.

Kekewich, J., on counsel admitting that the facts in this case were the same as *In re Mare, Mare* v. *Howey*, [1902] 2 Ch. 112, 50 W. R. Dig. 157, declined to have the question in dispute re-argued before him, and held that the representative of the deceased children was entitled to the fund. Under these circumstances the defendant, Elizabeth Susanna Blackburne, the sole next-of-kin of the wife, brought this appeal.

*Warrington, K.C.*, and *Joseph Tanner*, for next-of-kin of the wife.—There is nothing to induce the court to put an unnatural meaning upon these words. *Wilson* v. *Atkinson*, 4 De G. J. & S. 455, 13 W. R. Ch. Dig. 77, did not lay down any general rule, and all the authorities cited against us proceed on a mistaken view of the decision in *Wilson* v. *Atkinson*. In *Clarke* v. *Colls*, 9 H. L. Cas. 601, the words were "unmarried" and not "without having been married." In *In re Ball's Trust*, 27 W. R. 409, 11 Ch. D. 270, and *Upton* v. *Brown*, 28 W. R. 38, 12 Ch. D. 872, Fry, J., felt himself constrained to decide according to the supposed rule in *Wilson* v. *Atkinson*; but in *Emmins* v. *Bradford*, 28 W. R. 531, 13 Ch. D 493, Jessel, M.R., came to the conclusion that *Wilson* v. *Atkinson* had not laid down a general rule. *Hardman* v. *Maffett*, 13 L. R. Ir. 499, was a case on all fours with ours, and there the Irish Master of the Rolls followed the view of Jessel, M.R. In *Stoddart* v. *Saville*, 42 W. R. 361, [1894] 1 Ch. 480, Chitty, J., followed Fry, J., but in that case there was no trust for the issue of the marriage. *In re Arden's Settlement*, [1890] W. N. 204, was a very peculiar case. In *In re Deane's Trusts*, [1900] 1 Ir. R. 332, the Irish Master of the Rolls followed his former decision.

*Haldane, K.C.*, and *D. Pollock*, for the representative of the infant children.—In the case of a marriage settlement there is a strong presumption that you intend to benefit the issue of the marriage. In *Clarke* v. *Colls* that presumption was taken account of. The rule is this: Take the words as they stand, but if you find an intention, either written or presumed by law, you must take that into account. There is here a presumption of an intention to benefit the issue of a marriage rather than remote collaterals. This was the ground of the decision in *Wilson* v. *Atkinson*, which lays down a general rule of construction binding on this court. The principle laid down in *Wilson* v. *Atkinson* was the law at the time when this settlement was made. In this case the power of appointment is only in favour of children and not remoter issue, and no provision is made for the child of a son who might have married and died before attaining the age of twenty-one. In all the cases cited against us there was a general power of appointment.

They referred also to *In re Watson's Trusts*, 55 L. T. Rep. 316, 35 W. R. Dig. 220.

VAUGHAN WILLIAMS, L.J.—I think that in this case we must give to the words "without having been married" their natural meaning. It is argued that we ought not to do this, because, it is said, when you are dealing with a marriage settlement there is a presumption that the intending husband and wife intended to benefit the children of the marriage, and this presumption is so strong that it compels us to construe these words in a non-natural manner; so strong that it binds us to construe *nunquam nupta* as *innupta*. It is to my mind quite clear that Lord Cranworth did not recognize the existence of any such powerful presumption in the case of *Clarke* v. *Colls*, and the passage I am going to refer to is on p. 612 of the report (9 H. L. Cas.). The phrase which appeared in that case, it is true, was "unmarried" and not "without having been married," but he says this: "What is the meaning of the 'unmarried'? It may, without any violence to language, mean either 'without ever having been married,' or 'not having a husband living at death.' If the former construction be adopted, then, if the wife should survive her husband and afterwards marry and have children, her collateral relatives would take the fund to the exclusion of her own issue." That presumption, then, was not recognized by Lord Cranworth. But it is said that, although this may be so, the presumption is recognized in *Wilson* v. *Atkinson*. Now, firstly, as a matter of fact, there were special circumstances in that case which would have justified the decision without having recourse to any such principle. Of course if it could be clearly shown that the Court of Appeal did recognize that presumption, and, that in all cases of a marriage settlement where there is a clause, like the present, for the distribution of property in favour of the next-of-kin of the wife, such clause ought not to exclude issue of the marriage, we should be bound by the decision. And I am not forgetting that in *Stoddart* v. *Saville*, Chitty, J., did recognize *Wilson v. Atkinson* as laying down such a general rule and as having been acted on as an authority. Yet, notwithstanding that view, which was more or less shared by Fry, J., I do not think we ought to regard *Wilson* v. *Atkinson* as a decision by the Court of Appeal in which such a principle is recognized. It was unnecessary for the court to go that length. The circumstances in that case, in particular the declaration as to the illegitimate child, fully justified the conclusion arrived at by the court. It seems to me that we are left at large and are not bound to say that there is any presumption which compels us never to give any construction to these words which would result in the exclusion of issue. On the contrary, in each case one must look at what there is within the four corners of the settlement, and then see whether there is anything in the context which would justify us in departing from the natural meaning of the words used. I do not mean that in construing a marriage settlement the court will not more readily arrive at a conclusion which gives the husband and wife and children a benefit than at one which excludes them. But I cannot admit that there is a presumption powerful enough to override the natural meaning of words. I am not sure that in this particular case there is any need to go into *Wilson* v. *Atkinson*, because in this particular case not only do we not find anything which would assist us in coming to a conclusion which would not exclude the children, but there is everything to lead us to the conclusion that in this particular case there was no intention that the issue should take any benefit other than that expressly provided for them. If the cases are looked at, whatever may have been said in the judgments, there were always circumstances which of themselves would naturally lead to the

conclusion that in the particular case it could not have been intended to exclude children. Under these circumstances I do not propose to go through the cases one after another. It is sufficient for me to say that there are the cases of *Emmins* v. *Bradford*, *Hardman* v. *Maffett*, and *In re Deane's Trusts*, in which Jessel, M.R., and the Irish Master of the Rolls took the same view as that contained in my judgment. Kekewich, J., having regard to the previous decisions of Chitty, J., and Fry, J., did not feel himself justified in arriving at a conclusion in conflict with those decisions. In my judgment there is nothing in this case which prevents us giving these words their natural meaning, and herein I am following the almost express decision of Lord Cranworth.

ROMER, L.J.—I come to the same conclusion. I feel bound to say that I can find no ambiguity in the words of this particular clause. To my mind it is clear that the words should receive their natural meaning, unless there is anything in the instrument as a whole which would justify us in departing from that natural meaning. In my opinion there is nothing which would so justify us. It may be conceded that in the ordinary marriage settlement the children of the marriage are *primâ facie* the proper beneficiaries thereunder. It may very well be, and I do not doubt that where no provisions are made for the children of the marriage, or provisions obviously inadequate, we might be called on to say it would be unreasonable to give such words their ordinary meaning. But in this particular case I find a clear and adequate and proper provision for the children. There is no sufficient reason to justify the court in this particular case in failing to give these words their natural meaning. In my opinion there is no necessity binding this court to say that in all marriage settlements the clause "without having been married" must receive an artificial or special construction. In fact, in the present settlement, if you do not give those words their simple meaning, you will not be carrying out the intention of the parties to that settlement. It could not have been intended, when such careful provisions were made in the interests of children, that, in default of any child attaining a vested interest, the father should have been able to claim in form for them, in reality for himself.

There is only one possible state of circumstances which can be suggested as tending to show that the provisions in this settlement were not wholly reasonable. It was said that if a son married under twenty-one, had a son, and then died under twenty-one, his son would have been unprovided for. Well, the first thing I have to say is that such a state of circumstances is not very likely to occur, and the fact that such a contingency was not fully provided for is no sufficient argument to induce us not to give the words their proper natural meaning. In any case if another child obtained a vested interest under the settlement, the son who died under twenty-one would not be entitled to take a share. It appears to me that it was not intended that a son should attain a vested interest in such a case. The authorities on the matter were well dealt with by Swinfen Eady, J., in the case of *In re Smith's Settlement*, *ante*, p. 217, [1903] 1 Ch. 373, recently before him, and all I need say is that in *Wilson* v. *Atkinson* the learned Lords Justices decided on a settlement of a peculiar character.

COZENS-HARDY, L.J.—This case is important, because it raises the construction of a clause in a marriage settlement which is in almost common form. I doubt whether on perusing this particular clause any person could entertain a doubt as to its meaning. But it is argued that certain principles have been laid down by a series of cases which bind us to put a non-natural construction on these words. I can, however, find no rule laid down either by the Court of Appeal or the House of Lords which prevents us from giving these words their ordinary natural meaning. On the contrary, I think *Clarke* v. *Colls* a strong decision in favour of the appellants. It was pointed out in that case that the term "unmarried" was a word of dubious import, and might mean either "spinster" or "widow." Lord Cranworth expressly said that if the words used here, "without ever having been married," had been used, the decision in that case would have been different. In *Wilson* v. *Atkinson* the decision is plainly correct, but the case was decided on the context of a particular instrument. I adopt the judgment of Sir George Jessel, M.R., in *Emmins* v. *Bradford*, the judgments of the Irish Master of the Rolls in *Hardman* v. *Maffett* and *In re Deane's Trusts*, and the recent judgment of Swinfen Eady, J., in *In re Smith's Settlement*. No doubt there may be sometimes a context sufficient to justify the court in coming to another conclusion, as in *Wilson* v. *Atkinson*. I do not wish to decide what would be the effect if no provisions for children had been made in a settlement at all. Here a provision for children was made, and the ultimate trust only took effect in the event of no children attaining the age of twenty-one or marrying. The appeal must be allowed.

*Appeal allowed.*

Solicitors, *Bower, Colton, & Bower*, for *Mayo & Son*, Yeovil; *Quayle & Davey*; *Williamson, Hill, & Co*, for *Charlewood & Chesney*, Manchester.

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — March 31.

LONDON COUNTY COUNCIL v. WANDSWORTH BOROUGH COUNCIL. (a.)

*Metropolis—Management Acts—Street—New street—Paving expenses—Owners—Open space abutting on new street—Public body—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

*An open space, which had been dedicated to the public as a common or recreation ground, was, under the provisions of certain statutes, regulated and managed by the London County Council, as the successors of the Metropolitan Board of Works. The effect of the county council's statutory powers was that they could not use the common for any purposes except such as were subordinate to the public purposes to which it had been dedicated. They received rent for a refreshment-house which was erected on the common, and they also received yearly sums in respect of grazing rights and of licences to have gateways opening on the common; but the expenses of regulating and managing the common far exceeded the receipts.*

*Held, that the county council were not the owners of the common within the definition of "owner" in section* 250 *of the Metropolis Management Act*, 1855, *so as to make them liable to contribute to the expenses of paving a new street on which the common abutted.*

Vestry of Fulham *v.* Minter, 49 *W. R.* 415, [1901] 1 *K. B.* 501, *overruled.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) on a special case stated by a metropolitan police magistrate.

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(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The council of the metropolitan borough of Wandsworth, under section 77 of the Metropolis Management Act, 1862, claimed from the London County Council the sum of £319 19s., being the apportionment alleged to be payable by the London County Council as the owners of Tooting Bec Common, towards the expenses of paving a new street, called Rastell-avenue, in the parish of Streatham, and the metropolitan borough of Wandsworth.

Rastell-avenue was bounded on the eastern side by a row of houses and on the western side by Tooting Bec Common for a length of 474ft.

By the Metropolitan Commons Supplemental Act, 1873, a scheme relating to Tooting Bec Common, certified by the Inclosure Commissioners for England and Wales, pursuant to the provisions of the Metroplitan Commons Act, 1866, was confirmed. The scheme recited that the Manor of Tooting Bec had been purchased by Beriah Drew and Phillp William Flower, with the knowledge and approval of the Metropolitan Board of Works, to the intent that the commons or waste lands belonging to the said manor might be dedicated to the public as a recreation ground under the provisions of the Metropolitan Commons Act, 1866, and that it had been agreed that the said Beriah Drew and Philip William Flower, in pursuance of the object with which they bought the said manor, and to the intent that the same might be dedicated to the public, would transfer their purchase of and all their interest in the said manor, commons, and waste lands to the Metropolitan Board of Works, and the said board would accept the transfer thereof. The scheme provided that from and after the completion of the purchase by the Metropolitan Board of Works the commons or waste lands delineated in a plan deposited with the said Inclosure Commissioners, and comprising Tooting Bec Common, should for the purposes of the scheme be regulated and managed by the said board. The scheme conferred upon the board (*inter alia*) the following powers: The board may drain, plant, ornament, and improve the common as may be necessary, and, for the purpose of preserving the turf and grass, may enclose by fences for short periods such portions as may require rest to revive the same, and, for further protection of the common, may put up a post and chain defence against the straying of cattle along such portion of it as is marked by a dotted line in the said plan. No house or any other buildings shall be erected on the common, except such lodges or other buildings as may be necessary for the maintenance or management of the said common or recreation ground. The board may from time to time erect on the common such lodges and other buildings as may be necessary for the maintenance or management of the said common or recreation ground."

By section 14 of the Metropolitan Board of Works (Various Powers) Act, 1875, it was provided that the adjoining common of Tooting Graveney should be regulated and managed by the board as a place of recreation for the public, and for that purpose certain of the powers conferred on the board with reference to the management of Tooting Bec Common by the scheme and Act of 1873, including the above, were extended and made applicable to Tooting Graveney Common.

Tooting Bec Common and Tooting Graveney Common were regulated and managed by the Metropolitan Board of Works under the Acts and the scheme above mentioned down to the commencement of the operation of the Local Government Act, 1888, since which time they had been regulated and managed by the London County Council as the successors of the said board. Bye-laws relating to the said commons had been from time to time made by the said board and by the London County Council. The total area of the two commons was about 210 acres. On Tooting Graveney Common there was a lodge, of the gross rental value of about £30, necessary for the management of the common and occupied by an inspector in the employment of the London County Council, from whose wages a deduction was made in respect of the quarters provided for him in the lodge. On Tooting Bec Common there was a refreshment-house, which was let by the London County Council to a refreshment contractor at a rent of £30 a year, out of which the council paid repairs of the estimated amount of £5 a year. The county council let the rights of grazing under one entire contract over all the commons under their management and control for the sum of £210, of which the sum attributable to Tooting Bec and Tooting Graveney Commons was from £20 to £30. The county council received from the owners and occupiers of houses abutting on the said commons small annual payments, amounting in all to £5 19s. 6d., in respect of licences to have gateways opening on the said commons. The expenses incurred by the county council in the year 1898 to 1899 in respect of the management and regulation of the two commons amounted to £1,190 19s., while the total receipts (excluding the aforesaid sum of £5 19s 6d.) were £26 7s. 3d.—viz., £18 15s. from the refreshment-house and £7 12s. 3d. in respect of grazing rights. In the year 1899 to 1900 the expenses amounted to £1,518 11s. 9d. and the receipts to £55 15s. 3d.—viz., £24 9s. from the refreshment house and £31 6s. 3d. in respect of grazing rights.

The London County Council contended that they were not the owners of Tooting Bec Common within the meaning of the definition of the word "owner" in section 250 of the Metropolis Management Act, 1855; that the said common was not capable of being let at a rack-rent in consequence of the provisions of the above-mentioned Acts; and that they, the London County Council, did not and could not receive a rack-rent for the said common.

By section 250 of the Metropolis Management Act, 1855, the word "owner" shall mean "the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such lands or premises were let at a rack-rent."

The magistrate made an order against the London County Council for payment of the sum claimed, but stated this special case for the opinion of the court.

On the hearing of the special case the Divisional Court affirmed the decision of the magistrate on the authority of *Vestry of Fulham* v. *Minter*, 49 W. R. 415, [1901] 1 K. B. 501.

The London County Council appealed.

*Avory, K.C.*, and *Ryde*, for the appellants.

*Mattinson, K.C.*, and *J. C. Earle*, for the respondents.

*Cur. adv. vult.*

March 31.—VAUGHAN WILLIAMS, L.J., read the following judgment: It was decided in *Lambeth Overseers* v. *London County Council*, 46 W. R. 79, [1897] A. C. 625, following *Hare* v. *Overseers of Putney*, 29 W. R. 721, 7 Q. B. D. 223, that the public is not a rateable occupier. The question in this case is whether the public is or can be, within the meaning of the definition of the word "owner" in section 250 of the Metropolis Management Act, 1855, extended to land by section 77 of the Act of 1862, owner of land used by virtue of statutory provisions exclusively as a public recreation ground. Now, in

my judgment, this question cannot be disposed of on the authority of the rating cases which I have just cited. From an abstract point of view it is obvious that the question whether property dedicated to the public ought to contribute to poor rate is a very different question from the question whether such property ought to contribute to a road which is a convenience to the property. Moreover, it seems to me that the present case must necessarily be decided by ascertaining what is the true construction of the interpretation contained in section 250 of the Act of 1855. The terms of that section are: "'Owner' shall mean the person for the time being receiving the rack-rent of lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such lands or premises were let at a rack-rent." It seems plain that land may be so dedicated to public purposes that it cannot be let at a rack-rent at all, and in such case it seems to me to follow, from the decision of the Exchequer Chamber in *Plumstead Board of Works* v. *British Land Co.*, 23 W. R. 634, L. R. 10 Q. B. 203, that the persons in whom the legal title to such land was vested would not be owners within the meaning of section 250. The principle is thus stated by Lord Watson in *Great Eastern Railway Co.* v. *Hackney District Board of Works*, 31 W. R. 769, 8 App. Cas. 687: "The authorities cited in the course of the argument appear to me to establish this proposition—that the person vested with the property of heritable subjects which have been placed *extra commercium*, or are subject in perpetuity to the burden of a public right which deprives him of their beneficial use, is not an owner of land within the meaning of section 77 of the Act of 1862." And by Bowen, L.J., in *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379, the same principle is thus stated: "Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack-rent there ever could be an owner within the meaning of section 250, I very much doubt. I am inclined to think that, if this incapacity to be let were stamped on the premises, they never could have an owner within the meaning of section 250."

Applying the principle thus stated to the present case, we have to determine whether the county council could let these commons or any part of them at a rack-rent; and in considering this question I do not think that it is of any importance that it is a part only of the land which is so let or could be so let; nor do I think it of any importance that the payment received or which could be received is taken in a form in which rack-rent is not ordinarily taken, such, for instance, as by way of reduction of wages, or payment for the temporary right to take the herbage, or payment for the right to temporarily occupy a bandstand or a refreshment stall. The form is immaterial if that which is taken is the equivalent of rack-rent: *Vestry of St. Giles, Camberwell* v. *London Cemetery Co.*, 42 W. R. 446, [1894] 1 Q. B. 699. Again I do not think that the fact that the statutory conditions under which the land is held prevent so high a rent from being obtained as might have been obtained but for the limitations of user imposed by those conditions, negatives the rent received being a rack-rent within the meaning of the definition. What we have to determine is whether or not the dedication of the land to public purposes so that the use of it for any purpose must be a use subordinate to the public purposes to which —to use the words of Lord Fitzgerald in *Great Eastern Railway Co.* v. *Hackney Board of Works*—the park or recreation ground is in its whole devoted, excludes those in whom the land is legally vested from the category of owners within the meaning of section 250 of the Metropolis Management Act, 1855. The fact that the legal owners have no beneficial ownership, but are merely trustees, does not by the very terms of the section exclude them from the category of owners. Does the fact that they are trustees for the public exclude them? I have come to the conclusion that it does.

Apart from some such overriding limitation of the words of section 250 as is indicated by Lords Watson and Fitzgerald in *Great Eastern Railway Co.* v. *Hackney Board of Works*, I should have come to the same conclusion myself as that arrived at in *Vestry of Fulham* v. *Minter* by Bruce and Phillimore, JJ., and Mr. Rose, the magistrate. In my opinion the London County Council are the owners of land bounding or abutting on the street. They are trustees for the public, and would receive the rack-rent of the land as I think it lawfully might be without interfering with the purposes to which the land is devoted by statute. This in effect is the same conclusion as that arrived at by Mr. Rose in *Vestry of Fulham* v. *Minter*; but I think that the receipt of such rack-rent would be subordinate to the public purposes to which these parks or recreation grounds are wholly devoted. This is not a case where the rents received show a surplus after providing for the expenses of the execution of the statutory purposes. I think that such dedication to the public places the land *extra commercium*, and that the burden of the public right deprives those in whom the legal estate and possession is vested of the beneficial ownership or occupation of such land. In this case the Divisional Court only followed the decision in *Vestry of Fulham* v. *Minter*, which bound them. It does not bind us, and, as we think it was wrongly decided, we must reverse the decision of the Divisional Court.

STIRLING, L.J., read the following judgment: The question in this special case is whether the London County Council are the owners of Tooting Bec Common within the meaning of section 250 of the Metropolis Management Act, 1855, so as to be liable to contribute to the cost of a new street on which part of the common abuts. The section referred to provides that the word "owner" in the Act shall (with exceptions unnecessary to be mentioned) "mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such lands or premises were let at a rack-rent." The Divisional Court has in the circumstances held, on the authority of a previous decision of the same court (*Vestry of Fulham* v. *Minter*), that the London County Council are the owners of the common in question within the meaning of the section in question, and from this decision the council have appealed.

The meaning of the definition of owner in section 250 of the Metropolis Management Act of 1855, and of the similar definition in the Public Health Act of 1875, has been repeatedly considered by the courts. In *Hornsey District Council* v. *Smith*, 45 W. R. 581, [1897] 1 Ch. 843, A. L. Smith, L.J., delivering the judgment of the Court of Appeal, after stating in some detail the two cases of *Plumstead Board of Works* v. *British Land Co.*, in the Exchequer Chamber, and *Great Eastern Railway Co* v. *Hackney District Board of Works*, says: "These two cases, in our judgment, show that, if land be by statute for ever incapable of yielding a rack-rent, the owner thereof is not 'owner' within the meaning of the Acts." I respectfully agree with this conclusion.

The question then reduces itself to this, whether the land is by statute for ever incapable of yielding a

rack-rent. In *Plumstead Board of Works* v. *British Land Co.* the lands in question were roads dedicated to the public. In *Great Eastern Railway Co.* v. *Hackney District Board of Works* the "lands" consisted of the parapets of a bridge erected over a cutting in which the Great Eastern Railway runs. It was suggested that the walls of the parapets might be turned to profitable use by the company by letting the surfaces for posting advertisements. On this Lord Watson observed: "The suggestion is ingenious, and may or may not have some possible foundation in fact, but it fails to satisfy me that the Legislature in framing the Metropolis Management Acts intended to deal with the surface of a mere roadside fence as 'land' which might be let at a rack-rent." With this Lord Blackburn expressed his concurrence. Lord FitzGerald says: "The bridge is by the statute dedicated to public use, and its fence walls are provided for public protection; and if the ownership and control of the walls is in the company, it is so for public purposes and subject to the obligation of perpetual maintenance, unless and until some other good and sufficient fences shall be provided by the company in their stead for the public protection. The company could not let the walls at a rack-rent, and if they might use them for any purpose it must be a use subordinate to the public purposes to which the bridge as a structure is in its whole devoted." These passages seem to me to establish that, although land dedicated to public purposes may be, or be capable of being, used for some purpose of profit, it does not follow that it is, or can be, let at a rack-rent.

Now, Tooting Bec Common is by the scheme and statute of 1873 dedicated to the public as a "common or recreation ground." The extent of the rights of the public is shown by this, that it was considered necessary to insert express provisions authorizing the Metropolitan Board of Works to fence off for short periods such portions of the turf and grass as might require rest, and also to put up on a defined portion a post and chain fence for the protection of the common against the straying of cattle. These rights of the public appear to me to be such as to render the common as a whole incapable of being let at a rack-rent. It is stated in the special case that the common is let for grazing purposes; but I take this to mean that licences have been granted to feed sheep and cattle thereon subject to and consistently with the rights of the public; and any payments made in consideration of such licences appear to me to be similar in their nature to the profits which were suggested in *Great Eastern Railway Co.* v. *Hackney District Board of Works* as possible to be earned by the letting of the parapet walls for advertisements. At all events, the letting for grazing purposes mentioned in the case does not, in my judgment, constitute a letting at a rack-rent. Still less can this be said of the arrangements under which some small sums amounting to £5 19s. 6d. are paid in respect of licences granted to adjoining owners to have gateways opening on the commons with the view of preventing private rights being acquired by them. There are, however, two buildings to be considered—viz., the refreshment room built on Tooting Bec Common and the inspector's lodge built on Tooting Graveney Common. Of these the former is the more important, first, because it is situate on Tooting Bec Common, and, secondly, because it is let to a contractor at an annual rent of £30. Now, if this building abutted on the new street, I should, as at present advised, feel some difficulty in holding that the London County Council were not liable to contribute in respect of it. In fact, however, it is situate at a considerable distance from the new street and on a different part of the common. In the present case the London County Council are sought to be made liable, not in respect of this building as the owners of a house under section 105 of the Metropolis Management Act of 1855, but in respect of a portion of the common free from any building and as owners of land bounding or abutting on a new street under section 77 of the Act of 1862. The existence of the building can only be, and (I assume) is, justified as being "necessary for the maintenance or management of the common or recreation ground." If it be true, as I think, that the portion of the common which abuts on the new street is incapable of being let at a rack-rent, I do not see that the case is altered because the London County Council have for the purpose just mentioned seen fit to erect on another part of the common a building which is capable of being so let. For the like reason, the existence of the lodge on Tooting Graveney Common does not appear to me to create a liability on the part of the London County Council. On the whole, I arrive at the conclusion that the appeal ought to be allowed.

MATHEW, L.J., read the following judgment: I cannot agree with the Divisional Court in the interpretation put in the case of *Vestry of Fulham* v. *Minter* upon section 250 of the Metropolis Management Act, 1855. I do not think that the county council were owners of the land in question, nor were the moneys received by them a rack-rent within the meaning of the section. The county council had the legal estate in the land, which was vested in them for the perpetual use thereof by the public for exercise and recreation, and the erection thereon of such buildings and appliances as they might think requisite for those and the like purposes. They were in fact for those ends the custodians and managers of the property. The premises could not be let at a rack-rent and could not be profitably occupied by the county council. Their tenure meant, as is shown by the figures stated in the case, not income, but expenditure. Section 250, it seems to me, was intended to describe persons who had or who represented proprietary rights in premises abutting upon a street. The charge for the improvements in question might properly be imposed upon such persons, because the value of their interests was likely to be enhanced by the outlay. I do not think that the definition was intended to include imaginary or hypothetical owners. So far as the county council was concerned the land by Act of Parliament was rendered sterile and deprived of any commercial value. I am also unable to concur in the view that the moneys paid to the county council ought to be regarded as the best rent which could be obtained and therefore amounted to a rack-rent. The small sums received from the structures and appliances which the county council were empowered to provide bore no relation to the intrinsic value of the land. They have the character of the land upon which they stand. They are, like the land, devoted to the public purposes intended to be served. With respect to the receipts for herbage it was necessary that the grass should be kept down, and this purpose was served by letting it to be grazed by sheep. This was probably a more economical process than mowing the grass from time to time and casting it away. I think the appeal must be allowed.

*Appeal allowed.*

Solicitor for the appellants, *W. A. Blaxland.*

Solicitors for the respondents, *W. W. Young & Son.*

From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) March 26.

LANGRISH v. WATTS. (a.)

*Limitations, Statute of—Acknowledgment—Promise to pay—Promise to pay sum found due on accounts taken—21 Jac. 1, c. 16.*

*The defendant, whose debt of £100 to the plaintiff, his uncle, was barred by the Statute of Limitations, wrote to the plaintiff's wife within six years before action a letter in which he said that he was sorry at not having been able to pay it off long ago, that he was unable to satisfy himself as to the exact amount owing, but that he had some note of what he had paid back, and asking for particulars, adding that he would do his best to pay back what he owed. The plaintiff's wife having replied that the plaintiff denied that anything had been paid off, the defendant wrote to her as follows: "I must say your letter was a great surprise to me. I was well aware that I did give uncle a note for £100 originally, but subsequently I gave him a cheque for £40, because I kept the stub of the cheque, and I am almost positive I also gave him another cheque for £20, reducing the amount at the time I left home to £40. How it is uncle did not credit me with it, I cannot think; but if he hunts up his old bank books he will be able to trace up the amounts, and I feel sure he will be satisfied that I am correct. Anyway I hope so. Just at present I cannot lay my hand upon my bank book of that date, or would be more positive on the subject. At present I have no money on hand, having bought some houses out of the portion I got, but as soon as there is another division I will send uncle some. In the meantime I hope you will hunt up the required information." Since that letter "another division" (i.e., of property under a will) had taken place. In an action to recover the £100 and interest, the judge found that no part of the £100 had been repaid.*

*Held, that the letter, though not an acknowledgment of the debt of £100, contained a promise to pay the amount which might be found due from the defendant upon the accounts being taken, and that therefore the Statute of Limitations was no bar to the action.*

Appeal from the judgment of Bruce, J.

The action was brought to recover £201 15s. 10d. for principal and interest on a promissory note for £100, made by the defendant and dated the 9th of December, 1881, and payable with interest at £5 per cent. per annum to the plaintiff on demand.

The defendant did not deny the making of the note or that the plaintiff had lent him £100 on the date named, but alleged that he had repaid a portion of it, and also set up the Statute of Limitations (21 Jac. 1, c. 16). The main question was whether certain letters written by the defendant to the plaintiff's wife in 1901 contained an admission of the debt and promise to pay sufficient to take the case out of the statute.

On the 27th of June, 1901, the defendant wrote to the plaintiff's wife: "Dear Aunt Bessie,—On hearing from Maud this morning I was sorry to find that uncle had thought it necessary to get Mary to remind me of the promise I made when I saw him last. I fully intended to attend to it at once; but ever since then I have had such a constant drain upon my small means in consequence of my wife's terrible illness that I had put it off, thinking that there would soon be another division, and I should be placed in a better position to meet my obligation to uncle. I am very sorry I have never been in a position to have paid it off years ago. My papers have got considerably mixed up, and I cannot satisfy myself quite as to the exact amount I was owing uncle when I left home the first time. I have some note of what I paid back; but to clear up the subject I shall be pleased if you can furnish me with particulars to check them with mine, and I will do my best to pay back what I owe. I am writing this to you, as I expect uncle has very little to do with business affairs now. . . ." The plaintiff's wife replied that the plaintiff denied that any of the money had been repaid. To this the defendant answered, on the 10th of July, 1901, as follows: "Dear Aunt,—I must say your letter was a great surprise to me. I was well aware that I did give uncle a note for £100 originally, but subsequently I gave him a cheque for £40, because I kept the stub of the cheque, and I am almost positive I also gave him another cheque for £20, reducing the amount at the time I left home to £40. How it is uncle did not credit me with it, I cannot think; but if he hunts up his old bank-books he will be able to trace up the amounts, and I feel sure he will be satisfied that I am correct. Anyway I hope so. Just at present I cannot lay my hand upon my bank book of that date, or would be more positive on the subject. At present I have no money on hand, having bought some houses out of the portion I got, but as soon as there is another division I will send uncle some. In the meantime I hope you will be able to hunt up the required information." The plaintiff's wife having again written that the plaintiff denied having received payment of any part of the sum, the defendant, on the 29th of October, 1901, wrote to the plaintiff a letter, of which the following were the material parts: "I expect to be down shortly, and will call to see you about the note. If by any means I am not down before long, I will take other means of fixing up the matter. I cannot understand how it is you have no record of the amount I paid you. I am sorry to say that some of my papers have got mislaid or lost, which makes it very awkward, but I may be able to get some information at the bank at Farnham, as I drew a cheque for the amount paid. Anyway I hope to make you a satisfactory settlement." On the 23rd of November, 1901, the defendant wrote: "Dear Aunt,—In reply to your last letter I beg to say that I do not expect to be down for some time, so to save any trouble in the matter I have placed it in my solicitor's hands for adjustment. You will hear from him in the course of a few posts." It was admitted that since the letter of the 10th of July, 1901, there had been "another division"—*i.e.*, a division of property under the will of the defendant's father.

Bruce, J., was of opinion that there was no evidence of repayment of any part of the £100; and he held that, though the letters did not contain an acknowledgment of the debt, the letter of the 10th of July contained a clear conditional promise to pay upon "another division" taking place, and that, the division of money having taken place, the promise to pay was sufficient to take the whole debt out of the statute. He accordingly gave judgment for the plaintiff for the amount claimed.

*Moyses*, for the defendant.—There was no unconditional acknowledgment of the debt from which a promise to pay can be implied, nor was there any express promise to pay. Secondly, there was at most an acknowledgment that £40 was due. An acknowledgment that part of a debt is due cannot revive the whole original debt. Such an acknowledgment can at the most only support a promise to pay the part admitted to be due. *Prance* v. *Sympson*, Kay 678, 3 W. R. Ch. Dig. 42, only decides that an acknow-

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

ledgment that an account is pending and a promise to pay the amount found due on taking the account takes the case out of the statute. That is not the case here.

He also referred to *Tanner* v. *Smart*, 6 B. & C. 603; *Dabbs* v. *Humphries*, 10 Bing. 446; *Buckmaster* v. *Russell*, 9 W. R. 749, 10 C. B. N. S. 745; *Mowbray* v. *Appleby*, 80 L. T. Rep. 805, 47 W. R. Dig. 103.

*H. Holman Gregory*, for the plaintiff.—The true construction of the letters is that the defendant promised to pay the amount which should be found due upon inquiry. That amount has now been found to be £100 and interest. *Skeet* v. *Lindsay*, 25 W. R. 322, 2 Ex. D. 314; *Sidwell* v. *Mason*, 5 W. R. 729, 2 H. & N. 306; and *Prance* v. *Sympson*, all showed that such a promise would take the case out of the statute.

*Moyses* replied.

VAUGHAN WILLIAMS, L.J.—Questions upon the Statute of Limitations are nearly always troublesome to deal with. Where the time specified by the Statute of Limitations has run, the Legislature has said that, unless there has been either an acknowledgment of the debt from which the law will imply a promise to pay, or an express promise to pay, the action is barred. Full effect must be given to the law upon the subject. Taking that view, in my opinion the decision in *Buckmaster* v. *Russell* was perfectly right. That case decided two points. It was decided, first, that there was no sufficient acknowledgment of the debt; and, secondly, that if there was a fresh conditional promise to pay, the plaintiff could only sue upon the fresh promise if the condition was fulfilled, and, in that event, he could not sue upon the fresh promise for anything beyond that which was stated in the promise itself. In that case the letter relied upon as an acknowledgment of the debt was as follows: "Gentlemen,—I have received a letter from Messrs. Peard & Langdon, solicitors, of Barnstaple, requesting me to pay you an account of £40 9s. 6d. I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army in 1851. But, as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly." The court held that, as the special proposal was not accepted by the creditors, it could not be sued upon; and that, apart from that, there was no sufficient acknowledgment of the debt from which a promise to pay could be fairly inferred. When one looks at that part of the correspondence in the present case in which it is said that an acknowledgment of the original debt is contained, I entirely agree with Bruce, J., that the language can not be construed, without unduly straining it, as an acknowledgment of the original debt. It is impossible to read the letters of the 27th of June or the 10th of July as containing an acknowledgment of indebtedness for £100. By the letter of the 10th of July the defendant admitted £40 was due. I cannot read the letter as admitting £100 to be due. In these circumstances I agree with Bruce, J., that there is no acknowledgment of such a nature as to raise an implied promise to pay the original debt of £100. The learned judge, however, went on to deal with the case upon another view—namely, that the letters contained an invitation to take an account, coupled with a promise to pay the amount found due. The letters may mean that if an account is taken and it is ascertained how much the defendant has to pay, the defendant will pay it. The case seems to me to be on the border line, and I cannot say that Bruce, J., has not arrived to a right conclusion. There is ample authority in *Prance* v. *Sympson*, *Sidwell* v. *Mason*, and *Skeet* v. *Lindsay* that a promise to pay the balance of the original debt found due upon the taking the accounts between the parties is sufficient to take the case out of the Statute of Limitations. In substance in those cases, speaking of the common law cases apart from the claim in equity for an account, it is as if the defendant had said that he did not think that he owed more than a certain sum, but that if the vouchers were sent in he would pay what was found due. That is a promise to pay subject to a business operation being gone through. That operation was gone through in the present case at the trial. The appeal must, therefore, be dismissed.

STIRLING, L.J.—I am of the same opinion. I agree with Bruce, J., that there is no unconditional acknowledgment of the whole debt of £100 from which a promise to pay it can be implied. In the letter, however, of the 10th of July the defendant said that "as soon as there is another division I will send uncle some." It is admitted that another division has taken place; and, therefore, the condition has been fulfilled. What is the meaning of "I will send uncle some"? We start with the defendant's admission that he originally owed the plaintiff £100, and he says in his letters that he gave him a cheque for £40, and that he is almost positive that he also gave him another cheque for £20. So far, that is an admission that £40 is due. That is not enough. The question is whether there is a promise to pay the whole £100. In my opinion, the defendant meant by the words "I will send uncle some" that he would send him £40; but if upon a proper investigation it was found that he had not paid anything off the original debt he would pay the full amount. That being so, the judgment of the learned judge was right.

MATHEW, L.J.—I am of the same opinion. Upon reading the correspondence, it seems to me that it is impossible to come to any other conclusion than that the defendant promised that if the accounts were gone into between him and the plaintiff he would pay the amount found due. The defendant's proposal was that the accounts should be gone into between his uncle and himself. The cases of *Skeet* v. *Lindsay*, *Sidwell* v. *Mason*, and *Prance* v. *Sympson* are authorities in point. *Buckmaster* v. *Russell* is, in my opinion, a very different case from this. The suggested acknowledgment in that case contained in the earlier part of the defendant's letter was not an acknowledgment of the existence of the debt. On the contrary, it denied the existence of the debt. There was in that case no acknowledgment and no promise to pay the debt. It is clear that that case is not an authority in point, and it is not touched by our decision in the present case.

*Appeal dismissed.*

Solicitors for the plaintiff, *Church, Adams, & Prior*, for *C. & W. Trimmer*, Alton.

Solicitors for the defendant, *Kingsbury & Turner*.

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From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 19; March 20.

BISS v. BISS. (a.)

*Trustee — Lease — Renewal — Personal incapacity to benefit—Partial interest—Absence of unfair dealing—Rebuttable presumption of law.*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*The mere fact that a person has only a partial interest in a lease does not in itself disentitle him to take a renewal of the lease for his own benefit. Any presumption of law that the renewal is for the benefit of all the persons interested in the original lease may be rebutted by evidence that there has been no fraud or unfair dealing towards the other persons interested on the part of the person obtaining the renewal, provided that his position with regard to them is neither clearly fiduciary nor of such a special character that he owes a duty towards them by virtue thereof; in either of which cases the presumption of law of his personal incapacity to retain the benefit is irrebuttable.*

This was an appeal from a decision of Buckley, J.

The plaintiffs were the children of John Biss, who died intestate on the 23rd of September, 1900.

The defendant is the widow and administratrix of John Biss. At the time of his death the deceased was tenant from year to year of a house let to him by one Stone. John Biss had formerly held the house for a term of seven years from Lady Day, 1887, at a rent of £80. Stone had refused to renew the lease, but had allowed him to remain on as tenant from year to year at a rent of £84 a year.

On the death of John Biss the defendant was appointed his administratrix, and a receiver had been appointed by the court in May, 1901, in this action, which was instituted by the plaintiff, J. E. Biss, to obtain administration of the intestate's estate.

As Stone's own term was about to expire on the 25th of March, 1902, he, on the 23rd of September, 1901, gave notice to quit the premises from the 25th of March following.

John Biss had left three children, the plaintiff and a daughter by a former marriage, both of full age, and an infant daughter by the defendant.

On the death of John Biss negotiations had been opened by the widow for a new term, according to Stone, on her own behalf, but, as she said, on behalf of the estate. Stone refused in the most absolute terms to entertain any proposition for a renewal either to her or to anyone representing the estate, and he sent to the receiver a letter of the 17th of March, 1902, as follows: "With regard to your inquiry as to renewal of the above premises I beg to inform you that I positively decline any negotiations for renewal either to Mrs. Biss or to anyone representing the estate of the late Mr. John Biss. I have already rejected Mrs. Biss's application in this connection, and if I let the premises again it will be for the express purpose of offering it to Mr. J. E. Biss, jun., as a matter of respect for him and his late father, but this, of course, is entirely a matter between Mr. John E. Biss, jun., and myself."

The plaintiff, J. E. Biss (who was the person referred to in the letter as John Biss, jun.), had himself called on Stone in the previous February on learning that the receiver had been served with a notice to quit, with a view to a renewal for the benefit of the estate, which Stone had declined to make.

Carrying out the intention expressed in his letter, Stone obtained a renewal himself and offered the premises to the plaintiff on a three years' agreement at a rent of £95 a year, which the plaintiff accepted. It was proved that the deceased had used the premises as a lodging-house, and that the business had yielded a profit.

The defendant took out a summons in the administration action to have the plaintiff declared a trustee of the premises for all parties interested in the estate.

Buckley, J., was of opinion that there had been nothing in the plaintiff's conduct which was unfair so as to disentitle him to the benefit of the renewal, but he held, on the authority of *Ex parte Grace*, 1 Bos. & P. 376, that the plaintiff must be considered to stand in such a position as to be under a personal incapacity to accept the renewal otherwise than as trustee for all all persons interested in the estate.

The plaintiff appealed.

*Astbury, K.C.*, and *Ashton Cross*, for the appellant.—Buckley, J., was of opinion that *Ex parte Grace*, covered the present case. We submit that the cases are distinct. In that case the administratrix was jointly interested in the lease with an infant. As she stood in a fiduciary relation to the infant she could not have obtained a renewal of the lease for her own benefit, and her husband, who actually obtained the renewal, was in no better position. The doctrine of *Keech* v. *Sandford*, 2 White & Tudor L. C. 693, only applies where a fiduciary relationship exists, at any rate where there is no custom to renew. But the plaintiff at the time when he got the lease was in no way a trustee for the other persons interested in the estate. No fiduciary relationship exists between tenants in common of real estate: *Kennedy* v. *De Trafford*, 45 W. R. 671, [1897] A. C. 180.

They also referred to *Longton* v. *Wilsby*, 76 L. T. Rep. 770, 45 W. R. Dig. 165, and *James* v. *Dean*, 11 Ves. 383.

*T. H. Carson, K.C.*, and *J. G. Wood*, for the respondent.—The principle of *Keech* v. *Sandford* has been applied to cases where there was no covenant for perpetual renewal and no custom to renew, and the refusal of the landlord in the present case to renew is immaterial. The principle is that if a person possessing a partial interest in a lease obtains a renewal on his own account he is a trustee for all the persons interested in the old lease. The case of *Palmer* v. *Young*, 1 Vern. 276, is a direct authority to show that a joint tenant is such a person. The reason is that where several persons are interested in a lease they are deemed in equity to be also interested in any benefits which they may be able to obtain from their position as lessees, and such benefits are treated as an accretion to the original estate. Consequently, if one of them obtains a renewal on his own behalf, he is not allowed to take the benefit of this accretion to the original estate for himself, as this would be to increase his interest at the expense of others, who would be deprived of their interest in the tenant right of renewal arising out of the old lease.

The following cases were cited in the course of the argument: *Fitzgibbon* v. *Scanlan*, 1 Dow, 261; *Rawe* v. *Chichester*, Amb. 715; *Pickering* v. *Vowles*, 1 Bro. C. C. 197; *Hamilton* v. *Denny*, 1 Ball. & Beat. 199; *Jackson* v. *Welsh*, Ll. & G. *temp.* Plunket, 346; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; *Dicconson* v. *Talbot*, 19 W. R. 138, L. R. 6 Ch. App. 32; *Quinton* v. *Frith*, Ir. R. 2 Eq. 396, 17 W. R. Ch. Dig. 54, 99; *Warner* v. *Jacob*, 30 W. R. 731, 20 Ch. D. 220; *Rushworth's case*, 2 Freem. 13; *Rakestraw* v. *Brewer*, 2 P. Wms. 511; *Holmes* v. *Williams*, [1895] W. N. 116; and *In re Lord Ranelagh's Will, Beeton* v. *London School Board*, 32 W. R. 714, 26 Ch. D. 370.

*Astbury, K.C.*, replied.

*Cur. adv. vult.*

March 19.—COLLINS, M.R.—[His lordship stated the facts and continued:] Buckley, J., considered himself bound by *Ex parte Grace*, and but for that case his mind, as I understand his judgment, was in favour of the plaintiff. He considered that that case compelled him to hold that the plaintiff stood in such a position as to be under a personal incapacity to accept a renewal otherwise than as trustee for all persons interested in the estate. If, on

the other hand, he was at liberty to consider the special circumstances under which the renewal was affected, his view was, and I think it is entirely borne out by the affidavits, that there was nothing in the plaintiff's conduct which was unfair or such as to disentitle him to retain the benefit of the renewal. There are no doubt many cases in which the presumption of personal incapacity to retain the benefit is one of law and cannot be rebutted. The simplest instance is that of a trustee, as in *Keech* v. *Sandford*, but the principle has been extended to cover other persons who are not primarily trustees at all—for instance, tenants for life. The foundation of the presumption in their case is that they can take only what the will or settlement under which they make title gives them, and that a renewal must be looked on as an accretion to or graft upon the original term arising out of the goodwill or *quasi*-tenant right annexed thereto, and their rights to such accretion are those which they have in the term and no greater, and must therefore terminate with their own life: *Tuster* v. *Marriott*, Amb. 668; *Rawe* v. *Chichester*; *James* v. *Dean*; and other cases cited Lewin on Trusts (10th ed.), p. 193. But there is another class of cases in which, as it seems to me, there is no presumption of law but at most a rebuttable presumption of fact. In this class apparently are mortgagees (*Rushworth's case*), joint tenants (*Palmer* v. *Young*), partners (*Featherstonhaugh* v. *Fenwick*, 17 Ves 298). *Primâ facie* a mortgagee cannot renew for himself. He cannot hold the accretion any more than he can hold the term itself free from the right to redeem. The reason here is analogous to that which governs the rights of tenants for life. But in this case the presumption is apparently rebuttable, and in *Nesbitt* v. *Tredennick*, 1 Ball. & Beat. 29, Lord Manners held it was rebutted. He said: "Here no part of Nesbitt's conduct shows a contrivance, nor was he in possession; all that Nesbitt or Tredennick treated for was a new lease, giving, however, full opportunity to the plaintiffs to dispose of their interests or to renew if they were enabled so to do." As to partners, "It is clear," says Sir W. Grant, "that one partner cannot treat *privately and behind the back of his co-partners* for a lease of the premises where the joint trade is carried on for his own individual benefit. If he does so treat and obtains a lease in his own name it is a trust for the partnership" (*Featherstonhaugh* v. *Fenwick*, 17 Ves., at p. 311), and he then proceeds to examine the facts on that basis, and finds unfair dealing in fact. A joint tenant who is not a partner can be under no higher obligation.

Tenants in common do not stand in a fiduciary relation to each other (*Kennedy* v. *De Trafford*), and one of two mortgagors, tenants in common, is not debarred from buying for himself the undivided equity of redemption in the whole.

The reason of the rule in the case of trustees and others whose liability is absolute and irrebuttable is said to be public policy (*Griffin* v. *Griffin*, 1 Sch. & Lef. 352, at p. 354, per Lord Redesdale; *Blewett* v. *Millett*, 7 Bro. P. C. 367), and is based, it would seem, largely upon the fact that possession gives to such persons an opportunity of renewal (*Pickering* v. *Vowles*, 1 Bro. Ch. C., at p. 198, per Lord Thurlow), acting on the goodwill that accompanies it (*James* v. *Dean*, 11 Ves., at p. 395, per Lord Eldon). It may well be, therefore, that different considerations apply in the case of persons not in possession.

In the present case the plaintiff is simply one of the next-of-kin of the former tenant, and had as such a possible interest in the term. He was not as such a trustee for the others interested, nor was he in possession. The administratrix represented the estate, and alone had the right to renew incident thereto, and she unquestionably could renew only for the benefit of the estate. But is the plaintiff in the same category, or is he entitled to go into the facts to show that he has not in point of fact abused his position or in any sense intercepted an advantage coming by way of accretion to the estate? He did not take under a will or a settlement, with interests coming after his own, but simply got a possible share upon an intestacy in case there was a surplus of assets over debts. It seems to me that his obligation cannot be put higher than that of any other tenant in common against whom it would have to be established, not as a presumption of law, but as an inference of fact, that he had abused his position. If he is not under a personal incapacity to take a benefit he is entitled to show that the renewal was not in fact an accretion to the original term, and that it was not until there had been an absolute refusal on the part of the lessor, and after full opportunity to the administratrix to procure a renewal for the estate if she could, that he accepted a proposal of renewal made to him by the lessor. This question cannot be considered or discussed when the party is by his position debarred from keeping a personal advantage derived directly or indirectly out of his fiduciary or *quasi*-fiduciary position, but when he is not so debarred I think it becomes a question of fact whether that which he had received was in his hands an accretion to the interests of the deceased or whether the connection between the estate and the renewal had not been wholly severed by the action of the lessor before the plaintiff had accepted the new lease.

This consideration seems to get rid of any difficulty that might be caused by the fact that one of the next-of-kin was an infant. The right or hope of renewal incident to the estate was determined before the plaintiff intervened. *Ex parte Grace*, by which Buckley, J., conceived himself bound, does not in my opinion cover the present case. There Grace had married the administratrix of the deceased owner of the term, and held the term in her right and subject to the trusts on which she held it. He was therefore in no better position than she would have been had she, being unmarried, obtained a renewal. *Keech* v. *Sandford* was directly in point, and the renewed term could not be held otherwise than as part of the estate. I may also point out that in *Ex parte Grace*, even if the beneficial interests only of those entitled to the old lease which was renewed are looked at, there were ample grounds for supporting the decision, for the old lease belonged partly to an infant, and when possession of the demised premises was taken by the stepfather, the latter (who renewed the lease) became in contemplation of law a bailiff or agent for the infant in respect of the infant's share or interest, and was therefore in that capacity also in a strictly fiduciary position when he applied for a renewal: see Coke on Littleton, 90*a*; *Thomas* v. *Thomas*, 3 W. R. 135, 2 Kay & J. 79; *Quinton* v. *Frith*, where the cases are collected.

The case, as Buckley, J., says, seems to be somewhat loosely reported, but the *dicta* must be read in reference to the true facts.

Some reliance was placed by the respondent on the *dictum* of Lord Bathurst in *Rawe* v. *Chichester*, Amb. at p. 719, that "if trustees, mortgagees, or other persons interested obtain renewal, the new lease is always subject to the trusts and limitations of the old lease." But the cases cited by him show that he had not in his mind such an interest as that of the plaintiff in this case. No decision has in fact gone so far as we are asked to go here, and in my opinion, the principle to be extracted from the authorities does not cover this case. Public policy, which is said to be the basis

of the principle, does not seem to me to require that every person who takes an interest, however slight, in the estate of which a lease formed a part should be under a personal incapacity to hold a renewal of such lease in his own right. While, therefore, I am bound to differ from the actual decision of the learned judge, I feel that I am giving effect to his own view. The appeal must be allowed.

ROMER, L.J.—I agree with the judgment of Collins, M.R. I will not add anything to what he has said about the case of *Ex parte Grace* on the authority of which my brother Buckley decided this case. But since the arguments of this appeal I have had an opportunity of looking at most of the authorities bearing on the subject, and I think it may be useful if I add some observations upon them. I am induced to do this because there are some *dicta* of judges (notably of Bathurst, L.C., in *Rawe* v. *Chichester*), and some statements in text-books which might lead to the supposition that if any person who is partially interested in an old lease obtains from the lessor a renewal he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances in which he obtained the new lease. In my opinion the authorities when examined carefully, do not support any such general proposition. I will endeavour to state as shortly as I can to what extent they have gone. In the first place, as far as regards the circumstances under which the new lease is obtained the equitable doctrine I am considering is not limited in its application to cases where the old lease was renewable by agreement or custom, or where the new lease was obtained by surrender or before the expiration of the old lease. There may well be and often is an advantage for the purpose of obtaining a new lease in being in the position of an old lessee, and that advantage may be of appreciable value in the view of a court administering equity, even though the landlord is under no obligation to grant a new lease to the old tenant. Further, I may note here that the cases show that with regard to a person obtaining a renewal who occupies a fiduciary position it is contrary to public policy to allow him to rebut the presumption that in obtaining a renewal he acted in the interests of all persons interested in the old lease. I may also add that some of the decided cases where persons not in a fiduciary position obtaining renewal have been held to be constructive trustees, depend upon the fact that those persons acted fraudulently in the matter, as, for instance, by representing to the lessors or by inducing or allowing the lessors to believe that they were acting in the interests of those entitled to the old lease. Of course, if a person has obtained a new lease by reason or in consideration of a surrender or attempted surrender of an old lease or of rights belonging to third parties, he could not as against those third parties pretend to hold the new lease as his own absolute property. But cases falling within the two last-mentioned classes stand apart, and need no further examination.

I now proceed to consider the cases with reference to the position of the person obtaining the renewal. The cases where the person has clearly occupied a fiduciary position in the matter, including an executor, administrator, trustee, or agent, need not be dwelt upon, as they present no difficulty. I need only remark in passing that it must not be forgotten that if a stranger enters into possession of an infant's property he is to be regarded as acting as a bailiff or agent for the infant in respect of that property. The cases which really demand full consideration are those where the person renewing the lease does not clearly occupy a fiduciary position. On inquiring into these cases it appears to me as a result that a person renewing is only held to be a constructive trustee of the renewed lease if in respect of the old lease he occupied some special position and owed by virtue of that position a duty towards the other persons interested. Take, for example, the case of a tenant for life under a settlement of leaseholds, although not a trustee for the remaindermen, yet his position is not that of a stranger as regards them. He owes by virtue of his position certain duties towards them in respect of the settled property and if by virtue of his position he is enabled to obtain a renewal of the lease equity clearly demands that the new right obtained in virtue of the old should be regarded as a grant on the old and be treated accordingly as settled property. Take next the case of a partner obtaining a renewal of a partnership lease. Here, apart from the fact that in ordinary cases concerning the carrying on of the partnership business he is an agent for the partners, he clearly owes a duty to his co-partners not to acquire any special advantage over them by reason of his position. And therefore as a rule, even if a partnership lease has come to an end, yet if he by virtue of his position obtains a renewed lease he will be held to have acquired it on behalf of all the partners, as Lord Selborne, L.C, said in *Cassels* v. *Steward*, 29 W. R. 636, 6 App. Cas. 64, at p. 73, "A man obtaining his *locus standi*, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligations to his co-partners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them." Yet even with regard to partners, between whom the utmost good faith is required by a court of equity, there are the following observations made by Turner, L.J., in *Clegg* v. *Edmundson*, 8 De G. M. & G. 787, 5 W. R. Dig. 60. [His lordship read from "I am not prepared" to "the managing partners."] I will next deal with the cases decided as between mortgagor and mortgagee. Each of these owes a duty to the other in respect of the mortgaged property, and if in case of one being able by virtue of his position to obtain a renewal of a mortgaged lease, there are obvious grounds why it should be held against him, at any rate, as a rule, that the renewed lease should be engrafted on the old, as forming part of the mortgage security. In the case of a mortgagee renewing it was put as follows by the court in the case of *Rakestraw* v. *Brewer*, 2 P. Wms., at p. 513 (edition of 1826): "This additional term comes from the old root, and is of the same nature, subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagee getting such additional terms more easily as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor." The only case that seems to call for special comment beyond what I have already said is that of *Palmer* v. *Young*, which is represented by some text-books as laying down a general proposition about one of several joint tenants renewing for his own benefit. That case is so shortly reported in 1 Vern. 276 that I found it impossible to properly ascertain what the facts were, and I accordingly had the records and the registrar's notebook searched. The transcript of the records was somewhat difficult, but in result I have ascertained that the following are the facts of the case, and the grounds of the decision of the court, omitting unnecessary details. A lessee for lives from the Bishop of Rochester assigned part of the premises demised for the lives at a proportioned part of the rent to the plaintiff's predecessor in title. The lease

was left in the hands of the principal defendant in order to enable him to renew. He obtained a renewal by availing himself of the possession of the lease and by concealing the fact of the previous assignment, and by surrendering the old lease which still had two lives in existence. The renewed lease was for an additional life. The plaintiff brought his suit in Chancery, seeking to have it declared that under the circumstances the defendant was a trustee of the renewed lease so far as concerns the assigned premises and that the plaintiff was entitled to the benefit of the extra life to the exclusion of the plaintiff, and paying a proportioned part of the rent and of the expenses of renewal. The defendant admitted the facts and offered to place the plaintiff in his old position so far as concerns the two lives by granting him a lease, but otherwise claimed for himself the benefit of the renewal. The court found as a fact (as appears from Registrar Edwards' minute book of the 27th of November, 1684) that the defendant had gone with the "parchment" (*i.e.*, the old lease itself) and "pretended an interest in the whole" and had so obtained a renewal for an extra life to the exclusion of the plaintiff, and under these circumstances, of course, the court held the plaintiff entitled to relief, and as there was some doubt as to the validity of the new lease (presumably because the plaintiff as assignee of the demised premises had not joined in the surrender) it was ordered that the plaintiff and defendant do join in surrendering the premises and obtaining a new lease. These facts show that the case was one of clear breach of faith, and was decided on its special circumstances, and is no authority whatever to support the more general proposition for which it is often cited.

To conclude, the result of my investigation of the cases is that neither on authority nor principle can the appellant in the present case be held a trustee of the new lease he has obtained. He was in no wise in any fiduciary position in respect of the premises. He owed no duty to anyone in respect thereof; he has been guilty of no fraud or concealment, and he has not used any right that a court of equity can recognise as belonging to other persons to enable him to obtain the lease. I therefore agree in thinking that the appeal must succeed.

COZENS-HARDY, L.J., concurred in the judgments delivered by the Master of the Rolls and Romer, L.J.

Solicitors, *Arthur Price; T. H. Meynell.*

## High Court of Justice.

Chan. Div.
Byrne, J. } April 6, 8.

CORNBROOK BREWERY CO. (LIMITED) v. LAW DEBENTURE CORPORATION (LIMITED). (*a.*)

*Company — Brewery business — Debentures — Covering deed before* 1900—*Specifically mortgaged property—Property acquired after* 1900 *upon trusts of covering deed—Assignment to company—Sub-demise to the trustees—Registration of charge—Companies Act,* 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

*Trustees for the debenture-holders of a limited company were empowered by their trust deed, which was executed in* 1897, *to sell certain property therein specifically mortgaged, and were to hold the proceeds of sale upon trust (amongst other things) at the request of the company to purchase or acquire leasehold hereditaments, which were to be held upon the trusts of the specifically mortgaged property. The trustees having* £2,700 *in their hands upon the above trusts, and the company desiring to acquire a certain public-house, obtained themselves in March,* 1902, *a demise of the house for* £2,700 *for* 1,001½ *years; and then, in consideration of* £2,700 *received from the trustees in August,* 1902, *the company sub-demised the house to them for the whole term except the last day.*

*Held, that the sub-demise of August,* 1902, *was a specific mortgage or charge upon the public-house under section* 14, *sub-section* 1, *of the Companies Act,* 1900, *and must be registered under its provisions.*

In this case the question was whether or not the plaintiff company had, after the commencement of the Companies Act, 1900, created a mortgage or charge for the purpose of securing an issue of debentures within the meaning of section 14, sub-section 1, of the Act. The defendant corporation were trustees under a covering deed made in order to secure certain issues of debenture stock. That deed was executed on the 17th of February, 1897, and therefore before the passing of the Act. In the interpretation clause it was provided that "'The specifically mortgaged premises' means the hereditaments and premises specified or referred to in the second schedule hereto, and which are to be assured to or vested in the trustees in accordance with clause 8 hereof, and any other hereditaments, assets, and premises which may become vested in the trustees in pursuance of the provision hereinafter contained, or which ought to be so vested"; and that, "'The mortgaged premises' means and includes the specifically mortgaged premises and the general assets collectively." Clause 8 provided that "The company shall forthwith assure to and vest in, or cause or procure the freehold and leasehold hereditaments and premises specified or referred to in the said second schedule herto to be assured to and vested in the trustees upon the trusts hereof free from incumbrances in the manner" therein provided. Sub-section 2 of the same clause stated that leaseholds were "(unless the trustees require the same to be assigned) to be demised to the trustees for the residue of the term for which the same are respectively held except the last three days of each of the same terms." Clause 9 was "The company, as beneficial owner, hereby charges in favour of the trustees the specifically mortgaged premises with the payment of the stock and the interest thereon and all other moneys intended to be hereby secured, to the intent that such charge may be a specific charge, and not a floating charge, for the payment of such moneys." Clause 10 brought in a certain sum of £30,000 to be invested in the purchase of further properties to be held by the trustees as part of the specifically mortgaged premises. Clause 11 gave a charge upon all the assets and undertaking of the company for the time being, other than the specifically mortgaged premises, but as a floating charge only. Clause 22 gave powers as regards the specifically mortgaged premises, and provided that the trustees were to have "full power, at the request of the company, to do or concur in doing all or any of the things following." Then followed a series of powers given to the trustees to deal with the specifically mortgaged premises, including a power of sale and a power of letting on lease, and various other powers. Clause 23 provided that "The trustees shall hold the proceeds to arise from any sale, letting, exchange, or other dealing with the specifically mortgaged premises under the last preceding clause, which proceeds shall become and be part of the specifically mortgaged premises, upon trust at the request of the

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

company to apply the same if they shall think fit. . . . (2) In the purchase or acquiring of any freehold, leasehold, or copyhold hereditaments, or any rights of way, or any easements or rights which may seem suitable for any of the purposes of the company, and which shall be assured to and vested in the trustees"; and other purposes to which the money might be applied were mentioned. Clause 26 provided that "All property assured to or vested in the trustees in pursuance of the provisions herein contained shall be held by the trustees upon and subject to the trusts, powers, and provisions hereinbefore declared and contained, and relating to the specifically mortgaged premises, and shall for all purposes be deemed to form part of the specifically mortgaged premises." The second schedule contained a list of numerous freehold and leasehold public-houses. A supplemental trust deed was executed in June, 1899, but its terms are not material. Some part of the specifically mortgaged property had been sold, and a sum of £2,700 was in the hands of the trustees as the result.

The plaintiff company were a brewery company, and they desired to acquire a certain public-house known as the "Exile of Erin," and that the £2,700 should be applied to its purchase. The transaction was carried out by means of an indenture of assignment of a term from one Margaret Carroll to the company, and of an indenture of sub-demise from the company to the defendant corporation. The assignment was dated the 14th of March, 1902, and was made between M. Carroll of the one part and the plaintiff company of the other part, and by it, in consideration of £2,700, M. Carroll assigned the "Exile of Erin" with certain special rights to the plaintiff company, their successors and assigns, for the term of 1,001½ years, at the rent of £30, and subject to the covenants and conditions therein contained, and on the part of the company to be observed and performed. The sub-demise was dated the 18th of August, 1902, and was made between the plaintiff company of the one part and the defendant corporation of the other part, and was declared to be supplemental to the trust deed of February, 1897. It recited the indenture of March, 1902, and that "The corporation now holds under the trust deed certain moneys, forming part of the specifically mortgaged premises hereunder upon trust (among other things) to apply the same, if the corporation should think fit, in the purchase or acquiring of any freehold, leasehold, or copyhold hereditaments which may seem suitable for any of the purposes of the company, and which shall be assured to and vested in the corporation to be held by the corporation upon and subject to the trusts, powers, and provisions by the trust deed declared and contained relating to the specifically mortgaged premises thereunder." It further recited that this particular public-house and premises were "suitable for the purposes of the company, and had not been vested in trustees, and had not formed part of the specifically mortgaged premises under the trust deed." It further recited that "the corporation has in pursuance of the provisions of the trust deed agreed at the request of the company to pay to the company out of the moneys held by the corporation as aforesaid the sum of £2,700 upon having the land, messuages, and premises hereinbefore described sub-demised to the corporation upon the trusts of the trust deed in manner hereinafter appearing." And it was witnessed that in consideration of the £2,700 the company as beneficial owner demises unto the corporation this particular property, "to hold the same unto the corporation for all the residue now unexpired of the said term of 1,001½ years, granted therein by the said indenture (except the last day of the said term) upon the trusts and subject to the powers and provisions declared by and contained in the trust deed and the supplemental trust deed of and concerning the specifically mortgaged premises thereunder, and as part of such specifically mortgaged premises, as if the said lands, messuages, and premises had been originally comprised in and demised to the corporation by the trust deed."

In consequence of these transactions the defendant corporation took the property without being liable to the lessor under the covenants contained in the lease, which was presumably the object desired in carrying out the transaction in the above form.

As the sub-demise of August, 1902, was executed after the Companies Act, 1900, the defendant corporation proposed to register the deed as a mortgage or charge for the purpose of securing any issue of debentures under section 14, sub-section 1, of the Act. The plaintiff company thereupon brought this action, claiming a declaration that the sub-demise of August, 1902, did not require registration under the Companies Act, 1900, and an injunction to restrain the defendants from registering the deed.

*Danckwerts* and *J. W. Manning*, for the plaintiff company.—The sub-demise of August, 1902, does not create a fresh charge upon the property. It is part of a transaction whereby the corporation as trustees under the deed of 1897 invested the proceeds of sale of part of the specifically mortgaged property upon other property under clause 23 of the deed. The charge upon the property purchased resulted from the fact of its having been purchased for the purposes of the trust and with the proceeds of sale of part of the mortgaged property, and arose *ipso facto* upon the purchase by the company. The assignment to the company instead of to a third person or to the corporation was an immaterial circumstance, and does not alter the real nature of the transaction. If the assignment had been obtained by the corporation direct from the assignor it could not have been reasonably contended that registration was necessary. The question at issue is an important one, as by section 14, sub-section 6, of the Act of 1900 a copy of the registrar's certificate of registration must be indorsed upon every debenture. As the properties charged are very numerous and may be changed from time to time, this provision would become burdensome or impossible to be carried out if deeds of this kind must be registered. Moreover, how could all the debentures be called in for indorsement on every change of the specifically mortgaged property?

They also referred to *In re Harrogate Estates (Limited)*, *ante*, p. 334, [1903] 1 Ch. 498, and *In re Spiral Globe (Limited)*, [1902] 2 Ch. 209, 50 W. R. Dig. 27.

*Levett, K.C.*, and *K. Parker*, for the defendant corporation.—The property in question was assigned by the company to the corporation in August, 1902, and consequently must be registered. What might have happened if the property had been obtained by the corporation directly from the assignor is another matter and does not affect the question. The corporation, as trustees for the debenture-holders, are bound to make them safe by registering the deed of August, 1902.

*Cur. adv. vult.*

April 8.—BYRNE, J., after stating the facts: The result of this appears to be that property which prior to the execution of the deed of August, 1902, did not form part of the specifically mortgaged property as contained in the trust deed thenceforward formed part of such specifically mortgaged property. It is said, and as at present advised, I think said truly, that had this been a direct purchase from Margaret Carroll,

there would have been no question about the necessity for registration of the document as a charge created by the company, because in that case there would have been no charge created by the company subsequently to the coming into operation of the Companies Act, 1900. But that is not the case I have to deal with. It appears to me that the effect of this deed of the 18th of August, 1902, between the company and the corporation was to create "a specific mortgage or charge" upon the property thereby sub-demised, and that therefore it comes within the words of section 14, sub-section 1, of the Act, and that the necessary consequences as to registration under the other provisions of the same section of the Act must follow. There is another way in which the case has been put which I ought to mention, although I am not dealing *seriatim* with the arguments which have been used, because it seems to me that the view which I have taken of the transaction goes beyond those arguments. It has been said that if this £2,700, part of the specifically mortgaged property, had been invested in any property of a kind which the trustees were entitled to hold, then there would have been *ipso facto* a charge upon it by virtue of the original deed of 1897. If that had been the case, and if the deed of August, 1902, had not been executed, I see no reason to doubt that this sum of £2,700 might have been followed into the specific property; but that does not alter the fact that this deed creates a security which did not exist before it was executed. Under these circumstances the usual order must follow, and this action must be dismissed with costs.

Solicitors, *Hayes, Schmettau, & Dunn; Bircham & Co.*

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Chan. Div.
Buckley, J. } Feb. 11, 12, 13.

*In re* TANCRED'S SETTLEMENT.
SOMERVILLE *v.* TANCRED.
*In re* SELBY.
CHURCH *v.* TANCRED. (*a.*)

*Power—Appointment—Appointment to two objects—Subsequent appointments among all objects equally—Substitution—Election—Forfeiture on assigning or attempting to assign—Settlement—Assignment to trustees—Trusts for sole benefit of settlor—Power to charge expenses.*

*£7,000 was settled on trust for a husband and wife during their respective lives, and after their death as they or the survivor should appoint among objects. The husband and wife, by two deeds, irrevocably appointed one-seventh to each of two objects. After the death of the husband, the wife, by two deeds, irrevocably appointed the whole of the £7,000 among all the objects equally. On the death of the wife,*

*Held, that no case of election had arisen; that on the construction of the four deeds it was evident that the donee intended the £7,000 to be divisible in equal shares, and that, consequently, it was so divisible.*

England *v.* Lavers, 15 *W. R.* 51, L. R. 3 *Eq.* 63, *explained and followed*

In re Ashton, 46 *W. R.* 138, [1897] 2 *Ch* 574, *distinguished.*

*Property was appointed to an object of a power for a life, with a forfeiture clause in case he should assign, charge, or otherwise dispose or attempt to dispose of his life interest. By the object's marriage settlement he assigned his life interest, together with other property, to trustees, and appointed them his attorneys to receive it. The property settled was charged with expenses of management. The trusts of the property settled were, during his life, for his sole benefit.*

*Held, that his life interest was not forfeited.*

Adjourned summonses.

By the marriage settlement, dated the 15th of April, 1839, of Sir Thomas and Lady Tancred, a sum of £7,000 was settled, subject to their life interest therein, upon trust for the younger children of the marriage as they by deed or the survivor of them by deed or will should appoint, and in default of appointment for such of the younger children as should attain that age or, being daughters, marry under it. The settlement contained the usual hotchpot clause.

At the date of the appointment of the 17th of April, 1891, hereinafter mentioned, the younger children of the marriage were Prid aux Francis Tancred, Seymer Mitford Tancred, Harry George Tancred, Edith Jane Williams, Bertha Evelyn Somerville, and Lucy Sibyl Hawkins.

By the marriage settlement, dated the 27th of February, 1867, of Mrs. Hawkins, it was agreed that if Mrs. Hawkins (or Mr. Hawkins in her right) should, during the coverture, become entitled to any property of the value of £300, at one time, for any estate whatsoever, the same should be settled.

By a deed-poll, dated the 10th of September, 1872, Sir T. and Lady Tancred, in exercise of their power, irrevocably appointed that one-seventh share of the £7 000, should, subject to their life interests therein, go to such uses as Mrs. Hawkins should by deed or will appoint, and in default of appointment to her absolutely.

By a deed-poll, dated the 14th of October, 1878, Sir T. and Lady Tancred, in exercise of their power, irrevocably appointed that the trustees of the settlement of 1839 should stand possessed of the one-seventh part of the £7,000, subject to their life interests therein, in trust for Mrs. Somerville, to be an interest vested in her on the solemnization of her then intended marriage.

By the marriage settlement, dated the 19th of October, 1878, of Mrs. Somerville, her one-seventh part of the £7,000 was settled. The settlement contained no after-acquired property clause.

Sir T. Tancred died on the 7th of November, 1880.

At the date of the two appointments next hereinafter mentioned, Lady Tancred had apparently forgotten the existence of the appointments of 1872 and 1878.

By a deed-poll, dated the 17th of April, 1891, Lady Tancred, after reciting that under the settlement of 1839 she had a power of appointment, subject to her life interest therein, over the £7,000 among her six younger children, irrevocably appointed that the £7,000 should be transferred to trustees upon trusts which were, in effect, a settlement of one-sixth thereof on each of her three daughters and her three sons, for their respective lives, and after their respective deaths for the children of each appointee respectively.

The life interests of the daughters were restrained from anticipation.

With regard to the sons' life interests, there was a proviso in each case that his share of income should only be paid to him "until he shall assign, charge, or otherwise dispose or attempt to dispose of the said share of income or any part thereof, or become bankrupt or do or suffer something whereby the said income, if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person, whichever of the events shall first happen."

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

The trustees were given a discretionary power to maintain each son if his life interest should be forfeited.

By the same deed she made a similar appointment of certain property over which, under the will of one P. Selby, she had a power of appointment subject to her own life interest therein.

Being advised that this appointment was invalid in so far as it affected to restrain her children from anticipating or releasing their life interests, and in so far as it affected to appoint the capital after their deaths to their grandchildren, she executed another deed of appointment on the 3rd of February, 1893.

By this deed, after recitals to the above effect, in exercise of her power under the settlement of 1839, so far as the same remained unexercised, she irrevocably appointed that after the death of each of her three daughters and three sons one-sixth of the £7,000 should be held in trust for such daughter or son absolutely, "my intention being that, by virtue of the principal appointment—*i.e.*, that of 1891—and these presents, each of my said six children shall take a vested interest in one-sixth of the capital and income of the said sum of £7,000 subject only to my own life interest therein under the settlement."

By Seymer Mitford Tancred's marriage settlement, which was an instrument in Scotch form and dated the 3rd of June, 1896, he assigned to trustees all right, share, and interest then belonging to him, or which might thereafter belong to him, under the settlement of 1839 and Mr. Selby's will, and appointed them his attorneys to receive his right, share, and interest thereby assigned in and under the settlement and will, declaring that all moneys, securities, or investments which should be received by the trustees in virtue of the assignation should be held by them upon trusts which were, during his lifetime, for his sole benefit. There was also a charge on the whole of the property settled for the payment of "all necessary charges and expenses attending the execution of the trust hereby settled." There was also a general power to the trustees to realize the property assigned to them and to reinvest the proceeds.

On the death of Lady Tancred, on the 13th of November, 1901, the £7,000 under the settlement of 1839, and the property subject to the trusts of Mr. Selby's will, became divisible, and the present summonses were taken out and heard together.

Several questions were raised, but there were only two points which call for a report.

His lordship held that the restraint on anticipation and alienation imposed on the children of Sir T. and Lady Tancred by the deed of 1891, was bad, so far as she was thereby dealing with the £7,000 under the settlement of 1839, but was good so far as she was dealing with the property subject to the trusts of the will of Mr. Selby.

The question was argued as to what shares the six younger children took in the £7,000—that is to say, whether the two children who had benefited under the appointments of 1872 and 1878 were entitled each to claim one-seventh of £7,000, plus one-sixth of five-sevenths of £7,000, or whether the £7,000 was divisible in equal sixths.

*Astbury, K.C.*, and *J. Henderson*, for the trustees of the settlement of 1839.

*Buckmaster, K.C.*, and *Howard*, for the children who took no interest under the appointments of 1872 and 1878.—The intention of the donee of the power was that the children should bring their appointed shares into hotchpot. The children who took under the two earlier appointments are bound to elect between the earlier appointments and the later: *England* v. *Lavers*, 15 W. R. 31, L. R 3 Eq. 63; *In re Keon*, 3 L. R. Ir. 228. *In re Ashton*, 46 W. R. 138, [1897] 2 Ch. 574, where it was held that the rule against double portions did not apply, is distinguishable from the present case.

*Ingpen, K.C.*, and *L. W. Byrne*, for the trustees of Mrs. Hawkins's marriage settlement.—We are entitled to one-seventh of £7,000 plus one-sixth of five-sevenths of £7,000. By the deeds of 1891 and 1893 Lady Tancred was purporting to dispose of the whole £7,000, and, therefore, of something which already belonged to Mrs. Hawkins. If Mrs. Hawkins was not restrained from anticipation, then *England* v. *Lavers*, which was decided on the question of election, might apply. But by the deed of 1891, Mrs. Hawkins was so restrained, and on the principle of *In re Wheatley*, 33 W. R. 275, 27 Ch. D. 606, and *In re Vardon's Trusts*, 33 W. R. 297, 28 Ch D. 124, she or her assigns can keep both funds without making compensation. It is immaterial that the restraint imposed by the deed of 1891 was bad, because, the doctrine of election being based on the presumed intention of the person executing the instrument, it is sufficient that Lady Tancred should have intended to impose the restraint: *Haynes* v. *Foster*, 49 W. R. 327, [1901] 1 Ch. 361. Also, no question of election can arise, for Mrs. Hawkins must elect to take under the instruments of 1891 and 1893, which are the instruments giving rise to the election, and the engrafted doctrine of compensation cannot apply where this is the case: *In re Lord Chesham*, 34 W. R. 321, 31 Ch. D. 466.

*Darley*, for Seymer Mitford Tancred and the trustees of his marriage settlement.

*Ashton Cross*, for the trustees of Mrs. Somerville's marriage settlement and Mr. Somerville.

*Birrell, K.C.*, and *G. E. S. Fryer*, for Mrs. Somerville.—She is in the same position as the Hawkins trustees, with this difference, that, inasmuch as she has only settled what she took under the deed of 1878, it is only that which goes to her trustees, and anything which she gets under the deeds of 1891 and 1893 belongs to herself. The result is that there is no fund out of which compensation, which is the foundation of the doctrine of election, can come. *England* v. *Lavers* can only be supported, if at all, on the doctrine of election. The doctrine of substitution, on which it professes to be founded, is contrary to the principle laid down in *Trollope* v. *Routledge*, 1 De G. & Sm. 662. The present case is within *In re Ashton*.

*H. Terrell, K.C.*, and *W. M Cann*, for a child of Mrs. Hawkins, who was a beneficiary under the Hawkins settlement.—*England* v. *Lavers* shows that the intention of the appointor must be regarded. Lady Tancred could not have intended to substitute for the appointments of 1872 and 1878 those of 1891 and 1893, because she had forgotten the existence of the former.

BUCKLEY, J., after stating the facts, continued: Now the question has been argued before me whether the instruments raised a case of election or not. It is said that, Mrs. Hawkins having become entitled under the appointment of 1872 to one-seventh of £7,000, and under the appointments of 1891 and 1893 to another one-seventh of the £7,000, she can claim the one-seventh which she takes under the appointments of 1891 and 1893, without having to give compensation. *In re Wheatley; In re Vardon's Trusts, Haynes* v. *Foster*, and *In re Lord Chesham* were cited for the proposition that inasmuch as the first one-seventh was appointed to her in such a manner that she had only a life interest without power of anticipation, she could not deal with it, and could not therefore elect. On the other hand, it was said, on the authority of *England* v. *Lavers*, that

she must elect under which instrument she will take, and that she cannot take both interests without making compensation to her brothers and sisters.

Without going so far as to say that she could not give compensation, I do not think that the case is one of election at all. The real question is as to the meaning of the deeds of 1891 and 1893 having regard to what had been done in 1872 and 1878. Where you find that a power is given to a person to dispose of property you have to see whether the formalities have been observed, and if that is the case, then you must find out the intention of the person who had the power of disposing of the property. I ought, therefore, to read these four appointments and say what it was that she intended to do. At the outset it is clear that after the deeds of 1872 and 1878 neither Mrs. Hawkins nor Mrs. Somerville could take less than one-seventh of the £7,000. But it was open to Lady Tancred to substitute another interest for the one that she had given. By "substitute" I do not mean to imply that after 1878 she, or anyone else, could undo what had been done; nor did Lord Romilly mean that in *England* v. *Lavers*. But it is another matter to see what was her intention when, by the deeds of 1891 and 1893, she gave something more. In reading the deed of 1891 it is clear that Lady Tancred thought that she was entitled to dispose of £7,000, and that she meant to give one-sixth of that sum to each of her children. By the deed of 1891 she did to a large extent dispose of the sum in that way. By the deed of 1893 she disposed finally of the whole sum of £7,000. The concluding words in that deed [cited above] settle the matter. That is what she meant to do, and even without the deed of 1893 I should construe the deed of 1891 in the same way. How can I give effect to that intention? There remained after the deeds of 1872 and 1878 enough of the £7,000 to give to the children who had not a share of it one-seventh and a little more, and I read this as an appointment to them of one-seventh, together with enough to bring their shares up to one-sixth, and an appointment to Mrs. Hawkins and Mrs. Somerville of enough to bring their shares up to one-sixth.

In *England* v. *Lavers*, where the facts were like those in the present case, Lord Romilly, M.R., said: "My opinion is that the deed-poll is in substitution for the former appointments. Of course the donee of the power could not interfere with these; but I think that when he executed the deed-poll he meant to give to each of his daughters one-sixth of the fund, not in addition to the one-seventh he had already given, but in substitution for it." He is using the word "substitution" in the sense, not that the donee can undo the former appointments, but that by dividing the fund into fewer shares he had increased the value of the shares given by the previous appointments and had to that extent altered them. It would have been more accurate to say "in addition to the former appointments so as to equalize the shares taken by the children in the same manner as if the deed-poll had been substituted for the former appointments." I am not sure that I should follow Lord Romilly in holding that this would raise a case of election; but that point is immaterial to his decision, the basis of his judgment being that by the deed-poll the donee meant to provide that his children should take equal shares of the whole fund.

Then it is said that *In re Ashton* derogates from the authority of Lord Romilly's decision. In *In re Ashton* the donee of a power to appoint £10,000 made a will by which she appointed it to A., B., and C. equally. She then executed a deed appointing one-third of the fund to A. Subsequently she died without having altered her will. Stirling, J., held that A. was entitled to take one-third under the deed, and one-third of two-thirds under the will. That is not this case. The will written before the deed described the sum as £10,000. When the deed was executed one-third of the fund was taken out. When you read the will you must read it as at the date of the death of the testatrix, and if it had been executed then, the amount of the fund would have been less. *In re Ashton* has no bearing on this case, which I decide on the ground that, upon the true construction of the deeds of 1891 and 1893, Lady Tancred intended each child to take one-sixth of the whole fund. *England* v. *Lavers*, when properly understood, governs this case, and the whole of the fund passes in sixths.

The question was subsequently argued as to whether the assignment by Seymer Mitford Tancred to the trustees of his marriage settlement had effected a forfeiture of the life interest in the property subject to the trusts of Mr. Selby's will which had been appointed to him by the deed of 1891.

*Darley*, for S. M. Tancred and the trustees of his marriage settlement, argued that there had been no forfeiture, because in regard to the property, he, during his life, took the sole beneficial interest.

*W. M. Cann* (*H. Terrell, K.C.*, with him), for grandchildren, argued that there had been a forfeiture because he had disposed or had attempted to dispose of his life interest in the property.

He relied on *In re Porter*, 41 W. R. 38, [1892] 3 Ch. 481.

BUCKLEY, J., said that under the settlement of 1896 the whole of Seymer Mitford Tancred's life interest had been assigned to trustees upon trusts under which he was the sole *cestui que trust*, and so far he did not think that there had been any forfeiture. It was said that the clause authorizing payment of the charges and expenses of the trust gave a right to the trustees to look to this fund for recoupment of their expenses, and that that was a disposition or attempted disposition of the income whereby it would become "payable to or vested in some other person." In his opinion that was not so. The object of the clause was that if he disposed or attempted to dispose of his life interest or became bankrupt his life estate should go over. That had not happened. Seymer Mitford Tancred remained the only person entitled to the income. The mere fact that the trustees had power to charge their expenses was not sufficient to bring the case within the clause. The case was like that of a man who appointed an agent to collect his income and gave him power to charge a commission. Neither was the appointment of the trustees to be his attorneys to receive his income an assignment, for he still retained the beneficial interest.

He should have thought that the reason of inserting the words "attempt to dispose of" was that the words "dispose of" referred to an event which could not in strictness happen, because if he attempted to dispose of his interest, it *ipso facto* ceased and could not, therefore, be disposed of. It was said, however, that North, J., in *In re Porter* had held that the words "attempt to dispose of" had reference to a disposition which by reason of its having no legal effect failed independently of the clause. Even if that were so, in the present case there had been neither a disposition nor an attempted disposition. He held, therefore, that the life interest had not been forfeited.

Solicitors, *Payne, Shaw, Mackenzie, & Lake; Gray & Co.; Flower & Flower.*

## House of Lords.

From C. A. (England). March 9.

STARKEY v. BANK OF ENGLAND. (a.)

*Principal and agent—Power of attorney—Forged signature—Transfer of stock—Stockbroker—Warranty of authority—Liability—Indemnity.*

*Any person purporting to act as agent impliedly warrants the authority he professes to act under, so that, should the supposed authority turn out to be invalid or forged, he renders himself liable to make good the loss occasioned to those he has misled; and this is so even when he honestly believes his authority to be genuine. A stockbroker, therefore, executing a transfer of stock at the Bank of England under a forged power of attorney which he honestly believed to be good, must indemnify the bank for the consequential loss thereby occasioned them.*

Collen v. Wright, 6 *W. R.* 123, 8 *E. & B.* 647, *approved.*

*Decision of* Court of Appeal (50 *W. R.* 340, [1902] 1 *Ch.* 610) *affirmed.*

Appeal from order of Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ., reported *sub. nom. Oliver* v. *Bank of England*, 50 W. R. 340, [1902] 1 Ch. 610), which affirmed a judgment of Kekewich, J. (49 W. R. 391, [1901] 1 Ch. 652).

The facts are set out at length in the reports below; they may be shortly summarized as follows:

In December, 1897, the firm of Starkey, Lewison, & Cooke, stockbrokers, of which the appellant Starkey was a member received instructions from a solicitor named F. W. Oliver, for whom they usually acted, to apply for a power of attorney for the sale of Consols standing in the books of the Bank of England in the names of F. W. Oliver's brother, Edgar Oliver, and F. W. Oliver himself as trustees.

The firm accordingly obtained the form of power, which was forwarded for execution to F. W. Oliver, who returned it signed by himself, and apparently by Edgar Oliver, but the signature of Edgar Oliver was forged, and the usual notice failed to reach him.

The appellant, who alone signed the demand to the bank to act on the power, honestly believed both signatures to be genuine, and the Consols were transferred under it to other names. Certain bank stock were afterwards transferred under precisely similar circumstances.

F. W. Oliver died in July, 1899. After his death the fraud was discovered, and Edgar Oliver thereupon brought an action against the bank for replacement of the Consols and stock, and the bank served the appellant's firm with a third party notice for an indemnity.

Kekewich, J., gave judgment for the plaintiff, and held that the appellant was bound to indemnify the bank.

*Upjohn, K.C., Rufus Isaacs, K.C., Stewart Smith, K.C.*, and *Stamp*, for the appellant.—The sole question is, was the case within the law laid down in *Collen* v. *Wright*, 6 W. R. 123, 8 E. & B. 647? The bank did not rely only on the broker. An innocent misrepresentation only entitles to a rescission of the contract

*Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337; *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82; *Redgrave* v. *Hurd*, 30 W. R. 251, 20 Ch. D. 1; *Firbank's Executors* v. *Humphreys*, 35 W. R. 92, 18 Q. B. D. 54; *Polhill* v. *Walter*, 3 B. & Ad. 114; *Smout* v. *Ilbery*, 10 M. & W. 1; Story on Agency; *Cherry* v. *Colonial Bank of Australasia*, 17 W. R. 1031, L. R. 3 P. C. 24; and *Merry* v. *Nickalls*, 20 W. R. 929, L. R. 7 Ch. App. 733, were cited or referred to.

*H. D. Greene, K.C., Latham, K.C.*, and *Howard Wright*, for the respondents, were not called.

Earl of HALSBURY, L.C.—I confess that I have been puzzled to think how I should have argued this case on the part of the appellant, if I had had the duty of doing it. The two learned counsel who have ingeniously occupied a considerable time in endeavouring to do so, show the difficulty which I should have had under the circumstances. I entertain no doubt upon the question. It seems to me that there never has really been any doubt upon the subject. I will take the judgment in *Collen* v. *Wright*, and read three passages from it. Lord Campbell, C.J., says: "There can be no doubt that the testator asserted that he had authority to let the property on the terms to which he agreed. That is a promise and a warranty. Might he not then have been sued on the warranty, although he believed it to be true? If he induced the plaintiff to act upon it, he was bound. It is broken since the testator had not authority." Wightman, J., says: "If a man makes a contract as agent, he does promise that he is what he represents himself to be, and he must answer for any damage which directly results from confidence being given to the representation." Crompton, J., says: "I am of the same opinion. The first question is whether an action lies on the contract of a person representing himself to have authority, there being good consideration for such a contract." These three statements seem to me to cover the whole ground. And those statements are corroborated by the full Court of Exchequer Chamber. Therefore the whole number of judges who held both those principles to be part of the law of England was nine judges, nearly fifty years ago. That seems to me to render this case free from all doubt. I do not seek to go into the principle upon which that law may be supposed to rest. It is enough for me to say that at any rate, upon the grounds there stated, it has been the law for fifty years, enunciated by judges of the highest authority. I have not the least notion what is supposed to have shaken that state of the law in the decision in *Derry* v. *Peek*. We have more than once been told that *Derry* v. *Peek* is supposed to have altered the law—I do not think that it has anything to do with it. It was an action for deceit, and this House held that where it is an action for deceit you must prove deceit, and you must prove *mala fides* on the part of the person who deceived the other. I suppose that it was no new law. The application of that law to the particular case became a question of fact, and purely of fact. Some of us thought—I myself did—that the facts were rather in favour of the view that there was intentional deceit; but that was a question of fact, and it was disposed of by the court below. That court was unanimous in holding that the court of first instance was right in coming to the conclusion that there was in fact no real deceit. But what has that to do with the present case? Here is a formal document, intended to be acted upon, which upon the face of it purports to be a representation of authority by the person whose signature is appended thereto. Upon the facts I should have thought it impossible to doubt that it was a representation of authority on the part of those two persons whose signatures purport to be to it, and that the person who produced the authority and demanded to act upon it was himself asserting the authority which he supposed he had, to do the thing which he was doing. He had no such authority The result is that the bank have transferred

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

a quantity of Consols standing in the names of two persons when only one person gave the authority. That appears to me to come within the effect of the decision to which I have referred, and I do not think it necessary to go through the *catena* of cases upon that subject. It is said that this case is extending the principle of *Collen* v. *Wright*. I do not think that it is. It seems to me, as a matter of principle, to fall exactly within *Collen* v. *Wright*. I have not been able, and I never have been able from the beginning to the end of the argument, to understand what is meant by saying there is a distinction which makes it an extension of *Collen* v. *Wright*, because the consequence in that case was a contract, but here no such consequence followed. I think that it is absolutely immaterial, and arises from a confusion between "contract" and "warranty," but whether the facts made a contract between the plaintiff and the defendants, or whether or not a contract followed in consequence seems to me an absolutely illogical and unintelligible distinction. That which does enforce the liability is that, under the circumstances of this document being presented to the bank to be acted upon, and upon the representation that the agent had the authority of the principal, which he had not, that does import an obligation, the contract being for good consideration, on the part of the person that the thing which he represented to be genuine was genuine. The result is that I think that this appeal should be dismissed with costs and I move your lordships accordingly.

Lords ASHBOURNE and MACNAGHTEN concurred.

Lord DAVEY.—I also entirely agree. The point made by Mr. Rufus Isaacs seems to be this, that *Collen* v. *Wright* is an exception from the rule that an innocent representation gives no cause of action, and that, as an exception, it is to be confined to the particular case in which it was laid down; *Collen* v. *Wright* having been a case in which a supposed agent induced a third party to enter into a contract with him, it must be confined to the cases in which the transaction entered into with the supposed agent was in the nature of a contract. I think that it would be a very narrow construction to put upon the rule laid down, and not in accordance with the statement of it by the learned judges. I will not trouble your lordships by reading what Bramwell, L.J., said in the case of *Dickson* v. *Reuter's Telegram Co.*, 26 W. R. 23, 3 C. P. D. 1, but he pointed out that it was a fallacy to treat it as an exception from the law relating to actions of deceit and that it really and truly was a separate and independent rule of law. As a separate and independent rule of law it was not confined to the bare case where the transaction was simply one of a contract in business into which a third party was induced to enter by a representation that the person with whom he was doing business had the authority of some other person. Really and truly Mr. Upjohn's agument is the same thing in another form, because, as I understand it, the whole stre s of his argument has been to show that this case is not an exception from the rule as to actions of deceit. and that the rule as laid down in *Collen* v. *Wright* and other cases, which need not be enumerated, does not extend cases where the supposed agent did not know that he had no authority and had not the means of finding out. It is sufficient to take the earliest cases in which the rule is stated, and I will take as an example a case older than *Collen* v. *Wright*; *Lewis* v. *Nicholson*, 18 Q. B. 503, in which Lord Campbell, C.J., states the doctrine thus: After saying that in no case where it appears that a man did not intend to bind himself, but only to make a contract for a principal, can he be sued in place of the principal, merely because there was no authority, he says: "He is liable if there is any fraud in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not." Other cases might be cited to exactly the same effect, and I am of opinion that it is utterly immaterial for the purpose of the application of this branch of the law whether the supposed agent knew of the defect of his authority or not, and indeed that is the very doctrine which is asserted by Story, J., in his first edition, as well as in subsequent editions, on his work of Agency, to which reference has been made. The same point was also, as I understand the case, dealt with in the case of *Cherry* v. *The Colonial Bank of Australasia* in the Privy Council, to which reference was made. I have no hesitation in saying that I entirely concur in the motion which has been made in the present case.

Lord ROBERTSON concurred.

Lord LINDLEY.—This is the first time that I have ever heard *Collen* v. *Wright* disputed. It appears to me to be good law, and it was law, long before that case, according to Story, J. I do not quite understand the observation made by Cockburn, C.J., that there was nothing in Story against the view which he took. It appears to me that, whatever may be said of the other cases, *Collen* v. *Wright* is sound, *Firbank's Executors* v. *Humphreys* is sound, and so is this decision.

*Order appealed from affirmed and appeal dismissed with costs.*

Solicitors for the appellant, *Morley, Shirreff, & Co.*

Solicitors for the respondents, *Freshfields.*

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## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — May 11, 12

*In re* INNES. (*a.*)

*Company—Winding up—Contributory—Shares allotted without consideration—Liability of allottee—Misfeasance of directors.*

*In* 1899 *two brothers, Messrs. R. I. and J. I., who had certain patent rights, arranged with six shipowners to form a private company, and to sell to such company their business and patent rights for* £6,000, *payable as to* £3,000 *in cash and as to* £3,000 *in fully-paid shares. It was arranged* (1) *that the capital of the company should be* £25,000, *divided into* 2,500 *shares of* £10 *each;* (2) *that the vendors should take* 300 *fully paid-up shares as the balance of their purchase-money;* (3) *that the six shipowners should take and pay for fifty shares apiece for the purpose of raising the* £3,000 *payable in cash to the vendors;* (4) *that of the remaining* 1,900 *shares each of the six shipowners should take* 300 *fully-paid shares for his own benefit;* (5) *that the last* 100 *shares should be held in reserve and should be applied in making bonus payments to persons introducing business to the company. On the 7th of December,* 1899, *the company was duly incorporated with the capital above stated. No prospectus was issued, and there was no intention to go to the public with shares.*

*In pursuance of the above-mentioned arrangement an agreement, dated the 23rd of March,* 1900, *was entered into between the vendors and the company, whereby the*

(*a.*) Reported by R. R CAMPBELL, Esq., Barrister-at-Law.

*vendors purported to sell their business and patent rights to the company for £25,000, payable as to £3,000 in cash and as to £22,000 by the allotment to the vendors or their nominees of 2,200 fully-paid shares. This agreement was duly registered, and the shares were allotted in accordance with the antecedent arrangement.*

*In November, 1901, the company went into liquidation, and a summons was taken out by the liquidator against the four directors—viz., R. I. and three of the shipowners, for a declaration that the three shipowner directors were liable as contributories for the full amount of the fully paid-up shares which they had received, and, in the alternative for a declaration that all four directors were liable for misfeasance.*

*Held, that the contract of the 23rd of March, 1900, carried out the true previous intention of the parties; that it was a genuine contract of sale as between the vendors and the company; that the director allottees received these shares as nominees under the rights of the vendors; and consequently that the liquidator could not make them liable as contributories.*

*Held, further, that the directors were not liable on the ground of misfeasance, all the shareholders having known of and acquiesced in the transaction.*

*Judgment of* Kekewich, J. (ante, *p.* 378, [1903] 1 Ch. 674), *reversed.*

Appeal from the decision of Kekewich, J. (reported *ante*, p. 378, [1903] 1 Ch. 674).

The facts are fully set out in the report of the case in the court below.

The arguments adduced were the same as those in the court below, and the same cases were cited.

*Upjohn, K.C.*, and *Jessel*, for the appellants.

*Gore-Browne, K.C.*, and *Cozens-Hardy*, for the respondents.

VAUGHAN WILLIAMS, L.J.—There was a summons taken out by the liquidator against three directors and a Mr. Robert Innes, for a declaration that the first three respondents were liable as contributories for the full amount of certain shares in the company allotted to them respectively as fully paid up; and, in the alternative, for a declaration that all the respondents were jointly and severally liable as directors for misfeasance for having paid away the capital of the company without any consideration. Kekewich, J., did not find anything as regards the misfeasance point, and expressed his doubt as to whether these gentlemen could be made liable on that ground, but proceeded to deal with the summons independently of misfeasance. He gave judgment in favour of the liquidator, and it is that judgment which we have now to consider.

This was a company formed, as a private company, and everything that was done was done with the full knowledge of all the eight members, and the result was this: that, there being this company formed for the purchase of the business of Messrs. Innes, a contract was ultimately entered into under which the business of Messrs. Innes was sold to the company, and part of the consideration payable by the company to Messrs. Innes consisted of fully-paid shares. It is not disputed that of these fully-paid shares, which purported to be paid to Messrs. Innes, these three directors received, each of them, three hundred. It is said that these shares were not in any way paid for, either by these three directors or by Robert Innes, who represents the vendors, and that the transaction really constituted a gift by the company. There was some sort of a suggestion made that, because these gentlemen took as allottees, you might leave out the part of the contract which related to the vendors and their nominees, and treat the agreement of the 23rd of March, 1900, as a simple transaction between the company and directors. It is impossible now to argue that it is so. That contract was a transaction which entitled the vendors to have, as part of the consideration for the property they were selling, certain shares at their disposal. There was prior to the allotment no application by the allottees at all, and no contract between them and the company. It is impossible to ignore the fact of this contract, which has not been impeached, and under which property passed to the company. It is said, however, that we ought to treat these shares as shares taken without consideration, because, it is said, we ought to treat the business assets, which were sold, as being of the value of £6,000, and the fully-paid shares given beyond that price as not really being a part of the consideration of the purchase, but as a gift made by the company to the vendors for the purpose of being handed on to these directors. A great many cases have been cited as showing that the court is not bound by the form of a contract, but is entitled to go behind it. We are invited to say that the transaction was colourable; that, whilst purporting to be the payment of a price, it was really a gift, or, if not a gift, the payment of a commission for the placing of its capital. This is a mere question of fact, and I cannot agree that we ought to come to this conclusion of fact at all. It was not suggested by the liquidator that these gentlemen were guilty of any fraud, and therefore *primâ facie* we have got before us a contract under which these fully-paid shares were part of the price of the property which was sold. It cannot be suggested that mere inadequacy of price is sufficient of itself to invalidate the contract. To do that you must show that the contract of purchase in truth and in fact was something else than a purchase. I see no ground whatever for coming to that conclusion. On looking at the facts, as a whole, it seems to me that it was a most natural transaction that the vendors, when selling, should consider it a reasonable thing to do, not only to ask for cash, but also to ask for payment in shares. And, although I have not got to go into the question of the goodness or badness of the bargain on the part of the company, I think that, so far as the company is concerned, there is nothing to lead us to the conclusion that such a bargain was not made by those acting on behalf of the company in the honest belief that it was in the interests of the company. I have seen nothing in the affidavits or anything else to lead me to say that the transaction was not what it purported to be. The only other observation I have to make is with regard to one suggestion as to the largeness of the amount which was given in these fully-paid shares. I can only say that I entirely agree with the view taken by Mr. Upjohn, that when once you arrive at the conclusion that there really was a contract of sale and purchase, and that the company did get the property in fact, then it is a matter of indifference how the shares were divided amongst the eight shareholders. Under the circumstances, there is nothing to be said with regard to the misfeasance part of the summons. I am of opinion that we must reverse the judgment of the court below.

ROMER, L.J.—I have come to the same conclusion. When the arguments on behalf of the respondent, the liquidator, are analyzed, it will be found that for their validity they really depend on two assumptions. The first assumption is this—viz., that before the company was formed and before the contract was made between the vendors and the company, the two Innes and the six shipowners had arranged that Messrs. Innes should sell their property to the company for £6,000 only. Now I cannot agree with that assumption of fact at all. I do not think that Messrs.

Innes would have been willing to sell to the company without, as part of the terms of sale, obtaining such a hold of the share capital as would enable them to carry out the negotiations of sale as between themselves and the six other gentlemen. It was, to my mind, most important to Messrs. Innes that they should obtain the confidence in the company of the six shipowners, and that they should all be interested in the capital, and have that capital to themselves in the proportions which they had arranged between themselves. To my mind the negotiations between those parties and the arrangements come to were quite consistent with the view that the purchase-money should be fixed at £25,000, as to £3 000 in cash, and as to £22,000 in fully-paid shares, and that the six should get from Messrs. Innes, as vendors, such part of the £22,000 in shares as had been arranged between them. If such an arrangement had not been effected, there would, in my opinion, have been no sale and no company. The first assumption, then, goes by the board. The second assumption on which the liquidator relied was this—viz., that a contract had been made by the two Messrs. Innes to sell to the company for £6,000. It is, to my mind, impossible to make such an assumption No such contract ever existed. The contract which was in fact made and registered carried out, to my mind, the real intention of the parties. But for that registered contract the company would never have acquired the patent rights which they did acquire. And, when you look at the registered contract, it is not one which can be severed and treated as two contracts—one as a contract of sale by the Messrs. Innes for £6,000, the other as a contract by the company to issue shares to the shipowners as a consideration for their applying for £500 worth of shares. The registered contract cannot be so split up, and it is impossible to hold that these shares were allotted without consideration or at a discount.

The ground, then, upon which the case was decided in the court below cannot be supported. It is impossible to place the appellants upon the list of contributories as holders of unpaid shares. The case is covered by the decision of the Court of Appeal in *Carling's case*, 24 W. R. 165, 1 Ch. D. 115. There was no taking of shares by the appellants as between them and the company. They only acquired as nominees under the rights of the two Innes.

The only other ground upon which the liquidator could have succeeded is that of misfeasance. But the circumstances negative such a view. The shareholders were eight in number, all were *sui juris*, no other shareholders were contemplated. That being so, the company as a whole knew of these shares being given to the six shipowners, and consequently have no right to impeach the transaction or to call upon these gentlemen to refund either the shares or their value. There was no act *ultra vires* the company, there were no acts requiring to be validated by some formal meeting of the company. The creditors, again, have no right to impeach if the company has not the right. The creditors are not deceived. If they had looked at the registered contract they would have seen what the position was. They would have found that all the shares of the company had been issued as fully paid up; they would have seen that the property consisted of patents and other rights acquired by the company. The creditors, then, can have no right to make these gentlemen liable by alleging misfeasance. The appeal must succeed.

COZENS-HARDY, L.J.—I also am unable to adopt the view of Kekewich, J., in this case. There are two points for decision. If the question were now raised for the first time a good deal might be said in support of that part of the application which seeks to charge these directors with misfeasance. It is conceded that if there had been in fact other shareholders at the time, or any intention that there should be other shareholders, the directors might have been held liable. On principle it is not easy to appreciate the distinction between a private company and a public company. It might have been more satisfactory to say that in each case the mere knowledge and acquiescence of all the shareholders, not manifested by a formal resolution of the company in general meeting, ought not to suffice to condone a breach of trust in the event of the subsequent winding up of the company. But the authorities have, in my view, decided the contrary, and the misfeasance part of the summons cannot, therefore, be supported. As to the other part of the summons, I can find no ground for holding the appellants liable unless the court is prepared to overrule *Carling's case* and the subsequent authorities which have followed it, which, of course, is impossible. There was only one contract between the vendors and the company; it was not even one contract divisible into two parts. It was probably a voidable contract, but it cannot now be avoided or impeached. The company took possession of the property. The liquidator has sold it. The court cannot go into the question of consideration. The vendors, as between themselves and the company, were entitled to these shares fully paid up, and were entitled to have them allotted to their nominees. The agreement between the vendors and the directors as to the disposal of part of the purchase price receivable from the company did not make the contract of sale between the vendors and the company either a "sham" or "illusory."

*Appeal allowed*

Solicitors, *F. W. Hill; Burn & Berridge.*

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From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) April 21.

ATKINSON v. LUMB. (a)

*Master and servant—Employer's liability—Accident—Compensation—"On or in or about engineering work"—Construction of reservoir—Laying water-pipes—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

*A contractor had entered into a contract for the construction of a reservoir and the laying of water-pipes from the reservoir to a town about two miles away. The laying of the pipes was commenced at a point about* 600 *yards from the reservoir, and the work was continued towards the reservoir. The trench for the pipes had been opened for about* 100 *yards, and the pipe-track for the rest of the distance to the reservoir had been staked out. A workman who was employed by the contractor in laying the pipes was injured by an accident at a spot between* 500 *and* 600 *yards from the reservoir. The reservoir was being constructed by means of machinery driven by steam, but no machinery driven by steam, water, or other mechanical power was used in laying the pipes. In proceedings to assess compensation under the Workmen's Compensation Act.* 1897, *the county court judge found that the laying of the pipes was a necessary part of the entire work, which was an "engineering work" within section* 7, *sub-section* 2, *of the Act, and that therefore the*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*workman was at the time of the accident employed on that engineering work.*

*Held, that there was evidence upon which the county court judge could so find.*

Appeal from an award of the Todmorden County Court judge under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman in the employment of a contractor named Lumb. Lumb had entered into a contract with the Corporation of Todmorden for the construction of a water reservoir and filter beds, and the laying of pipes from the reservoir to Todmorden, a distance of about two miles. The work was all being carried out under one contract. The laying of the pipes was commenced at a point about 600 yards from the reservoir, and was continued towards the reservoir. A trench for the pipes had been opened for about 100 yards from this point, and the contractor had taken possession of the rest of the ground between this and the reservoir, and had staked out the pipe track up to the reservoir. The pipes were brought to the place in wagons and lifted out of the wagons by means of a derrick worked by hand.

On the 15th of January, 1902, the applicant was employed in laying the pipes in the trench, when, in paying off the steel rope attached to the derrick, a broken strand injured his thumb and incapacitated him for work. At this time the reservoir was being constructed by means of machinery driven by steam. In proceeding to assess compensation under the Workmen's Compensation Act, 1897, it was admitted the construction of the reservoir was an "engineering work" within the meaning of section 7 of the Act, but it was contended on behalf of the employer that the applicant was not at the time of the accident employed "on or in or about engineering work."

The county court judge, in giving his decision, said that the point at issue was whether or not the water pipes, which were to be connected with the reservoir, and the work necessary for laying them down, were so much an integral part of the water system as to bring the case within the Act. In his opinion, this work for and laying of the pipes were a necessary part of the engineering work of the water supply, and so intimately connected with it as to make it a part of the entire work, and in no wise dissociated from or merely ancillary to it, as in the case of *Chambers* v. *Whitehaven Harbour Commissioners*, 47 W. R. 533, [1899] 2 Q. B. 132. The reservoir without the pipes, or the pipes without the reservoir, would not in either case be a complete work, and as a part was engineering so was the whole. He accordingly made an award in favour of the applicant for half his weekly wages.

The employer appealed.

After the award the applicant died from blood poisoning consequent upon the injury, and his personal representatives were made respondents to the appeal.

*Adshead Elliott*, for the employer.—The employment of the deceased man at the time of the accident was not "on or in or about engineering work" within section 7 of the Workmen's Compensation Act, 1897. The reservoir was an engineering work, but this accident happened between 500 and 600 yards away from it. It therefore did not happen "about" the engineering work: *Chambers* v. *Whitehaven Harbour Commissioners* is directly in point. The award was therefore wrong.

*E. Shortt*, for the respondents.—The county court judge has found as a fact that the work of constructing the reservoir and laying the pipes was one entire work carried out under one contract. The work was split up into sections for convenience, and the judge has found that the laying of the pipes was a necessary part of that engineering work. There was evidence upon which the judge could so find, and this court cannot interfere with his finding. It is a question of fact in each case, and whether the distance from the reservoir is 600 yards or 20 yards can make no difference in principle. The deceased man at the time of the accident was therefore engaged "on," or at any rate "about," engineering work. The case of *Middlemiss* v. *Middle District Committee of Berwick*, in the Court of Session in Scotland, 2 Ct. Sess. Cas. (5th ser.) 392, is directly in point.

He also referred to *Mason* v. *Dean*, 48 W. R. 353, [1900] 1 Q. B. 770; *Fenn* v. *Miller*, 48 W. R. 369, [1900] 1 Q. B. 788.

*Elliott*, in reply.—In *Chambers* v. *Whitehaven Harbour Commissioners* it was just as much a necessary part of the dredging operations to carry the mud out to sea when dredged as the laying of the pipes in the present case was a necessary part of the engineering work of the water supply. Could it be said that if the reservoir had been 100 miles away from the town the laying of the pipes near the town would have been part of the engineering work?

COLLINS, M.R.—This is an appeal by the employer from an award of the county court judge in favour of the workman. The workman who was injured was in the employment of a contractor, who had entered into a contract for the construction of a reservoir and the laying down of pipes for the supply of water to a town. It is admitted that the construction of the reservoir involved the use of machinery driven by steam power, and that, therefore, the construction of the reservoir comes within the definition of "engineering work" in section 7, sub-section 2, of the Workmen's Compensation Act, 1897. That sub-section says that "'engineering work' means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer." Pausing there, the county court judge has found that this particular work of constructing the reservoir and laying the pipes does not come within that part of the definition. The clause goes on: "and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." That is the definition of "engineering work" given in the Act, and by section 7, sub-section 1, "this Act shall apply only to employment by the undertakers as hereinafter defined on or in or about . . . engineering work." In dealing with this definition I desire to call attention to this, that the word "work" is used in two senses, and unless this is borne in mind it may give rise to some difficulty. In the first part of the definition it is used as meaning the labour bestowed; in the second part it is used as meaning the thing upon which the labour is bestowed. Accordingly, in the second part of the definition of "engineering work," with which alone we are concerned in the present case, the word "work" is used as meaning, not the labour bestowed, but the thing on which the labour is bestowed. It is, therefore, a physical thing which embraces a certain physical area. It is important to bear that in mind, and it emphasizes the distinction between the present case and those cases in which it was held that a workman who was not on or in or about a factory did not come within the Act merely because he was at the time of the accident employed upon his master's business. We are not concerned in this case with labour bestowed upon a thing, but with the thing itself. If, therefore, the injured

workman was at the time of the accident employed on or in or about the physical thing—the engineering work—the Act applies. The county court judge has found as a fact that the area of this work embraced the place where the workman was injured. He met with an accident when he was employed on this physical thing called an engineering work. That at once distinguishes many of the cases on the Act from the present case. Even if I did not agree with those cases, I am bound by them; but I must say that I entirely agree with them. The words "on or in or about" are used in reference to area, and do not cover the case of a workman who is injured while employed on his master's business unless he was at the time on or in or about the area of, among other things, the factory or engineering work. But if the area of the factory or engineering work is extended to the place where the workman is injured the Act applies.

In *Chambers* v. *Whitehaven Harbour Commissioners* a steam dredger was used for dredging a harbour and workmen were employed on the steam dredger. The mud which the steam dredger raised was discharged into a hopper which, when full, was taken by a tug out to sea and there emptied. The hopper was not driven or actuated by steam. One of the workmen so employed went in his turn in the hopper to help in discharging the mud into the sea, and when about a mile and a half out at sea he was knocked overboard and drowned. The county court judge there found as a fact that the accident did not happen "on or in or about" engineering work. There was no finding in that case that the place where the man met with the accident was part of the physical area which was described as the engineering work. The steam dredger and the place where it was were the physical area of the engineering work. The hopper was like the cart which conveys the goods from a factory, and with regard to which there has been more than one decision. This court held, following a line of decisions, that the man did not meet with the accident while employed on or in or about engineering work. Then there is the case in Scotland of *Middlemiss* v. *Middle District Committee of Berwick*. That case is very difficult to distinguish from the present case. There a road was being repaired by means of a steam-roller and a water-cart, the water-cart being used to sprinkle the newly-laid surface before it was rolled. The driver of the water-cart was directed to water a piece of road over a quarter of a mile away from where the steam-roller was at work, and he was there killed by an accident. The Court of Session held that he was employed on an engineering work when he was killed, the operations being part of a process. They held that the physical area of the engineering work extended to the place where the man met with the accident. In the present case the county court judge has found that the place where the accident happened was part of the area of the engineering work, and in my opinion there is evidence to support that finding. The appeal must therefore be dismissed.

STIRLING, L.J.—I am of the same opinion, and I have nothing to add.

MATHEW, L.J.—I also am of the same opinion, and I agree with the reasons given by the Master of the Rolls.

*Appeal dismissed.*

Solicitors for the appellants, *W. Hurd & Son*, for *Chapman & Brooks*, Manchester.

Solicitors for the respondents, *Firth & Co.*, for *Craven & Garsed*, Todmorden.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — April 21.

ELVIN v. WOODWARD & CO. (a.)

*Master and servant—Employers' liability—Accident—Compensation — "Scaffolding" — Painter's steps—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c* 37), *s.* 7.

*An ordinary pair of self-supporting painter's steps, eight feet high, with flat steps and a board on the top for a painter to stand upon to enable him to paint a place out of his reach from the ground may be a "scaffolding" within section 7 of the Workmen's Compensation Act*, 1897.

*So held by* Collins, M.R., *and* Mathew, L.J.; Stirling, L.J., *dissenting*.

Appeal from an award of the judge of the Shoreditch County Court under the Workmen's Compensation Act, 1897.

The applicant for compensation was a painter in the employment of Woodward & Co., who had contracted to repair and paint a house which exceeded 30ft. in height. The applicant was employed on the painting work of the house. He was painting a wall 10 or 11ft. in height above the street, and in order to reach the necessary height he was standing upon a pair of ordinary painter's steps. These steps were 8ft. high and had ten flat steps with a board on the top upon which a man could stand when at work. The steps were supported by uprights, and could be moved from place to place. While the applicant was at work standing on the steps, he fell off and was injured. At the time of the accident the main scaffolding, which had been used in repairing the house, had been taken down.

Upon proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge gave judgment as follows: "I find that the applicant in this case was injured by a fall from steps on which he had been standing for the purpose of painting a wall above the height he could reach when standing on the ground. The steps were 8ft. high, ten rungs, ordinary painter's steps. In my opinion such steps, though used at the time of the accident to support the man while doing the work, afford no evidence that the house in question was being repaired by means of a scaffolding. If the court is of opinion that there was evidence on which I might find that the steps were a 'scaffolding,' I award £1 a week from fourteen days after the accident until ended, reduced, or varied, with costs on scale C. Award for the respondents (the employers) with costs on scale C."

The applicant appealed.

*Rueyg, K.C.*, and *Chester Jones*, for the applicant.

*A. Powell, K.C.*, and *Addington Willis*, for the employers.

The arguments and the cases are referred to in the judgments.

COLLINS, M.R.—At one time I should have held without any hesitation that such steps as these were not, and could not be, a "scaffolding" within the meaning of section 7, sub-section 1. of the Workmen's Compensation Act, 1897. The House of Lords, however, has, in *Hoddinott* v. *Newton, Chambers, & Co.*, 49 W. R. 380, [1901] A. C. 49, placed a construction on the word scaffolding which is not consistent

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

with the view I had previously taken. They held that scaffolding might be external or internal, and might include an internal staging arranged with planks and trestles and without poles. That decision has cut away the grounds upon which I should have held that this arrangement of steps could not be a scaffolding. It is exceedingly difficult to find any principle of law to apply in ascertaining what is a scaffolding. In *Marshall* v. *Rudeforth*, 50 W. R. 596, [1902] 2 K. B. 175, this court held that it was impossible to say as a matter of law that a ladder which was placed against a house and was used for the work of repairing the house must be a scaffolding. On the other hand, this court held in *Veazey* v. *Chattle*, 50 W. R 263, [1902] 1 K. B. 494, that a contrivance called a crawling-board used for the repair of the roof of a building might be a scaffolding. In that case the court affirmed the decision of the same county court judge as decided the present case, holding that there was evidence to justify the finding of the judge that this contrivance was a scaffolding. The same learned judge has now put the question in the present case to the court whether a pair of ordinary painter's steps such as these can be a scaffolding within the meaning of the Act. He has held that the steps, though used at the time of the accident to support the man while doing the work, afford no evidence that the house was being repaired by means of a scaffolding. If he had merely made an award in favour of the employers, I should not have found it possible to disagree with him, because there seems to me to be evidence upon which the county court judge could have found either way. But he has made an award based upon the assumption that these steps could not be a scaffolding, while at the same time he added that "if the court is of opinion that there was evidence on which I might find that the steps were a scaffolding, I award £1 a week from fourteen days after the accident." That amounts to saying that if there is any evidence, he would have held that the steps were a scaffolding. The learned judge does not ask us, if we think that there is some evidence, to send the case back to him. I base my judgment on this, that these steps may be a scaffolding. I cannot draw any distinction in point of law between a staging consisting of planks placed across trestles or footstools and ordinary painter's steps which carry their own support with a top wide enough to form a platform for a man to stand upon at work. I cannot say as a matter of law that such an arrangement cannot be a scaffolding. That being so, there is evidence upon which the county court judge might have found that the steps were a scaffolding, and therefore the appeal must be allowed and an award made in favour of the applicant for £1 a week from fourteen days after the accident.

STIRLING, L.J.—I regret that I am unable to agree with my learned brothers. The question is whether the structure which is described as ordinary painter's steps is a "scaffolding" within the meaning of the Workmen's Compensation Act, 1897. The House of Lords, in *Hoddinott* v. *Newton, Chambers, & Co*, has laid down the way in which the Act is to be construed. Lord Macnaghten says: "I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and that the court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be." In the same case Lord Brampton cited with approval a passage from the judgment of Rigby, L.J., in *Maude* v. *Brook*, 48 W. R. 290, [1900] 1 Q. B. 575, where the Lord Justice said: "In construing the Act we are not at liberty to confine the meaning of the word 'scaffolding' to that which is its most usual form; anything, whether usual or unusual, that can properly be called scaffolding is within the Act." And, lastly, Lord Lindley said: "Anything which can fairly be called a scaffold is a scaffolding within the meaning of section 7 if used as mentioned in the Act." Guided by those opinions, I ask myself whether an ordinary pair of painter's steps which are used for enabling a painter to paint a wall out of his reach from the ground can be fairly regarded as a scaffolding. Much as I regret to differ from the other members of the court, I feel bound to come to the conclusion that the view taken by the county court judge is correct.

MATHEW, L.J.—I agree with the Master of the Rolls. We must take the words of the Act and see what they mean. A scaffolding within the meaning of this Act includes a structure inside or outside a building erected for the purpose of enabling workmen to construct or repair the building or part thereof. We have been instructed by the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* that this question is a question of law for the court after the facts have been ascertained, and that one of the elements to be considered is the purpose for which the scaffolding is used. That case shows that what would not in the ordinary acceptation of the term be called a scaffolding may be a scaffolding within the meaning of the Act. I have no hesitation in saying that two trestles with a plank placed across them may be a "scaffolding" within the decision in the House of Lords, if used in the way mentioned in the Act. In the present case we have a pair of steps so constructed as not to answer the ordinary purpose of a ladder—namely, to enable a man to go up or down from one place to another. They are constructed for a special purpose and are self-supporting, upon which a man can stand while he is at work. The appeal must therefore be allowed.

*Appeal allowed.*

Solicitors for the applicant, *Shaen, Roscoe, Massey, & Co.*

Solicitors for the employers, *Treadwell & Aylwin.*

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## High Court of Justice.

Chan. Div. Byrne, J. — May 14.

*In re* PEIRSON'S SETTLEMENT.
CAYLEY *v.* DE WEND. (*a.*)

*Settlement—Marriage settlement—Trust for persons who would have been entitled as wife's next-of-kin if wife had survived husband—Survivorship of husband—Time for ascertaining next-of-kin.*

*Under the ultimate trust in a marriage settlement trustees were directed to hold certain funds "in trust for the person or persons who, under the statutes made for the distribution of intestates' personal estates, would then be entitled to the personal estate of A. P." (the wife) "in case she having survived" her husband "had died possessed of the said stocks, funds, and securities, and to be paid and divided accordingly." The husband survived the wife*

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

*Held, following* Pinder v. Pinder, 28 *Beav.* 44, 8 W. R. Ch. Dig. 71, *that the persons entitled were the wife's next-of-kin at the time of the husband's decease.*

This was a summons to determine what persons, in the events which had happened, were the next-of-kin of Mrs. Anne Peirson, deceased, under a marriage settlement bearing date the 1st of December, 1852.

The plaintiff was the Rev. Richard Edward Cayley, of 37, Gunterstone-road, West Kensington, clerk, who claimed to be the sole surviving trustee of the said settlement.

The defendants were parties claiming as the next-of-kin at Mrs. Peirson's death, and at her husband's death respectively.

The facts of the case were as follow: Under the said settlement it was declared that the trustees should stand possessed of the several sums of Consolidated Bank Annuities therein mentioned upon trust as to the income for Mr. and Mrs. Peirson during their lives as therein mentioned, and after the death of the survivor of them it was declared that the said trust moneys, stocks, funds, and securities, and the annual produce of them, should be in trust for the children of the said Mr. and Mrs. Peirson as therein mentioned, and in the event of the failure of such issue the said moneys and funds should be held on such trusts as Mrs. Peirson should during coverture by will appoint, and in default thereof in trust for the person or persons who under the statutes made for the distribution of intestates' personal estates would then be entitled to the personal estate of the said Anne Peirson in case she having survived the said Thomas Peirson had died possessed of the said trust moneys, stocks, funds, and securities, and to be paid and divided accordingly.

Mrs. Peirson died on the 1st of May, 1891, leaving no issue, and without having exercised her power of appointment.

On the 9th of November, 1902, Mr. Peirson died.

At the date of Mrs. Peirson's death her only next-of-kin was her sister, Mrs. De Wend, who died on the 22nd of February, 1897, and whose executors and trustees were before the court.

At the date of Mr. Peirson's death Mrs. Peirson's next-of-kin were her sister's four children.

*T. L. Wilkinson*, for the trustees of the settlement.

*J. W. Galbraith*, for Mrs. Peirson's trustees.—The class ought to be ascertained at the date of the husband's death: *Pinder* v. *Pinder*, 28 Beav. 44, 8 W. R. Ch. Dig. 71; *Chalmers* v. *North*, 8 W. R. 426, 28 Beav. 175; *In re King, Gibson* v. *Wright*, 60 L. T. Rep. 745, 37 W. R. Dig. 158; *Clark* v. *Hayne*, 37 W. R. 667, 42 Ch. 529. The words are practically the same as in *Pinder* v. *Pinder*.

*T. Pakenham Law*, for the representatives of Mrs De Wend.—The date at which the next-of-kin entitled to take under this gift ought to be ascertained is the death of the wife: *Druitt* v. *Seaward*, 34 W. R. 180, 31 Ch. D. 234; *In re Bradley*, 58 L. T. Rep. 631. There is a conflict of authorities here, and all the cases cannot be reconciled. *Druitt* v. *Seaward*, however, closely resembles this, and should be followed.

BYRNE, J. (after stating the facts).—The point is, at what date the next-of-kin are to be ascertained, whether at the death of the wife or of the husband. There is a difficulty in reconciling the cases, but the words in this case are almost the same as those used in *Pinder* v. *Pinder*. Chitty, J., says in regard to the judgment of Romilly, M.R., in *Pinder* v. *Pinder*, in *In re King, Gibson* v. *Wright*, 60 L. T. Rep., at p. 747: "I do not think it would be right after that decision has stood for so long a period, and when I have got a trust, as I have stated, as nearly identical as could be, to depart from that decision, which may frequently have been acted on." I cannot add anything. I think that I ought to take the same course here as was taken in *Pinder* v. *Pinder*. Stirling, J., in *In re Bradley* did not dissent from *Pinder* v. *Pinder*. He stated that the words there were altogether different. I cannot as to *In re Bradley* throw over that part of Stirling, J.'s judgment. In *Clarke* v *Hayne* Kay, J., disapproved both of *Druitt* v. *Seaward* and *In re Bradley*. I can only say that this case falls within *Pinder* v. *Pinder* and I must follow the decision there.

Solicitors (for all parties), *Cayley & Cayley*.

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Chan. Div. Byrne, J. } May 8, 9.

CARTER v. ROBERTS. (a.)

*Practice—Motion to commit—Exhibits to affidavits—Service of copies upon respondent—R.S.C.* 1885, *ord.* 52, *r.* 4.

*An exhibit to an affidavit is not part of the affidavit within the terms of ord.* 52, *r.* 4, *and that rule does not require copies of exhibits to be served upon the respondent to a motion for committal. But the respondent ought to have notice of the evidence intended to be used against him, and if the party moving omits to furnish him with copies of such exhibits as are necessary to enable him to know fairly the nature of this evidence, the applicant will be liable to have the motion dismissed.*

Motion.

This was a motion by the plaintiff in a partnership action for the committal of the defendant for contempt of court, and also for the appointment of a receiver of the assets of the partnership.

*Levett, K.C.*, and *T. Douglas*, for the plaintiff, stated that there were certain exhibits to the affidavits filed on behalf of the plaintiff, copies of which had not been served upon the defendant with the notice of motion, and they asked for an adjournment. It appeared that copies of the exhibits had subsequently been given to the defendant.

*Rowden, K.C.*, and *P. S. Stokes*, for the defendant.—We object to any adjournment, and ask that motion may be at once dismissed. The plaintiff has not complied with ord. 52, r. 4, of the Rules of the Supreme Court, 1883, by not having served copies of the exhibits. Exhibits are part of the affidavit (*In re Hinchliffe*, 43 W. R. 82, [1895] 1 Ch. 117), and copies of them must be served with the notice of motion: *Rosenbaum* v. *Belson*, 45 SOLICITORS' JOURNAL, 576, [1901] W. N. 124. The irregularity is fatal and cannot be cured: *Taylor* v. *Roe*, 68 L. T. Rep. 213, [1893] W. N. 14, 41 W. R. Dig. 171. Every iota of the rules must be complied with: per Bowen, L.J., in *In re Evans*, 41 W. R. 230, 9 Times L. R. 109

*Levett*, in reply.—The service of copies of affidavits is not required by the rules: *In re Hutchings*, [1887] W. N. 254; *Sloane* v. *Britain Steamship Co.*, 45 W. R. 203, [1897] 1 Q. B. 185.

*Cur. adv. vult.*

May 9.—BYRNE, J.—The rule upon which the question depends is rule 4 of order 52. There are two cases noted in the Weekly Notes bearing upon the question. One is *In re Hutchings*. In that case a

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

preliminary objection to the motion was taken on the ground that copies of the exhibits had not been served with the notice of motion in accordance with the Rules of the Supreme Court, 1883. Stirling, J., in overruling the objection, said that although the rule did not in terms extend to the exhibits, he was far from saying that they ought not to be delivered with the affidavits. But in that case the respondent had seen all the exhibits, and had filed affidavits in reply, in which he had dealt with them all; so that it is not really a decision on the point, because, as I read it, the learned judge thought that if the objection was a good one, it had been waived. Then it appears that there was a case before me of *Rosenbaum* v. *Belson*. I have a vague recollection of the case. The party appeared in person, and said that he had not had copies of the exhibits. I cannot call to mind whether I dismissed the action upon the ground that they had not been served. If so, and if it was done upon that general ground, I am not prepared to say that I was right. I have now had an opportunity of hearing the question fully and carefully argued by counsel on both sides, and I will state the conclusion to which I have come.

I think that for some purposes the exhibits are treated in the Rules of the Supreme Court as part of the affidavit, and that in other respects and purposes they are undoubtedly not so treated. Thus affidavits to be filed under ord. 38, r. 10, do not include exhibits. The exhibits are not filed, but go back to the persons to whom they belong. On the other hand, it was decided in *In re Hinchliffe* that for the purposes of ord. 38, r. 23—that is as regards the right of inspection—exhibits are part of the affidavit. In *In re Hutchings*, Stirling, J., said that exhibits were not within the terms of ord. 52, r. 4. I take that as meaning that the term affidavit does not include exhibits. It has been pointed out in the course of the argument that it would be impossible in certain cases to serve copies of exhibits. Thus upon a motion to attach a man in respect of some infringement of an invention it might be necessary for strict proof to exhibit an iron safe weighing a ton. Or, as Mr. Levett suggested, the exhibit might be a box of cigars. How could you serve a copy of the safe or of the box of cigars? There are other cases where it would seem oppressive to the parties, either to the party moving, or if the motion should be successful to the respondent, to serve copies of all written exhibits. Thus it might be necessary to exhibit a copy of a long account, the original of which was known to be in the possession of the respondent. In that case it would seem to be *primâ facie* oppressive on the respondent if he should thereafter have to pay the costs of the motion, because he would have to pay for the copy of a document, the original of which he had in his own possession, and with which he was acquainted. I have therefore come to the conclusion that the terms of ord. 52, r. 4, do not make it necessary to serve copies of exhibits so as to impose upon the party moving the absolute result of having his motion dismissed for irregularity in case he omits to serve them. At the same time it is obvious, as was said by Kekewich, J., in *Taylor* v. *Roe*, that the meaning and intention of the rule is that the defendant shall have fair notice, not merely of the grounds on which the motion is made, but of the evidence on which it is founded, and I think that a party moving to attach who did not furnish copies of such exhibits as were reasonably necessary to enable the defendant to understand the nature of the evidence that would be brought against him would be in peril of having his motion dismissed. Each case must depend upon its special circumstances. Under these circumstances I think that the plaintiff is entitled to ask for the motion to stand over upon the ground that he has not committed an irregularity within the words of the rule.

[Upon attention being called to ord. 14, r. 2, his lordship observed that where the rules intend an affidavit to be served it is so stated.]

*Motion adjourned.*

Solicitors, *Jaques & Co.*, for *C. Beaumont Cottam*, Ludlow; *Chester, Broome, & Griffithes*, for *Weyman & Weyman*, Ludlow.

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Chan. Div. Farwell, J. — March 6, 12.

*In re* WELLS.
BOYER v. MCLEAN. (*a.*)

*Will—Agreement for determining the trusts of the will by paying off annuities—Sanction of court on behalf of infants—Arrangement for benefit of infants other than a "compromise"—Jurisdiction.*

*The court has jurisdiction to sanction an arrangement between parties, some of whom are infants, notwithstanding that such arrangement be not strictly speaking a "compromise."*

Peto v. Gardner, 2 Y. & C. C. C. 312, *not followed.*

Adjourned summons.

By his will, dated the 15th of December, 1882, H. W. gave all his property, both real and personal, to trustees upon trust to pay two annuities, and during the lifetime of the two annuitants and of the survivor to accumulate the remainder of the income, and upon trust after the death of the survivor of the two annuitants for such of the children of his two daughters as should be then living and should attain the age of twenty-one.

A son of one of the two daughters made a settlement of his expectant share, and his son, an infant, had a contingent interest under this settlement.

By a conditional agreement entered into on the 19th of November, 1902, it was agreed that the two annuitants should be paid off and the residue of the fund divided among the persons then entitled in expectancy to shares therein.

This summons asked for the sanction of the court to the agreement on behalf of the infant.

*Butcher, K.C.*, and *J. A. Nash*, for the plaintiffs.

*A. F. C. Luxmore; Upjohn, K.C.*, and *F. W. Webster; W. Scott Thompson; Forder Lampson; Begg;* and *Taubmann Goldie*, for the several defendants, asked the court to sanction the agreement, but called attention to the decision of Knight-Bruce, V.C., in *Peto* v. *Gardner*, 2 Y. & C. Ch. Cas. 312, that the court had no jurisdiction to give such sanction except to a literal compromise—*i.e.*, a compromise of an actual dispute; and to *Day* v. *Day*, 9 Jur. 785, in which the same judge acted upon his previous decision in *Peto* v. *Gardner*.

FARWELL, J.—I am satisfied that the proposed arrangement is for the benefit of the infant, and I should have no doubt, but for the decision of Knight-Bruce, V.C., in *Peto* v. *Gardner*. That decision seems to me, however, to run counter to a continuous stream of authority. To go back to the beginning of things, the judgment of Lord Hardwicke in *Inwood* v. *Twyne*, Amb. 417, is an early and excellent

(*a.*) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

authority that the court will "change the nature of an infant's estate if that be for the infant's benefit." To the same effect is *Pierson* v. *Shore*, 1 Atk. 480, where Lord Hardwicke treats the fact that the transaction in question was the most beneficial there could be for an infant *cestui que trust* as a sufficient reason for supporting it. Again the court will allow policies of life assurance which have been settled to be surrendered in certain circumstances, as in *Hill* v. *Trenery*, 23 Beav. 16, 6 W. R. Ch. Digr 54; *Beresford* v. *Beresford*, 23 Beav. 292, 6 W. R. Ch. Dig. 91, and in an earlier and even stronger case before Lord Langdale, *Vickers* v. *Scott*, 1 Jur. 402. Nor is it necessary to the exercise of the jurisdiction of the court that the arrangement to be sanctioned should have in the strict sense a compromise. In *Brooke* v. *Lord Mostyn*, 13 W. R. 1115, 2 De G. J. & S. 373, Turner, L.J., though he spoke of the arrangement then under discussion as a compromise, describes the jurisdiction of the court in the broadest terms. He says: "In the exercise of that jurisdiction the court may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of the *cestuis que trust* who are infants or under disabilities." The most recent reported case bearing on this subject is *In re New, In re Leavers*, [1901] 2 Ch. 534, where, again, the jurisdiction of the court is stated in terms which do not suggest any such limitation as Knight-Bruce, V.C., laid down, and where it is said "it is impossible, and no attempt ought to be made to state or define all the circumstances under which or the extent to which the court will exercise the jurisdiction." I do not think *Peto* v. *Gardner* can fairly be distinguished from the present case, but I come to the conclusion that it runs counter to a continuous stream of authorities, and that I am not bound to follow it.

Solicitors, *Collins & Cook; Collins & Collins; Duffield, Bruty, & Co.; Travers, Smith, & Co.*

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Chan. Div.
Farwell, J. } Feb. 17.

*In re* SAUNDERTON GLEBE LANDS (*a*)

*Railway—Compulsory purchase—Personal inconvenience to limited owner—Compensation—Lands Clauses Act,* 1845 (8 & 9 *Vict. c.* 18), *s.* 73.

*A limited owner of lands taken by compulsory purchase under the Lands Clauses Acts is entitled to have any personal inconvenience which may be caused to him by the works for which the land is taken, considered in the fixing of the purchase price, and to have so much of the purchase price as is attributable to such consideration paid to him.*

Petition.

By a private Act powers were given to a joint committee of the Great Western and Great Central Railways to acquire a part of the glebe lands of the parish of Saunderton, Bucks, for the purpose of constructing a new line of railway and of widening an existing line.

The sum of £1,600 was paid into court as purchase-money, and the rector now applied to the court for the payment out to him of £100 as compensation for the personal inconvenience, annoyance, and loss of amenity of residence occasioned to him by the noise of the works, the temporary obstruction of the only roads leading to the rectory, the crowd of strange workmen brought into the parish, and other causes connected with the works.

Affidavits were sworn by the valuers who had fixed the purchase price of £1,600 to the effect that they had taken these circumstances into consideration, and that, had they not done so, they would have fixed the price at least £100 lower.

*C. E. Bovill*, for the petitioner, referred to *In re Collis' Estate*, 14 L. T. Rep. 353; 14 W. R. Ch. Dig. 107.

*G. Borthwick*, for the patrons, did not oppose the application.

*Medd*, for the railway companies.

FARWELL, J.—This is an application of an unusual character, but the order asked for seems to be clearly within the proviso of section 73 of the Act, and I accordingly make it.

Solicitors, *Routh, Stacy, & Castle; R. R. Nelson.*

(*a*.) Reported by GODFREY R. BENSON, Esq., Barrister-at-Law.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) } April 27.

LUMBY *v.* FAUPEL. (*a*.)

*Landlord and tenant—Lease—Covenant by lessee to pay taxes, rates, and assessments—Expenses of paving rate—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s* 150.

*A covenant in a lease that the lessee would during the continuance "pay all taxes, rates, and assessments imposed or assessed upon the premises, or on the landlord or tenant in respect thereof," does not impose on the lessee the apportioned cost of paving the road in front of the premises in respect of work done by the local authority under section* 150 *of the Public Health Act,* 1875, *where the work was done before, but the apportionment was made after, the granting of the lease.*

Baylis *v.* Jiggens, [1898] 2 *Q. B.* 315, 46 *W. R. Dig.* 87, *followed.*

Foulger *v.* Arding, 50 *W. R.* 417, [1902] 1 *K. B.* 700, *distinguished.*

Appeal from his Honour Judge Russell, sitting at the Kingston County Court.

The action was brought by the lessor of No. 46, Broadway, Wimbledon, to recover from the lessee the sum of £25 18s. 11d., being the amount of the expense of paving the roadway apportioned on the premises, under section 150 of the Public Health Act, 1875.

The plaintiff by a lease dated the 2nd of October, 1898, leased the above premises to Edward Gordon for the term of twenty-one years.

On the 29th of May, 1899, Edward Gordon assigned his interest in the premises to the defendant.

In November, 1899, the defendant surrendered his lease, and was granted a new lease for the term of twenty-one years from the 29th of September, 1899.

The lease contained a covenant that the lessee would pay all "rates, taxes, and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parliament or otherwise."

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

The work was completed in January, 1897, notice of apportionment was given on the 2nd of January, 1902, and the demand for payment was made on the 3rd of May, 1902.

His Honour Judge Russell gave judgment for the plaintiff on the authority of *Foulger* v. *Arding*, 50 W. R. 417, [1902] 1 K. B. 700.

The defendant appealed.

*J. S. Green*, for the defendant.—The covenant in this case is identical with *Baylis* v. *Jiggens*, [1898] 2 Q. B. 315, 46 W. R. Dig. 87, and Channell, J., there held that the burden did not fall on the tenant. Further, the work in this case was done before the lease was entered into, and the case of *Surtees* v. *Woodhouse*, *ante*, p. 275, [1903] 1 K. B. 396, decides that the tenant is not liable for a charge on the premises, even though the final apportionment is not made till after the lease is entered into.

He also cited the following cases: *In re Bettesworth* v. *Richer*, 36 W. R. 544, 37 Ch. D. 535; *Hurst* v. *Hurst*, 4 Exch. 571; *Farlow* v. *Stevenson*, 48 W. R. 213, [1900] 1 Ch. 128; *Hartley* v. *Hudson*, 4 C. P. D. 367, 28 W. R. Dig. 419; *Wilkinson* v. *Collyer*, 32 W. R. 614, 13 Q. B. D. 1.

*W. O. Hodges*, for the plaintiff.—This is an assessment imposed upon the landlord in respect of the premises, and therefore falls within the covenant. As regards the second point, though the original lease was surrendered it was a continuous tenancy, and *Surtees* v. *Woodhouse* is accordingly distinguishable.

He cited *Payne* v. *Burridge*, 12 M. & W. 727; *Thompson* v. *Lapworth*, 16 W. R. 312, L. R. 3 C. P. 149.

Lord ALVERSTONE, L.C.J.—The discussion of this case, which has been, of course, of very great assistance to us on both sides, has only brought out in strong relief the difficulty which I felt when I gave judgment in *Foulger* v. *Arding*, and which was expressed on the appeal in that case by the learned Master of the Rolls—namely, the difficulty of attempting to go through this maze of cases and endeavouring to lay down some distinct and definite rule which will reconcile them all; I believe it would be quite impossible to do so, and it certainly is high time that, either by a decision of the House of Lords or by legislation, there should be put an end to this tangle in which parties are placed by these various decisions.

But in this particular case we have to deal with an action brought upon a covenant which contains the words that the lessee will pay the rent "and will also pay the rates, taxes, and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parliament or otherwise." The particular charge in question is a paving expense under section 150 of the Public Health Act, 1875, the work in respect of which had been done—some two years before the lease—in the year 1897, but the apportionment for which was not made until nearly three years afterwards. I endeavoured when I gave judgment in *Foulger* v. *Arding* to express my opinion. I thought you could possibly lay down some sort of general principle that you must find words which showed a contract by the tenant to take particular payments or particular duties and burdens upon his own shoulders, and that it was possible in some way of that kind to reconcile the various authorities. I therefore came to the conclusion that the word "impositions" was not sufficient in that case to put the burden upon the tenant. The Court of Appeal took a different view, which I can well understand, and no doubt I was wrong in the construction I put upon the word "impositions"; and of course the judgments of the Master of the Rolls and the other two Lord Justices in the Court of Appeal have, if not altogether removed, affected and impaired the weight of some of the arguments and reasons which were given in the earlier cases for declining to put the obligation on the tenant. As the Master of the Rolls has pointed out, the trend of the decisions has been gradually in favour of the landlord, and that such a case as *Farlow* v. *Stevenson* would, if decided at an earlier period, have been, in all probability, not decided in the same way. If, therefore, we could see that *Foulger* v. *Arding* had laid down some rule or principle which would impose the liability upon the tenant in this case, it would have been of assistance to us, and probably we might have been able in this and future cases to dispense with the task of going through any part of the maze of cases to which I have already referred. But, taken as an authority for this particular case, I do not think that *Foulger* v. *Arding* does afford us that guide. The words in *Foulger* v. *Arding* were "taxes, rates, including sewers, main drainage assessments, and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted may be taxed, rated, assessed, charged, or imposed upon," and the reasoning of the learned judges, practically speaking, proceeds upon the construction to be put upon the covenant in consequence of the presence there of the word "impositions," which may no doubt from some point of view be construed as being a wider word than "rates, taxes, or assessments," although if some of the earlier cases had been followed a wider meaning would not have been put on that word. That being so, we cannot protect ourselves under the decision of *Foulger* v. *Arding* by saying that the Court of Appeal has already put a construction upon the covenant now before us. There are not here these words which, in the opinion of the Court of Appeal, were wider words. We have here to deal with the words "taxes, rates, and assessments." I think the argument has shown that the only words that can be relied upon are "assessments imposed or assessed upon the premises or upon the landlord or tenant." Really one might almost say that there might be equally good reasons for giving the judgment one way or the other. If you take the view that any sum of money that is paid in respect of property is an assessment upon that property, then it would come within the words "assessments imposed." On the other hand, if you hold that "assessment" has a narrower meaning—and I think from some points of view it must be considered to have a narrower meaning than "payments" or "impositions" or "duties" or "charge"—you can give good reasons why it should not come within that. Under these circumstances I must say I am pressed with the fact that there are two, and it may be said from one point of view three, very great and weighty opinions which have taken the view that these words are not sufficiently wide to impose this upon the tenant. There is the opinion of Manisty, J., in *Wilkinson* v. *Collyer*, which, so far as the actual words "rates, taxes, and assessments" are concerned, is an opinion to the same effect, but does not go quite so far, because, as was pointed out by my brother Channell in *Baylis* v. *Jiggens* the covenant there was not so wide with reference to the person upon whom the rates, taxes, and assessments were imposed. Then there was the opinion of A. L. Smith, J., in *Lyon* v. *Greenhow*, 8 Times L. R. 457, where the words are certainly, so far as I can see, identical: "Rates, taxes, assessments imposed or assessed upon the premises or landlord or tenant in respect thereof by authority of Parliament." Then

there is the opinion of my brother Channell in the case of *Baylis* v. *Jiggens*; and I must say that when we find that the Court of Appeal, in dealing with *Foulger* v. *Arding*, and having a great many of these cases before them, have themselves relied upon the further word "impositions" as imposing the liability, there is some ground for thinking that if the words had been merely such as occur in the cases I have referred to, the decision would probably have been different. I have accordingly come to the conclusion that we ought not, at any rate sitting here, to hold, in face of the opinions that have been expressed, that the words "rates, taxes, and assessments imposed or assessed" are sufficient within the meaning of the covenant to impose the liability upon the tenant to bear a paving expense in respect of which the work has been done, and has become a charge upon the premises before the commencement of the lease. I prefer to base my judgment on that ground, though I do not express any opinion hostile to Mr. Green's argument founded upon *Surtees* v. *Woodhouse*, but I prefer to base my judgment upon the ground that the words of the covenant do not impose the duty upon the tenant.

I can well understand the county court judge thinking that this case was governed by *Foulger* v. *Arding*. For a long time I myself thought that *Foulger* v. *Arding* went further than I now think it does, and for the reasons I have given I do not think it can be regarded as an authority to overrule the decisions I have referred to, and this appeal must therefore be allowed.

WILLS, J.—I am of the same opinion. These words which are used in this lease, "rates, taxes, and assessments," have been used over and over again in leases which have received judicial construction for a number of years past, and the result of the authorities is well summed up in A. L. Smith, J.'s, judgment in *Lyon* v. *Greenhow*, where he says: "Though a great number of cases have been cited"—and he is dealing with the same words that I am dealing with—"there is not a single authority in which the tenant has been held to be liable whose lease contained words such as were in the present lease. Where the tenant was held liable there were words in excess of those found in this covenant." Then, having disposed of the authorities in that way, he expressed his opinion that the liability to pay for a drain, which was very much the same class of work as there is here, did not fall within the words "rates, taxes, or assessments."

I know that arguments may be advanced to show that this is an assessment, and if the mere fact that a sum of money has to be apportioned between some individuals who happen to occupy contiguous properties is enough to make it an assessment, of course it is; but I should think, used in this sense, "rates, taxes, and assessments" does not mean and was not intended to mean such a case as this. I agree with my lord it is best to base our judgment on this point. I confess that my own individual opinion is that the principle in *Surtees* v. *Woodhouse* for the purpose of construing covenants of this kind goes a good deal further, and very nearly, if not quite, covers this case; but that has not been thoroughly and fully argued, because we gave an intimation of our opinion that we should probably decide the case upon the other point and I therefore prefer to rest my judgment definitely upon the first point which has been argued.

CHANNELL, J.—I agree that we ought to decide this case in the way in which my lord and my brother Wills have stated, on the ground that, upon the authorities, words identical with those in this lease have in fact been construed as not imposing the liability upon the tenant; and that in all the cases in which the liability has been imposed there has been some larger word than is to be found in this covenant, either duties, charges, or impositions. One of those three has been found in every case, so far as I know, in which the liability has been put on the tenant. Under these circumstances I think we ought to allow this appeal. At the same time I have the greatest possible doubt about it. One of the cases in which that has been so decided was my own decision (*Baylis* v. *Jiggens*). I had very great doubt about that at the time. I have still greater doubt about it now, because a portion of the reasoning upon which I proceeded has certainly been destroyed by the subsequent case of *Foulger* v. *Arding*; but it is only a portion of the reasoning, and my judgment was justified in that case by something which I do not think I knew of at the time—viz., that the late Master of the Rolls had given a precisely identical decision, which I do not think was quoted to me. The matter really is extremely doubtful, and I quite agree with what my lord has said, that it is very desirable that, if possible, an end should be put to these questions. How to do it one does not quite know, because even if one of these cases were taken to the House of Lords, in all probability some draughtsman would put a new word into the covenant which the courts would have to deal with, and I hope that Parliament will not prevent parties contracting in such terms as they are advised. The real thing that ought to be done to prevent these difficulties is that tenants should take a little trouble about the preparation of their leases. In point of fact the tenant nearly always allows the landlord's solicitor to prepare the lease for the sake of expense, and he probably does not take much trouble to have it supervised on his own behalf, and then the lease contains words which are ultimately construed by the court to include some charge which no tenant in his senses would now deliberately agree to pay. The difficulties of the court might be removed if persons who were going to take leases would take a little more care about the preparation of them.

*Appeal allowed.*

Solicitors for the plaintiff, *Ashley, Lumley, & Cooper.*

Solicitors for the defendant, *Gregson, Warham, Waugh, & Gregson.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.)

March 26; April 24.

FARMER v. GLYN JONES. (a.)

*Inland revenue—Stamp duty—Medicines—Owner, proprietor, original or first vendor—Stamp Act,* 1804 (44 *Geo.* 3, *c* 98), *s.* 2—*Medicine Stamp Acts,* 1802 (42 *Geo.* 3, *c.* 56), *s.* 3, *and* 1812 (52 *Geo.* 3, *c.* 150), *s.* 2, *Schedule.*

*A chemist bought from a firm of wholesale chemists a well-known drug, called ammoniated tincture of quinine. He affixed to it a label stating that it was a well-known and highly recommended remedy for influenza.*

*Held, that he was not the "owner, proprietor, original or first vendor" of the medicine in question within the meaning of the schedule,* 52 *Geo.* 3, *c.* 150, *and that therefore he was not liable to stamp duty as having held out or recommended the medicine.*

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Case stated.

The facts of the case and the arguments fully appear from the judgment.

*Sir E. Carson, S.G.*, and *Rowlatt*, for the appellant.

*Asquith, K.C.* (*H. D. Bonsey* and *Galbraith* with him), for the respondent.

*Cur. adv. vult.*

April 24.—WILLS, J., read the judgment of the court: The appellant is an officer of the Inland Revenue. The respondent is a registered chemist and druggist holding a license for the sale of medicines liable to duty under the Medicines Stamp Duty Acts. The respondent sold on the 8th of April, 1902, to an officer of the Inland Revenue, a bottle with a label affixed containing the following words: "Ammoniated tincture of quinine, B.P., a well-known and highly recommended remedy for influenza and colds." It had, however, no stamp. Proceedings were taken by the appellant against the respondent under 52 Geo. 3, c. 150, s. 2, for selling this bottle without a stamp. The magistrate dismissed the summons, being of opinion that no stamp was necessary. The appellant has prosecuted the present appeal by way of a case stated under 20 & 21 Vict. c. 43, s. 2, and 42 & 43 Vict. c. 49, s. 33, and the rules made under the latter Act. Section 2 of 52 Geo. 3, c. 150, provides that "if any person, whether licensed or not, shall either vend or expose to sale or offer or keep ready for sale, whether for foreign or home consumption, or buy or receive or keep for the purpose of selling by retail, either on his account or on the account or behalf of any other person, any packet, box, bottle, phial, or other enclosure containing any of the drugs, herbs, oils, waters, essences, tinctures, pills, powders, preparations, or compositions mentioned, and set forth in the schedule annexed to this Act, without a paper, cover, or label provided and supplied by the Commissioners of Stamps pursuant to 44 Geo. 3, c. 78, or to 42 Geo. 3, c. 56, and duly stamped for denoting the duty charged on such packet, box, bottle, &c., being properly and sufficiently pasted, stuck, fastened, or affixed thereto in such manner that such packet, box, &c., cannot be opened or the contents taken therefrom without tearing such stamped cover, wrap, or label, so as to prevent its being made use of again, the person so offending shall be liable to a penalty of ten pounds."

The schedule begins with a list of about 600 named powders, pills, essences, tinctures, lozenges, and preparations of every description, including foreign medicines of all kinds except drugs, and proceeds as follows: "And also all other pills, powders, lozenges, tinctures, &c., medicated herbs and waters, chemical and officinal preparations whatsoever to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder or complaint incident to or in anywise affecting the human body, made, prepared, uttered, vended, or exposed to sale by any person whatsoever, wherein (*a*) the person making or preparing the same vending or exposing to sale the same, hath or claims to have any occult secret or art for the making or preparing the same; or such person hath claims to have (*b*) any exclusive right or title to the making or preparing the same; or (*c*) which have at any time heretofore been, now are, or shall hereafter be prepared, uttered, or exposed to sale under the authority of any letters patent to the great seal; or (*d*) which have at any time heretofore been, now are, or shall hereafter be by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, affixed to or delivered with any packet, box, bottle, &c., containing the same held out or recommended to the public, by the makers, vendors, or proprietors thereof as nostrums or proprietory medicines, or as specified for or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint incident to or in anywise affecting the human body." The schedule continues as follows: "Special exemptions," of which the first is "all drugs named in the book of rates referred to by the Acts of Tonnage and Poundage of 12 Car. 2, and in another book of rates referred to by the Act 2 Geo. 1, c. 11"; secondly, "all drugs uttered or vended entire without any mixture or composition with any other drug or ingredient whatsoever by any surgeon, apothecary, chemist, or druggist or other person duly qualified as therein specified"; thirdly—and this is the part of the exemptions more especially material in the present case—all mixtures, compositions, or preparations named or compounded with or prepared from any "medicinal drugs, medicated or chemical preparations, &c., bearing different denominations and having different properties, qualities, &c., which shall be uttered or vended by any such surgeon, apothecary, chemist, or druggist, or other such person as appointed, the different denominations, properties, &c., of which mixtures, &c., are known, admitted, and approved of in the preservation, cure, or relief of any disorder, malady, &c., affecting the human body, and wherein (*a*) the person mixing, compounding, preparing, uttering, or vending the same hath not nor claims to have any occult or secret art for the mixing or compounding the same, nor (*b*) hath no claims to have any exclusive right or title to the mixing, compounding, &c., of the same, and which mixtures, &c., have not been, are not, nor shall hereafter be, prepared, uttered, vended, or exposed to sale under the authority of any letters patent under the great seal, nor at any time heretofore have been, now are, or shall hereafter be, by any public notice, advertisement, or by any written or printed papers or handbills, or by any labels or words, written or printed papers fixed to or delivered with any such packet, box, bottle, &c., held out or recommended to the public by the owners, proprietors, makers, compounders, original or first vendors thereof as nostrums, &c., proprietary medicines, or as specified or as beneficial to the prevention, cure, or relief of any such distemper, malady, ailment, or complaint as aforesaid."

It is found in the case—(1) that ammoniated tincture of quinine is a mixture of medicinal drugs bearing different denominations and having different properties; (2) that the ammoniated tincture of quinine, the subject of the present inquiry, was prepared in accordance with the formula published in the British Pharmacopœia of 1898, and that the "B.P." upon the label was intended to indicate that it was so prepared; (3) that the denominations, properties, qualities, virtues, and efficacies of ammoniated tincture of quinine are known, admitted, and approved of in the prevention, cure, and relief of influenza and colds, and that influenza and colds are ailments affecting the human body; (4) that the respondent has not and does not claim to have any occult secret for, nor any exclusive right or title to, the mixing, composing, or vending of ammoniated tincture of quinine; (5) that it has not been nor is prepared or sold under the letters patent of the great seal; (6) that the respondent is not the originator of ammoniated tincture of quinine. It was first introduced as a medicine several years ago, and is in general use and on general sale by chemists throughout the country. The ammoniated tincture of quinine the sale of which gave rise to this case was bought by the re-

spondent from wholesale chemists, who compounded it and who sold it without any such label as the respondent used, and without any recommendation of any kind. (7) Except that the label in question was affixed by the respondent, the owners, proprietors, makers, compounders, original or first vendors of ammoniated tincture of quinine never held it out or recommended it to the public by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed and affixed to or delivered with any packet, box, bottle, &c., containing the same as a nostrum or proprietary medicine, or as a specific, or as beneficial for the prevention, cure, or relief of any distemper, malady, ailment, or complaint incident to or in any wise affecting the human body, and the person aforesaid has not, nor claims to have, any more than the respondent himself, any occult secret or art for the mixing or compounding the tincture, nor any exclusive right or title to the mixing, compounding, preparing, or vending the same; nor was it ever prepared, uttered, vended, or exposed to sale under the authority of letters patent under the great seal.

Unless the respondent by affixing the label in question has brought himself within the description contained in the last portion of the "special exemptions" of the schedule to 52 Geo. 3, c. 150, and is the "owner, proprietor, maker, compounder, original or first vendor thereof," the tincture he has sold falls in every respect within the special exemption. The difficulty is to ascertain who are the persons meant in the "special exemption" by the "owners, proprietors, makers, compounders, original or first vendors thereof"—*i.e.*, of the "mixtures, compositions, or preparations" to which the clause refers; for it is clear that such words as "makers, compounders" cannot refer to the immediate antecedent, which includes "bottle," "pot," and "phial," their application to which would be absurd. Great light seems to be thrown upon the question by the words "at any time heretofore have been, now are, or shall hereafter be . . . held out or recommended to the public" as beneficial for curative purposes. For it is plain that whoever the owner, proprietor, &c., may be, if he once issues an advertisement or affixes a label containing a recommendation of the preparation as of curative efficacy, the subject-matter of such advertisement or recommendation, or rather the bottle, &c., containing it, is affected with a perpetual liability to stamp duty. This consideration alone seems sufficient to show that a retail chemist who buys in the ordinary course of business an article which till it got into his hands was within the exemption, cannot be within the designation of the "owner, proprietor, &c," of the preparation. Indeed the Solicitor-General was driven to the argument that "owner, proprietor" referred to the last antecedent and meant owner, &c., of each particular bottle or phial sold. It has already been shown that this application of the phrase would make the passage absurd. It cannot be supposed that the maker of the glass bottle can by any act of his determine its liability or non-liability to duty when containing a substance which he could have no object in puffing, or which the owner of the bottle and the substance could prevent him from puffing if he were so minded. Thus far we have dealt only with the very words of the exemption itself.

It is desirable to go more deeply into the matter and see whether the view expressed is consistent with and borne out by the rest of the legislation on the subject. We may start with the Act 42 Geo. 3, c. 56, because that Act recited that the earlier Act (25 Geo. 3, c. 79) had been much evaded, and repealed not only the former duties, but all powers and authorities contained in that and any subsequent Act for levying and collecting the same. Section 2 of 42 Geo. 3, c. 56, granted *ad valorem* duties on every packet, box, bottle, &c. (using the same language in this respect as the Act of 53 Geo. 3) containing any drugs, herbs, pills, &c., or other preparation or composition, whatever to be used externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder affecting the human body. The duties were the same in amount as those now chargeable. Section 3 provided that the duties should be payable by the "owners and proprietors or makers and compounders or original and first vendors" of such drugs, &c., as aforesaid, and should be charged upon and paid in respect of every packet, box, bottle, &c., with any such contents as aforesaid before the same should be first sold or delivered out of the custody or possession of the owners, proprietors, makers, compounders, original or first vendors thereof for sale either wholesale or retail, either for foreign or home consumption or otherwise, and before the same should be in any way uttered, vended, or exposed for sale, or offered or kept ready for sale, and not in bulk, in any shop, house, or other place by any such owner, proprietor, &c., or any person on his behalf. This is still the law. The 4th and 5th sections closely resemble, if they are not identical with, those now appearing as "special exemption." It seems impossible to doubt that the owners, proprietors, &c, here (section 5) designated are the same persons as those mentioned in section 3 as the persons who are to pay the duties before they put the wares into circulation; and it surely must be for them to say whether or not they will, by advertising it as possessing curative properties, at once obtain the advantage of such advertisement, and subject the article at once and for all time to the disadvantage of having to pay duty.

Sections 8 and 10 of the same Act require persons making, compounding, preparing, uttering, vending, or exposing to sale or keeping ready for sale any drug or any packets, boxes, bottles, &c., with such contents as aforesaid, which are subject to the duties to take out licence and to procure from the Commissioner of Stamps covers, wrappers, or labels to be affixed to the packets, boxes, &c., in which the dutiable articles are sold. Section 19, in order to obviate doubts on the subject, provides that all articles enumerated in a schedule to the Act shall be dutiable, and all similar articles and also all preparations wherein the person preparing and selling the same has or claims a secret process or exclusive right, or articles prepared, &c., under letters patent, or which heretofore, are now, or shall be advertised in any way as a curative by the makers, vendors, or proprietors thereof, and the persons uttering or selling the same shall be charged with the duties imposed as licensees. It will be observed that this section, though giving an extensive application to substances or articles to be charged with the duty, makes no change as to the persons who are to pay the duties, and that the incidence, so far as relates to persons, is still regulated by section 3. The importance of this remark is emphasized by the fact that the section does enlarge the class of persons required to take out licences or give information to the commissioners under liability of a fine, thus obviously carrying out the idea that the duties were to be paid by the person who first put the article into circulation. The framework of these Acts was altered by the Act of 44 Geo. 3, c. 98, which repealed all the duties under the care of the Commissioner of Stamps, but granted new duties in lieu thereof and preserved the machinery for their incidence and collection. It brought together all such duties in two schedules, A and B, each of which is headed "Stamp

Duties." The duties now in question are in Schedule B, under the head "Medicines," and impose upon every packet, box, bottle, &c., containing any drugs, &c., or other preparation used or to be used externally or internally as medicines or medicaments, &c., uttered or vended in Great Britain, the same *ad valorem* duties as before, ending with a duty of £1 on every packet, box, or bottle, &c., which with its contents should exceed the value of 50s. It continues with a schedule of drugs within schedule B. Seeing that by section 3 the duties imposed by the Act are to be paid by the "owners, proprietors, makers, or compounders, or original or first vendors of the dutiable articles so that if they are once so advertised by the makers, vendors, or proprietors they become permanently affected with duty, it cannot be doubted that, notwithstanding the difference of language, the "makers, vendors, or proprietors" mean the same persons as those designated by the fuller phrase of "owners or proprietors or makers or compounders or original or first vendors of the drugs or preparations."

By the 43 Geo. 3, c. 73, the Act of 42 Geo. 3 was amended: By section 1, an amended and enlarged schedule (like the former schedule), only a list of specific preparations made by the Act specifically liable to duty was substituted for the former schedule. By section 2 it was provided that any person who should receive from any proprietor, original or first vendor (a phrase obviously meant to have the same scope as the longer phrase in section 3 of the first Act, 42 Geo. 3), or any agent of such person any article subject to duty for the purpose of selling again without the proper label affixed, and who shall not within ten days either return the article to the person from whom he received it or give information thereof to the commissioners, should be liable to a penalty.

Of some hundreds of specified articles and collections, first, all the previous general descriptions of dutiable articles, and then the exemptions under the title of "special exemptions," except in a few matters of description and arrangement of no assistance in construing the Acts, it is undistinguishable from the schedule to the amending Act of 52 Geo. 3, c 150, and it is only noticed as showing how and when the legislation imposing the duties took the form of a schedule embodying both incidence and exemptions.

The duties are still payable under section 3 of 42 Geo. 3 by the "owners or proprietors or makers and compounders or original or first vendors" of the preparations, the obligation of the retail dealer being, if he receives any dutiable article—and it will be dutiable, and dutiable for ever, if the original owner of the preparation has once advertised it as possessing remedial qualities—to return it to the vendor or to inform the commissioners. If, however, the article is compounded of drugs or chemicals as to which there is no secret either of denomination, quality, efficacy, or mode of manufacture; if it is in no sense a proprietary or patent medicine; if the person who originally introduced it to the public is not and no person has become the owner and proprietor, not of the bottle or box or jar in which the compound is sold, but of the mixture or compound itself, so that it is not the common property of all the world, and has never advertised it as a specific or as possessing remedial qualities, and if it is made up or sold by a duly qualified person, it is exempt from duty. In short, the description in section 3 of 54 Geo. 3 of the persons chargeable with the duty, that of persons recommending it by advertisement, label, or other like means as curative in the portion of the schedule of 52 Geo. 3 which affects it with duty, and the description of the person by whom it must have been so advertised if it is to escape duty contained in the "special exemptions," though in somewhat different words, all mean the same thing. The whole scheme of the Acts appears to be to strike with chargeability medicines imported from abroad and medicines which particular persons can make to the exclusion of others. Where a specific case affords any substantial recommendation and gives any value to the article, there is sure to be some person who can prevent other persons from using the same name for his compound. The same may be said of secret preparations, proprietary and patent medicines, and if the advertisement or public recommendation as a curative agent is to stamp the article with chargeability, it is reasonable to conclude that the makers, vendors, or proprietors, upon the fact of advertisement or recommendation by whom the future as well as the present chargeability is to depend, must be persons who can exercise a choice as to whether the article shall or shall not be put upon the market with accompaniments or accessories which will make it for ever afterwards liable to duty. The fact that the persons, the only persons, who are to pay the duties are those by whom the article shall be first sold, and that they are to pay the duties before the articles are first sold, points strongly in the same direction. We may add that, if we were to adopt the Solicitor-General's argument that the respondent must be considered the "first vendor thereof" because he was the first person to sell the mixture in a shape in which it could be taxable—that is, with a label recommending it—the result would be that the exemption could never take effect at all, for no case could come within it, except cases which the taxing enactment did not hit. The article sold by the respondent seems to us to have been sold by a person and under conditions which bring it within the "special exemptions," and this appeal must therefore be dismissed with costs.

Solicitor for the appellant, *Solicitor to the Inland Revenue.*

Solicitors for the respondent, *Neve, Beck, & Kirby.*

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K. B. Div. (Bigham, J.) — Feb. 23, 24; April 1, 22.

CORNFOOT v. ROYAL EXCHANGE ASSURANCE CORPORATION. (a.)

*Insurance, Marine—Policy—Duration of risk—Construction—"Thirty days in port after arrival."*

*A policy of marine insurance on a vessel was expressed to be for "a voyage from Portland, Oregon, by any route to Algoa Bay and for thirty days in port after arrival, however employed." The policy described the risk as running until the vessel "hath moored at anchor twenty-four hours in good safety." The words "twenty-four hours" were struck out and the words "as above" were written over them. The vessel arrived at Algoa Bay at 10 a.m. on the 2nd of August, 1902; was safely moored at anchor in the bay at 11.30 on the same day; and was totally lost at 4.30 p.m. on the 1st of September.*

*Held, that "thirty days" meant thirty consecutive periods of twenty-four hours, beginning at 11.30 a.m. on the 2nd of August, and not thirty calendar days, and that therefore the vessel was lost after the expiration of the time covered by the policy.*

Action tried in Commercial Court before Bigham, J., sitting with a jury.

(a) Reported by W. T. TURTON, Esq., Barrister-at-Law.

The plaintiff, on behalf of himself and all others the owners of the vessel *Inchcape Rock* sued the defendants on a policy of insurance, which the latter had underwritten, as for a total loss.

The risk in the body of the policy was in writing and was as follows: "For a voyage from Portland, Oregon, by any route to Algoa Bay, and for thirty days in port after arrival, however employed."

The print of the policy was in the ordinary Lloyd's form and described the risk as running until the vessel "hath moored at anchor twenty-four hours in good safety." The words "twenty-four hours" were struck out and the words "as above" were written over them.

The vessel arrived in Algoa Bay at 10 a.m. on the 2nd of August, 1902; she was safely moored at anchor in the bay at 11.30 a.m. on the same day; and she was totally lost at 4.30 p.m. on the 1st of September.

*Hamilton, K.C.*, and *Leck*, for the plaintiffs.—The question is whether the insurance extended beyond 4.30 p.m. on the 1st of September. The effect of the policy is that the ship was covered until the end of the thirtieth day after arrival in the bay, and that means until the expiration of thirty calendar days. The days ran from midnight next after the ship arrived, and the vessel therefore was covered during the whole of the 2nd of September. In law a day means a calendar day and not any period of twenty-four hours.

They referred to *The Katy*, 43 W. R. 290, [1895] P. 56.

*Scrutton, K.C.*, and *Loehnis*, for the defendants.—The question is whether the ship was covered for thirty periods of twenty-four hours commencing at 11.30 a.m. on the 2nd of August, or for thirty calendar days. If the policy means thirty calendar days, the day on which the vessel arrived counts as one of them. If the time began to run from midnight, as the plaintiffs contend, then the ship was not covered between 11.30 a.m. and midnight on the 2nd of August.

*Cur. adv. vult.*

April 22.—BIGHAM, J., read the following judgment: In this case the defendants had underwritten the plaintiff's ship *Inchcape Rock*. The risk is described in the body of the policy in writing in the following words: "For a voyage from Portland, Oregon, by any route to Algoa Bay and for thirty days in port after arrival, however employed." The question I have to determine is whether at the time of the loss the thirty days here mentioned had run out; and the answer to the question depends upon the meaning to be attached to the word "days," whether it is to be taken to mean thirty consecutive periods of twenty-four hours or thirty calendar days. The print of the policy is in the ordinary Lloyd's form, which describes the risk as running until the vessel "hath moored at anchor twenty-four hours in good safety"; but the printed words "twenty-four hours" are struck through with a pen and the words "as above" are written over them, the effect being to incorporate at this point the earlier written words which I have just read. Thus the duration of the risk may be described as extending until thirty days after the vessel's arrival and safe mooring at anchor in the bay. The case was tried before me with a jury; and they found the following facts: (1) That the vessel arrived in Algoa Bay at 10 a.m. on the 2nd of August, 1902; (2) that she was safely moored at anchor in the bay at 11.30 a.m. on the same day; and (3) that she was totally lost at 4.30 p.m. on the 1st of September.

Thus it will be seen that if the thirty days are to be calculated as periods of twenty-four hours beginning at 11.30 a.m. on the 2nd of August the risk had run off at the time of the loss, otherwise if the thirty days are to be taken as meaning thirty clear calendar days. I do not suppose that there could be any doubt about the duration of the risk if the policy had been issued in its original printed form, unaltered and without the written words which I have read. The risk would have lasted until 11.30 a.m. on the 2nd of August, and from that moment until 11.30 a.m on the 3rd of August. It could not have been contended that the first of the twenty-four hours did not begin to run until noon on the 2nd of August, for the period of time from 11.30 to 12.30 is as much an hour as the period of time from noon to 1 p.m. Why should the expression "thirty days" be read in a different way? No doubt in some cases the word "day" means a period of twenty-four hours starting from midnight and ending at midnight. That is a calendar day—a Monday or a Tuesday. But did the parties to this contract use the word in that sense? I think clearly not. The risk was to be a continuing risk. It was not to stop at 11.30 on the morning of the 2nd of August and then to revive at midnight. It was to run continuously from 11.30 a.m. on the 2nd of August until the expiration of the thirty days, and no longer. To interpret the contract in the way contended for by the plaintiff would have the effect either of imposing on the defendants a longer risk than they bargained to undertake or of relieving them from liability during the hours from 11.30 a.m. on the 2nd of August until midnight. Neither party intended to make such a contract. It follows, therefore, that the thirty days mentioned in the policy must be taken to mean thirty consecutive periods of twenty-fours beginning at the time of the ship's safe mooring in the bay. After the jury had been discharged another point was taken on behalf of the plaintiff. It was said that the ship was not ready to discharge until 5 p.m. on the 2nd of August, and that, as upon the authorities a ship cannot be said to be safely moored unless and until she is ready to discharge, the time did not begin to run until 5 p.m. I am, however, quite satisfied, notwithstanding some of the *vivâ voce* evidence, that the ship was an arrived ship within the meaning of the policy by 11.30 a.m., and was then ready to discharge, and this was what the jury meant to find, and did find, in answer to my questions. There must be judgment for the defendants, with costs.

*Judgment accordingly.*

Solicitors for the plaintiff, *Botterell & Roche.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.) May 5.

*In re* HALL.
FOSTER *v.* METCALFE. (*a.*)

*Will—Contingent legacy—Appropriation.*

*When a testator gives a sum of cash as a contingent legacy without any provision for the payment of interest before the happening of the contingency, the executor is not entitled of his own authority, and to the possible detriment of the contingent legatee, to invest and appropriate a fund to meet that legacy; and if the fund so appropriated should, owing to depreciation of the security, be insufficient to answer the full amount of the legacy, if and when the legacy becomes payable, the legatee is entitled to have the deficiency made good, either out of the residuary estate or by the executor personally.*

*Decision of Kekewich, J.*, ante, *p.* 107, *reversed.*

Appeal from the decision of Kekewich, J. (reported *ante*, p. 107).

The facts were as follows:

By his will, dated the 26th of November, 1896, William Hall gave to each of his godchildren (by name) who should survive him, and who should attain the age of twenty-one years or marry under that age, a legacy of £1,000 free of legacy duty, but without any provision for the payment of interest in the meantime.

The testator died on the 14th of October, 1897.

Phyllis Chalmers, one of the godchildren named in the will, was, at the date of the testator's death, an infant and unmarried, but she had since attained twenty-one.

Two other godchildren were still infants and unmarried.

In 1899 the trustees of the will invested three several sums of £1,000 in the purchase of trustee securities to meet the three contingent legacies, and one of the securities, being £700 Great Eastern Railway Irredeemable 4 per cent. Stock, was appropriated by them to meet Miss Chalmers' legacy.

The stock in question depreciated in value, and when Miss Chalmers came of age she refused to accept the stock in satisfaction of her legacy. The surviving trustee thereupon took out a summons to determine the validity of the appropriation.

Kekewich, J., came to the conclusion that the appropriation was good, and ordered the legatee to pay the costs of all parties.

Miss Chalmers appealed

*Buckmaster, K.C.*, and *Baildon*, for Miss Chalmers.—There is no power in the will enabling the executor to appropriate in this manner. The rule is quite clear and is in accordance with reason and justice—viz., an executor must not distribute the estate until he has set aside what will be amply sufficient to pay contingent legacies. If he fails to do this he must bear the consequences of his own imprudence. Fortunately in this case the executor need not bear the loss, for there is undisposed-of residue. The sum set aside to meet contingent legacies is part of the estate and not appropriated to the particular legatee.

They referred to Roper on Legacies (4th ed.), 931; *Webber* v. *Webber*, 1 Sim. & St. 311; *Allhusen* v. *Whittell*, L. R. 4 Eq. 295, 15 W. R. Ch. Dig. 122; and Seton, 1679, 1690.

*Warrington, K.C.*, and *Northcote*, for beneficiaries.—An appropriation having been made, the contingent legatee must bear the loss or take the profits. [ROMER, L.J.—You are maintaining that the executor has turned himself into a trustee, which he had no power to do.]

They referred to *Burgess* v. *Robinson*, 3 Mer. 8; *Rock* v. *Hardman*, 4 Madd. 253; *Green* v. *Pigott*, 1 Bro. Ch. C. 103. [VAUGHAN WILLIAMS, L.J., referred to *Sitwell* v. *Bernard*, 6 Ves. 520.]

They also cited Lewin on Trusts (10th ed.), p. 687, and *In re Waters*, [1889] W. N. 39.

*Clauson*, for the infant beneficiaries.

*Crossfield*, for the executor.

VAUGHAN WILLIAMS, L.J.—I do not think that in this case the order of the learned judge can be supported. The question is whether the trustees of the will had any right to make such an appropriation as they have made without the consent of the legatee, and having made it had then the right to say that the loss arising from the depreciation of the stock appropriated must be borne by the legatee. I am of opinion that it is not true to say that they could make such an appropriation and then throw the loss upon the legatee. The question really in each case is this. When an investment is made, which it is desired to appropriate to a particular object, whose property is the sum so invested? Does it become the property of the legatee? Or does it remain a portion of the estate? In my judgment, if you ask that question in the present case, where the legacy was contingent and the legatee was to take the legacy without interest in the meanwhile, the answer is that the sum invested did not become the property of the legatee but remained a part of the estate. There was no such appropriation here as could have caused the legatee to bear the loss or entitle her to take the profits arising on the appropriation. The interest on this investment became a part of the estate of the testator, and, in the event of not being wanted to satisfy the debts or obligations of the testator, would go to the estate of the residuary legatee. There has been some confusion during the argument between a legacy payable *in futuro* and a contingent legacy. If you have got a vested legacy which will certainly be payable *in futuro*, the legatee has an absolute right to go to the trustee and say, "Although my legacy, is payable *in futuro*, it is vested, and I require you to invest the amount of the legacy." When this is done, that fund is really appropriated, and the gain or loss falls on the legatee. This is what Lord Hardwicke meant when he said, in the case of *Johnson* v. *Mills*, [1749] 1 Ves. Sen. 282, "I thought nothing was better settled than what is now endeavoured to be made a question: that wherever a demand was made out of assets, certainly due but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the meantime."

But this has no application to the case where not only the legacy is contingent, but the interest in the meantime does not go to such legatee, but remains part of the estate. In the present case the contingent legatee does not take the interest in the meantime, and I have not heard any authority leading to the conclusion that the executors had any other right than to retain, as prudent executors and as part of the estate, a sufficient sum to answer this legacy, should it become necessary to do so by the happening of the contingency. I do not know that it is necessary to say any more. An executor is not entitled at his own will to take any portion of the estate and turn it into a trust fund,

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

with the contingent legatee as *cestui que trust*. It could no doubt be done if the court thought fit to make an order to that effect, but as to that I will say nothing at all. All I say here is that the executors under the will had no power to make this appropriation, and the loss in value cannot fall upon the legatee.

ROMER, L.J.—I am of the same opinion. If executors have to provide for a vested legacy, and there is no one who can give a receipt for it, undoubtedly both the executors and the court have power to set apart a sum of money and properly invest it to meet the legacy. Further, if you find that a legacy is settled upon trust, the same course would apply. And even if you find a contingent legacy and a direction in the will that the income to arise therefrom is to go to the legatee before the contingency happens and the legacy becomes payable, then you may properly infer an intention on the part of the testator that a fund should be set aside to answer it. Again, even if you have the case of a purely contingent legacy and no provision as to the application of income in the meantime, that mere fact does not paralyze the administration of the estate. It does not prevent the executors or the court parting with the residuary estate after taking reasonable care to provide for the contingency. It is also possible that if in a similar case an executor without going to the court could prove that he had acted in a thoroughly reasonable manner, and had, before distributing the residue, set aside such a sum as would in all reasonable probability satisfy the legacy, he would not be held personally liable if subsequently it turned out that the sum set apart was not sufficient to answer the contingent legacy. But such a setting apart would be a setting apart of a fund, not as the legacy, but to answer it, and the income of the fund so set apart would be payable as part of the residue, for, as I have pointed out, the sum set apart is still part of the estate. But it appears to me that there is no authority in the court and the executor, and certainly none in the executor unaided, which would justify dealing with the fund as if it were a separate settled fund to be held on trust to invest, and, so far as regards income to be paid to the residuary legatee until the contingency happens, and, subject to that, for the contingent legatee if the legacy becomes payable, and otherwise over. The testator has not indicated, nor has the court power to infer, such a trust. There is an inconvenience, and it may be that there are several; but it is sufficient to say that the court has no jurisdiction to create such a trust. There is always this dilemma, that if the fund is set apart as on a special trust there is no jurisdiction, and, if it is not so set apart, in what way does the income go to the residuary legatee except on the footing that the fund still remains part of the general estate? In the case before us the legacy is clearly contingent, and there is not a word in the will as to the income before the legacy becomes payable. It is clear that the executor had no power to set apart a fund as he purported to do and invest it and hold it on trust. The fund was not set apart solely for the contingent legatee, but was really held upon trust, and, in my opinion, there was no power for the executor to turn himself into a trustee or hold the fund in any way to the prejudice of the legatee. For these considerations the appeal must succeed.

COZENS-HARDY, L.J.—I am of the same opinion. I cannot approve of the judgment of the learned judge either on principle or authority. The fund invested never ceased to be part of the general estate, to the income of which the residuary legatee was entitled. When there is a contingent legacy of a sum of cash, and no direction either express or implied as to investment, the legatee, I think, cannot require the sum to be appropriated.

I may refer to *King* v. *Malcote*, 9 Hare 692, at p. 696, where Turner, V.C., says: "A contingent legacy is separated from the assets, or secured, because it is a sum which in any event is certainly payable to some person, though it may be uncertain to whom it will become payable. But a contingent debt is a sum which it is altogether doubtful whether it will ever be taken out of the assets. Even in the case of a contingent legacy, the legatee is not, as it was assumed at the bar, entitled to have a sum actually retained or appropriated to answer the legacy when the contingency arises. That is not an unusual way of providing for the legacy, but it is a matter of arrangement, not of right, and in strictness the legatee is only entitled to have security for the payment of the sum should the contingency arise." If the legatee is not entitled to have the sum set aside, it would be strange if the executor without the sanction of the court had the right to make an appropriation which might be detrimental to the legatee. It seems to me that what has been done here has really been to create a settlement of £1,000 on the contingent legatee until twenty-one years of age and then over. And for that I can find no authority, and there is no principle upon which it can be supported. I think, therefore, that the appeal must be allowed.

*Appeal allowed.*

Solicitors, *Edgar, Robins, & Clarke; Collyer-Bristow, & Co.*, for *Watson Sons, & Carrick*, Hull; *J. A. Bartrum.*

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From K. B. Div.
(Vaughan Williams, Stirling, and Mathew, L JJ.) April 7.

ANGEL v. MERCHANTS' MARINE INSURANCE CO. (*a*.)

*Insurance (marine)—Loss—Constructive total loss—Taking value of wreck into account.*

*Where a vessel has been stranded by a peril insured against, in estimating whether or not she is a constructive total loss, the value of the wreck is not an element which ought to be taken into consideration.*

Appeal from a judgment of Bigham, J.

The action was brought by a shipowner upon two policies of marine insurance. The first was a policy dated the 2nd of August, 1900, issued by the defendants for £1,000 upon the hull and machinery of the steamship *Phillis Angel*, valued at £23,000, for twelve months from the 27th of July, 1900; and the second was a policy of the same date issued by the defendants for £1,000 upon disbursements in the said steamship for twelve months from the 28th of July, 1900.

Bigham, J., gave judgment in favour of the defendants.

The plaintiff appealed.

*Carver, K.C., Lochnis*, and *Lewis Noad*, for the appellant.

*J. A. Hamilton, K.C.*, and *Maurice Hill*, for the respondents.

The facts and arguments are sufficiently stated in the judgments.

*Cur. adv. vult.*

April 7.—VAUGHAN WILLIAMS, L.J., read the following judgment: This is an appeal from the judgment of Bigham, J., in favour of the defendants

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

in an action claiming as for a constructive total loss on a policy on ship. The ship was wrecked on the coast of Sicily, being driven on the rocks. There was from the first the hope that the ship might be got off, but the plaintiff (the shipowner) gave a notice of abandonment to the underwriters, which they did not accept. The ship was floated and brought to Malta by the operations of the salvage association acting for the benefit of all concerned on the terms that they were to receive nothing unless the ship was salved. The cost of these operations was afterwards assessed at £3,500. The ship was to a certain extent repaired at Malta with a view to her proceeding under steam to Cardiff for permanent repairs. The underwriters agreed with the master for the navigation by the ship's crew of the ship when repaired from Malta to Cardiff for a sum of £1,400. The repairs somehow or other, although certified by surveyors to be sufficient, broke down almost immediately after leaving Malta; the fact being that it was only possible to get repairs of a very temporary nature done at Malta. The ship was nearly lost, but succeeded in getting into Tunis. She was again temporarily repaired there, but was not allowed to proceed to England under her own steam, and was towed to Cardiff. Estimates were obtained at Barry for the repair of the ship, but she was not actually repaired before the trial before Bigham, J. Bigham, J., arrived at the conclusion that £22,559, less some £200 which the shipowner admitted he could not support, was the proper amount to fix as the cost of repairs. The repaired value of the ship the learned judge took as £23,000, which by the terms of the policy was to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. Bigham, J., in estimating the cost of repairs, did not add anything for the expenses incurred by reason of the accident which compelled the ship to put into Tunis. This accident he attributed to the perils of the sea, and thought that the temporarily repaired ship could have been insured for the voyage to England for a premium of £150; and it was for this reason that he included nothing in the expenses of repairs for expenses incurred by reason of the accident, and only included the insurance premium. Bigham, J., deducted from the plaintiff's estimate of repairs certain items to which objection was taken by Mr. Griggs, the expert witness called on behalf of the defendants. As to several of these items, I am not sure that I should not have arrived at a different conclusion in fact. I do not, however, think that we ought to review the decision of the learned judge, arrived at after a five days' trial, on matters which in a sense are all questions of fact, for I treat estimates based on facts as matters of fact. A different finding on some of these objections by the underwriters would have been sufficient to make the expenses exceed the repaired value. I accept, however, as I have already said, the findings of the learned judge; and I only mention the dispute on these points to show how little the figures relied on as constituting the items of the cost of repairs or the total arrived at thereby can be relied on as factors in a mere arithmetical conclusion, especially in a case in which the learned judge thought, to use his own expression, that it was a very close thing, and so very near a constructive total loss that the underwriters might very well have paid it. The shipowner gave his notice of abandonment immediately after the marine accident. Precise estimates, are, of course, impossible, and it seems to me that unless the insured shipowner is to take upon himself risks which ought not to be borne by him (such as the risk whether the ship will be got afloat at all, or, having been got afloat, will arrive at a port for temporary repairs, and ultimately at home for permanent repairs) a large margin ought to be added to the figures of cost of repairs to cover risks of this sort—risks which a "prudent uninsured owner" could certainly take into consideration in determining whether he should repair or sell. There is, however, another consideration which it is suggested the "prudent uninsured owner" would certainly in fact have regarded in determining whether he should repair—I mean the damaged value of the ship; that is, the price which could be got for her as she lay unrepaired, which was, it was said, about £7,000. But, unfortunately, this part of the case was not very thoroughly gone into. The plaintiff in the earlier part of the trial seems to have been content to rely upon the estimates of cost of repairs exceeding the £23,000. Then, when it seemed likely that the deductions made by the judge would reduce the repairs below the £23,000, the claim to add the value of the damaged vessel was put forward and discussed, the judge, however, saying that there was no real evidence of the value. It seems unsatisfactory to have to discuss an important question of marine insurance law in a case in which the facts, perhaps, do not raise the question at all. I do not think that it could be or was denied that the value of the damaged ship must be included in the calculation, if the ship had, in fact, been sold where she was and as she was, and the question, after sale, had been whether the circumstances justified abandonment. But it is said that this item of calculation must be disregarded if there is no such sale. Now in my judgment the "prudent uninsured owner" test was already accepted as the proper test at least down to 1873. The recognition of the test in *Irving* v. *Manning*, 1 H. L. Cas. 287, and in *Rankin* v. *Potter*, 22 W. R. 1, L. R. 6 H. L. 83, puts the matter, to my mind, beyond argument. Nor do I think that it is possible to say that *Moss* v. *Smith*, 9 C. B. 94, which was cited in *Rankin* v. *Potter*, had then been recognized as substituting for the "prudent uninsured owner" test an arithmetical test turning on the difference between estimated totals. The prudent uninsured owner test was, I think, adopted for the very purpose of covering considerations which cannot be embodied in the figures of an arithmetical calculation. I wish to observe that in *Moss* v. *Smith* there was no approximation of the cost of repairs and repaired value, and that the alleged misdirection was a misdirection with regard to the freight (which was separately insured), inasmuch as the Chief Justice, it was said, omitted to tell the jury that, in determining whether or not there was a total loss of freight, they were to throw out of consideration the value of the ship and to consider only whether a prudent owner, acting with a view to earning freight, would have executed the necessary repairs either wholly or in part. The court held that there was no misdirection, and it is with reference to this that Maule, J., made the observations which are relied upon as either substituting the "arithmetical" for the "prudent owner" test, or for limiting the measure in applying the prudent owner test to a contrast of the figures of cost of repairs and repaired value. There can be no doubt, to my mind, but that Baron Bramwell and Baron Martin, in delivering their opinions in *Rankin* v. *Potter*, both recognized the value of the damaged ship as an item which was to be taken into consideration in the application of the "prudent uninsured owner" test; and, more than that, recognized the value of the damaged ship as an item going to make up the total of the figures to be contrasted with repaired value. This view has been applied by Phillimore, J., in *Beaver Line* v. *London and Provincial Marine and General Insurance Co.*, 5 Com. Cas. 269, and by Walton, J., in *Wild Rose Steamship Co.* v. *Jupe*, 19 Times L. R. 289. It is

to be observed that in *Rankin* v. *Potter* the item of value of the damaged ship was essential to the conclusion that there was a constructive total loss. You cannot get the required result without it. It is further to be noted that in *Rankin* v. *Potter* the ship was not in fact sold. It seems to me that, perhaps, the authorities could be reconciled if one took the rule to be that the shipowner could only take into consideration the value of the damaged ship if the cost of repairs approximated to the repaired value. If the damage to the ship by the perils of the sea is so extensive that it is clear that the cost of repairs will approximate to the repaired value, it would not be reasonably practicable to repair her if a substantial sum could be obtained for her as she is and where she is, seeing that the expense of repairs would be such that, under the circumstances, no man of common sense would incur the outlay. Such a ship, as a matter of business, is totally lost. Take, however, the case where the damage is slight. The cost of repairs is small relatively to the value of the ship. The shipowner, as a matter of business, would not take into consideration the necessarily high value of the slightly damaged ship unless, instead of desiring to minimize the loss incurred by the perils of the sea, he regarded the marine accident as affording a market enabling him to sell his ship at a profit. In my judgment, a case in which the costs of repairs and the value of the ship so nearly approximate as they do in the present case, would be just a case in which the "prudent owner" test would apply, and, as I have suggested, would do justice, which the mere comparison of figures would fail to do. But there is no case which has recognized this modification in the application of the prudent owner test, and one hesitates to introduce such a modification in the rules of law governing so widely extended a business as that of marine insurance under British law, although the application of the prudent owner test, as understood by Baron Bramwell and Baron Martin in their opinions in *Rankin* v. *Potter*, and also by Lord Abinger in *Young* v. *Turing*, 2 Man. & Gr. 593, might lead to the result pointed out by the editors of the last (the seventh) edition of Arnould on Marine Insurance, s. 1124—Mr. de Hart and Mr. Ralph Simey—following a suggestion by Mr. McArthur in his work on marine insurance. The note in the last edition of Arnould runs thus: "*e.g.*, suppose a vessel comes into port requiring repairs costing £1,000—her damaged value being £10,000, and her repaired value £10,500. This, according to the argument derived from *Young* v. *Turing*, would be a case of constructive total loss. But it is submitted that it is absurd to say a vessel is a total loss, whether constructively or otherwise, which is only damaged to the extent of 10 per cent. or less." The contention seems to be that the old test of a "prudent uninsured owner" was adopted at a time when there was no telegraph and the means of communication were difficult and at a time when there was no salvage association ready to step in to salve the ship and take charge of her until she could reach a port where permanent repairs could be effectively executed, and where, therefore, the cost of the repairs could be measured either by the actual execution of the work or by reliable estimates obtained on invitations to tender. It is said that at the time of the adoption of the "prudent owner" test, the master, through difficulty of communication and inability to secure with any certainty means of repair, was in practice apt to consider seriously the question whether he should sell the materials of the ship, or the ship as she lay, rather than make the attempt to repair. But it is said that nowadays such a case rarely arises, and that when it does the old test can be applied; but that now the conveniences of modern times, telegraphic communication, the salvage associations, and Lloyd's agents everywhere, throw on the master but rarely the old alternative, repair or sell; and that in modern times the shipowner ought to guide his conduct as an insured owner desirous to have regard to the interests of all concerned, and that the damaged ship ought, whenever it is possible, to be taken to the port where permanent repairs can be effected, and the arithmetical test applied with something like precision. Such a rule seems to me too favourable to the underwriter. I think that this contention is open to the criticism that the shipowner at the moment of election, when he has to exercise the option of giving notice of abandonment, has really no precise *data* upon which to act, and that there must always be a quantity of items, especially the cost of the temporary repairs and the getting of the ship to the ports of temporary and permanent repair, as there were in the present case, which do not admit of precision. I doubt whether under the absolute arithmetical test the underwriter really takes upon himself the whole of the risks of the perils of the sea. I think it was a doubt of this sort which made lawyers of the United States of America adopt the 50 per cent. rule. The final result in this appeal, I think, must be that the judgment of Bigham, J., must be affirmed; first, because I doubt whether in any case we ought to reverse the decision of Bigham, J., on this question of marine insurance law, having regard to the state of the evidence as to the value of the damaged ship, the manner in which the point was taken at the end of the trial, and the mode in which it was disposed of by the learned judge, and I am not prepared to do so. Secondly, even though my opinion were stronger than it is, I should not like to differ from my brethren on a point which does not properly arise on the evidence. I therefore do not differ from the judgment of my brethren, that the judgment of Bigham, J., must be affirmed.

STIRLING, L.J.—I agree that in this case we ought to accept the conclusion of fact of Bigham, J. It is therefore to be taken that the value of the ship when repaired exceeded the expense of repairs by a sum of about £700 or £750. The learned judge arrived at a smaller figure, but I understand it to have been conceded in argument that some consequential corrections which would have been the result of his determination would have brought it to the figure I have mentioned. It is then contended that the loss ought nevertheless to be treated as a constructive total loss, because the value of the ship as she lay on the rocks exceeded that sum, so that a prudent uninsured shipowner would have sold her rather than repaired her. Bigham, J., rejected this contention, saying that there had not been adduced any evidence as to that value on which he could act. Now the evidence stood thus: No one was called on behalf of the plaintiff to show what the value of the ship was at the time. Naturally none of the plaintiff's witnesses were cross-examined on the subject, nor has there been any evidence of these matters adduced by the defendants. In truth the plaintiff seems to have launched his case in the expectation that he would be able to satisfy the judge that the cost of repairs would exceed the value of the ship when repaired, and it was only when he failed in satisfying the judge on that point that he fell back on this question of the value of the ship, and he now seeks to establish the amount from expressions which occur in the correspondence and in the light of subsequent events. I think there is much to be said in favour of Bigham, J.'s, view. I think mere

estimates of value not made at the time ought, in a case of this kind, to be closely scrutinized by the court, and I hesitate to rely on inference with respect to a matter in which direct evidence can be given. I do not think, therefore, that it would be right to overrule Bigham, J.'s, decision, and this would be sufficient to dispose of the case, so far as I am concerned. But a question of law has been argued, and unfortunately on it different views seem to be entertained by my brethren, and it may be right, therefore, that I should express the opinion that I have formed.

The case of *Young* v. *Turing*, 2 Man. & G. 593, was decided in the year 1841 in the Exchequer Chamber, and Lord Abinger, in giving the judgment of the court, says at p. 601: "The Chief Justice has laid down the usual and recognized rule, that the jury ought to consider whether, under all the circumstances attending the ship, a prudent owner, if uninsured, would have repaired the vessel." Then he says: "Now, to the value of the repairs must be added her value as she lay in the dock." It is upon that observation that the argument in this case is founded. It is to be observed it is a mere *dictum*; it was not necessary for the decision of the case, and, so far as appears from the report, did not form the subject of argument before the court.

Now, in 1847 there was decided the case of *Irving* v. *Manning*, in the House of Lords, and Patteson, J., who delivered the opinion of the learned judges who advised the House, says: "The course has been in all cases in modern times to consider the loss as total where a prudent owner, uninsured, would not have repaired." And again at a later point he says: "The established mode of putting the question, when it is alleged that there has been what is perhaps improperly called a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against. If he would not have repaired the vessel it is deemed to be lost." In 1850 the case was decided of *Moss* v. *Smith*, 9 C. B. 94, in which the question was very much considered, and judgments were given which are constantly referred to in subsequent cases. Maule, J., says at p. 103: "If a ship sustains such extensive damage that it would not be reasonably practicable to repair her—seeing that the expense of repairs would be such that no man of commonsense would incur the outlay—the ship is said to be totally lost. It is in that way alone that the question as to what a prudent owner would do arises. However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure she is not totally lost. The ordinary measure of prudence which the courts have adopted is this—if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss." Wilde, C.J., at p. 108, says this: "The underwriter undertakes to indemnify the owner against a loss of freight by perils of the sea. The law has fixed the meaning of this warranty against sea damage in such distinct terms that for many years every contract of insurance has been made with reference to the known and recognized principle that a ship is prevented from performing her voyage, and consequently from earning freight, when she has sustained damage which can only be repaired at an expense which no prudent owner uninsured would incur; and that is when the outlay will exceed that which he will get by it—viz., when the ship, after the repairs are executed, will not be worth the sum which has been expended upon her." Now it seems to me that in that case the court defined, as Maule, J., points out, the standard—the measure of prudence—which the courts have adopted with reference to such a case.

In the year 1853 there was published the third edition of Phillips on Insurance, and at section 1534 the learned author states the law thus: "In English jurisprudence the right to make an abandonment of the ship is governed by the rule just stated—namely, that the right to abandon on account of the damage and expense merely accrues where, and only where, the ship when recovered or repaired will not be worth the expense necessarily to be incurred for the purpose of recovering or repairing it." Then he adds: "This rule has reference to a case in which the amount merely determines the character of the loss. Other circumstances may come into consideration in determining the loss to be partial or total."

I do not propose to go in any detail through the subsequent cases, but it appears to me that, notwithstanding the observations of Baron Bramwell and Baron Martin in advising the House of Lords in *Rankin* v. *Potter*, to which my lord has referred, the weight of authority is in favour of the view which is based on the decision in *Moss* v. *Smith*, and which is expressed in the language which I have just cited from Phillips on Insurance.

I should like, however, to refer particularly to the case of *Aitchison* v. *Lohre*, 28 W. R. 1, 4 App. Cas. 755, where the question of whether or no there was a constructive total loss was discussed by the House of Lords. Lord Blackburn deals with the point (4 App. Cas., at p. 761) where he says: "I think it convenient to pause here and inquire what would have been the loss to an uninsured owner from the perils of the seas under such circumstances. If such an uninsured owner chose to sell the hull as it lay, his position would be this," and he goes through a calculation by which he arrives at a loss, amounting to £2,521, and then he says: "And if the hull had been so damaged that to repair it would have cost more than the ship would, when repaired, have been worth, the prudent shipowner would have taken this course. But in fact he not only could, but did, repair it." Then he goes into a second calculation, in which he ascertains the loss, having reference to the repairs and expenditure necessary for the purpose of repairing, and the value of the ship when repaired, and he arrives at an amount of loss which is smaller than that which he ascertained would have been suffered if a sale had been made. As I understand the figures, the result would have been the same, whether the value of the vessel as the ship lay is taken into consideration or not, and therefore it appears to me not to be a decision which guides us in the present case. But the way in which the learned lord lays down the law in a subsequent passage appears to me to agree with that which was contended for by the defendants in the present case. He says (4 App. Cas.) at p. 762: "The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not, even then, bound to do so. But if the ship can be practically repaired within the meaning of that phrase, as explained by Maule, J., in *Moss* v. *Smith*, the assured has not the option to treat it as a total loss; and on the figures stated in the special case the respondent here had not that option." It appears to me that the learned lord there adopts the mode of stating the case which is laid down in the judgments of *Moss* v. *Smith*, and the law is laid down in the same manner, as it seems to me, by Lord Watson in a subsequent case in the House of Lords

of *Sailing Ship Blairmore Co.* v. *Macredie*, [1898] A. C. 593.

For these reasons I have arrived at the conclusion which I have stated. I only wish to add this, that I do not say that evidence of value in such cases as these can be entirely excluded, and therefore I do not differ from Phillimore, J., and Walton J., in what they did in the cases before them, because their decisions were only on the admissibility of evidence. It may be that evidence of the value of the ship as a wreck might be material in ascertaining the question of fact whether or no there was or was not a total loss.

I agree, therefore, with the judgment which has been given.

MATHEW, L.J., read the following judgment: The plaintiff sought to establish his right to abandon to the underwriters by evidence that the cost of the repairs of the ship would exceed the repaired value. Bigham, J., decided that the plaintiff had failed and that there was no constructive total loss. It has not been easy to follow the steps of the learned judge, through a mass of evidence and argument submitted to him in the course of a trial that lasted over five days. The vessel was insured by a time policy for £23,000, and by the terms of the policy the insured value of the ship was to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. The vessel, while covered by the policy, was cast ashore on the coast of Sicily, and upon news of the disaster the assured gave a notice of abandonment which the underwriters declined to accept. With the consent of all concerned salvage operations were undertaken by the salvage association, and the ship was floated and brought to Malta at a cost of £3,500. In her damaged condition she was worth about £7,000. Under the superintendence of surveyors, who represented the plaintiff and the underwriters, temporary repairs to enable the vessel to be brought home were done at a cost of about £550. The learned judge has found that the repairs were properly done. The underwriters had provided a sum of £1,475 to cover the expenses of the voyage home. This sum, added to the value of the damaged ship, could be insured from Malta to a home port for £150. The vessel sailed from Malta, but in a few hours, as it would seem from some peril of the sea, her steering gear gave way and she was obliged to put into Tunis. Further repairs were found to be necessary, which were done at a cost of £218. A tug was sent out from England to bring the vessel home at a cost of £750. She was brought safely to Barry, and a tender was obtained to cover all necessary repairs. These sums of £218 and £750 would be covered by the insurance from Malta to a home port, and were held by the learned judge not to be charges which the owner would have had to meet. At the trial accounts were put in which had been prepared to show the plaintiff's estimates of the costs of reinstating the ship. The total amounted to the very large sum of £26,222. These figures were reduced by the learned judge to £22,559. In the discussion before us the items allowed on the one hand and struck out on the other were objected to, and we were asked to review the decision of Bigham, J., as to the cost of repairs. But I see no reason to differ from the conclusion that £22,559 was a proper estimate of the outlay necessary to reinstate the ship.

But it was contended for the plaintiff that, upon the assumption that the entire cost of repairs did not exceed the sum of £22,559, the plaintiff was nevertheless entitled to treat the loss as total. It was argued that the question to be determined was whether or not a prudent uninsured owner would abandon the venture and sell the wreck as she lay on the rocks. In arriving at a conclusion on this subject, the owner, it was said, would take into account the value of the damaged vessel, and would certainly sell rather than repair. I am unable to agree with this reasoning. The solution of the question whether there is a constructive total loss may sometimes be helped by considering what a prudent owner would do, where, for instance, a stranded vessel is immediately sold on the ground that salvage operations were difficult, and the result uncertain. But it seems to me in such a case as the present, where the actual costs of repairs have been ascertained and are not a matter of estimate, the matter cannot be dealt with on that footing. The question is not what an owner would consider the course most advantageous to himself. What has to be determined is to what extent the ship has been damaged by the perils insured against, and thus to settle whether the loss is partial or total. It is total if the prosecution of the voyage has become commercially impracticable. In recent times, with the readier means of communication open to underwriters, the condition of a stranded ship is rarely left to mere speculation. When notice of abandonment has been given the skilled agents of the underwriters are enabled to visit the vessel, and they can generally form a sound judgment as to whether the ship can be saved. Where there is a fair prospect of reinstatement, salvage operations are undertaken on behalf of the insurers without requiring the owner to incur any expense. In this case the usual course was followed. The salvage operations succeeded, and the underwriters satisfied the learned judge that the loss was partial and not total. They arrived at this result by showing that the cost of rendering the ship as serviceable as she was when insured was less than the repaired value. The argument that the real question was what an imaginary owner would do when his vessel was still on the rocks seems to me not to be open to the plaintiff. Any such general principle would seriously prejudice underwriters, and might impose upon them losses which were not due to the perils insured against. The test applicable here is that sanctioned in the many decisions referred to by counsel for the underwriters from *Moss* v. *Smith*, to *Sailing Ship Blairmore Co.* v. *Macredie*. The rule seems to me to have been properly applied by Bigham, J.

But it was further urged for the plaintiff that, in determining the question of the right to abandon, the value of the damaged ship should be added to the cost of repairs, and with this addition the valuation fixed by the policy would be largely exceeded. The application of this supposed mode of calculation would seem to involve unreasonable results, for, in adjusting the amount the assured could recover under his policy, what is saved from the perils insured against is treated as having been lost. The authority relied upon by the plaintiff's counsel was a *dictum* of Lord Abinger in his judgment in *Young* v. *Turing*. It was admitted that the point had not been dealt with in that case, either at *nisi prius* or in the Court of Common Pleas, and the observation of the Chief Baron was not necessary for the decision of the court. Further, that with the exception of the recent judgments at *nisi prius* referred to in the argument, the authority of *Young* v. *Turing* upon this point had not been judicially approved. It is noticeable that at the trial no evidence was offered to show that average adjusters acted upon any such rule. The subject is discussed unfavourably to the plaintiff's contention in 2 Phillips on Insurance, s. 1534; Carver's Carriage by Sea (3rd ed.), s. 303; and 2 Arnould on Marine Insurance (7th ed.), s. 1124. I am of opinion that the

plaintiff's contention fails, and that in determining whether the ship can be repaired the assured is not entitled to add the damaged value of the ship to the cost of repairs. [His lordship then dealt with another point not material to the main question, and concluded by saying that the judgment should be affirmed.]

*Appeal dismissed.*

Solicitors for the plaintiff, *Dowling, Bolam, & Co.*, for *Downing & Handcock*, Cardiff.

Solicitors for the defendants, *Walton, Johnson, Bubb, & Whatton.*

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From Chan. Div.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) March 18.

LAMPLOUGH v. THE COMPANY OF PROPRIETORS OF THE KENT WATERWORKS. (a.)

*Waterworks company—Prescribed rates of dividend—Surplus profits—Deficiencies in previous years—Incorporation of Waterworks Clauses Act,* 1847—*Deficiencies in years prior to incorporation of Act—Waterworks Clauses Act,* 1847 (10 & 11 *Vict. c.* 17), *s.* 75.

*A waterworks company, which was incorporated in* 1809, *obtained in* 1864 *an Act of Parliament to enable it to amalgamate with another company. This Act provided that from and after the passing of the Act the Waterworks Clauses Act,* 1847, *should apply to the whole of the undertaking and waterworks of the company. Before the passing of the Act of* 1864 *there was no limitation on the rate of dividend which the company might pay, but after that date, by virtue of section* 75 *of the Waterworks Clauses Act,* 1847, *no larger dividend than* 10 *per cent. was permissible, "unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of"* 10 *per cent.*

*Held, that the Act of* 1847 *was not retrospective, but spoke only from the time of its incorporation, and as providing for the future. Consequently the company was not justified in paying a larger dividend than* 10 *per cent. in order to make up any deficiencies or arrears of dividend which had occurred prior to the year* 1864.

This was an appeal from a decision of Joyce, J.

The question which had to be determined in the action was whether the defendant company was entitled to apply surplus profits in making up to stockholders a dividend of 10 per cent. upon their stock from the year 1809, when the company was incorporated, down to the 30th of June, 1864, at which date the Waterworks Clauses Act, 1847, first became applicable to the company's undertaking, or whether the surplus profits must now be applied in constituting a reserve fund to secure future dividend, and, subject thereto, in reduction of the maximum water rates chargeable by the company under its Acts.

The defendant company was incorporated by an Act passed in the year 1809, by which it was empowered to purchase certain waterworks which had been established under letters patent granted by King William III. giving an exclusive right for a term of 500 years to supply water to Greenwich and other places in the county of Kent.

By this Act the company was empowered to raise £100,000 capital in shares of £100 each, the holders of which were to be "entitled to receive the entire and net distribution of an equal proportionate part, according to the money so by them respectively paid, of the profits and advantages that shall and may arise and accrue by the rates and other sums of money to be raised, recovered, or received by the said company of proprietors by the authority of this Act." The Act also gave the company power to raise additional capital if necessary.

Further Acts were obtained by the company giving powers of extension and raising fresh capital in 1811, 1850, 1860, and 1862.

In 1864 the defendant company was desirous of amalgamating with the North Kent Waterworks Co., and an Act (27 & 28 Vict. c. 146) was obtained to enable the amalgamation to be carried into effect.

Section 2 of this Act of 1864 incorporated among other Acts the Waterworks Clauses Act, 1847, and section 27 was as follows: "The several provisions of this Act with respect to water supply and water rates or rents, and all incidental matters, including the several provisions incorporated with this Act of 'the Waterworks Clauses Acts, 1847 and 1863' . . . apply from and after the passing of this Act to the whole of the undertaking and waterworks of the company."

Before the passing of this Act the company was under no obligation as to supply' and there was no limit upon the rates which it might charge nor upon the rate of dividend which it might pay.

Further Acts were obtained by the company in 1877, 1888, and 1902.

Under the Act of 1862 all the company's share capital had been converted into ordinary stock subject to the provisions of the Companies Clauses Act, 1845, and all the shareholders were entitled to rank rateably in respect of dividend except a special issue of 7 per cent. ordinary stock issued in pursuance of the Act of 1877.

Since the passing of the Act of 1864 the amount of dividend to be received by the shareholders was limited by section 75 of the Waterworks Clauses Act, 1847, which is in the following terms: "The profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or where no rate is prescribed they shall not exceed the rate of ten pounds in the hundred by the year on the paid-up capital in the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate."

Section 76 of the same Act provided that if profits exceeded the amount limited the excess should be invested and form a reserve fund.

The company had for some years past been paying dividends in excess of 10 per cent. and had thereby made good all deficiencies or arrears which had arisen on the years from 1864 onwards. It was now proposed to continue paying dividends in excess of 10 per cent. in order to make up the deficiencies or arrears which had arisen on years prior to 1864, a proceeding which it was stated would involve a sum of no less than £700,000.

The plaintiff was the holder of £2,500 7 per cent. stock of the defendant company created under the Act of 1877, and he moved for an injunction to restrain the company from paying any dividend on any of their ordinary stock in respect of, or so as to make up, any deficiency or alleged deficiency of dividend on those stocks which might have occurred before the 30th of June, 1864.

Joyce, J., came to the conclusion upon the construction of the Acts that the payment of these back dividends was not within the powers of the company, and he granted an injunction accordingly.

The company appealed.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*Cripps, K.C.*, and *R. J. Parker*, for the company.

*Younger, K.C.*, and *Ashworth James*, for the plaintiff, were not called upon to argue.

COLLINS, M.R., stated the facts, and continued: It is contended for the company, in a very ingenious argument, that it is entitled to go back behind the period at which the Waterworks Clauses Act, 1847, was incorporated, and to treat the deficiencies occurring before section 75 of that Act was applicable at all as enabling it now to enlarge the dividend beyond 10 per cent.

It seems to me that, on the fair and grammatical construction of the sections in this case and applicable to it, that contention cannot be supported. [His lordship referred to section 27 of the Act of 1864, and continued:] Now what is the meaning of that? It seems to me those are words pointing to the application in the future of the provisions of the general Act. And what are those provisions? The provisions are contained in the 75th section, which still speak for the future; from the date at which the general Act is applied the company is to have the right of dividing profits at the prescribed rate, and of making up the deficiency of any previous dividend which shall have fallen short of that rate.

The Act speaks from the time it is passed, though in cases where it is incorporated, it speaks from the time from which it is incorporated, and when it refers to "the deficiency of any previous dividend," it is providing for the future, and when in future the company comes to distribute a sum by way of dividend and finds that it has more in hand than would suffice to pay the "prescribed rate"—that is, 10 per cent.—it looks back to see whether, from the time that Act came into operation which enables it to do that, there is a deficiency in a previous year. Of course there cannot be any such deficiency in the first year, but there may be in the second or the third; and so this company is in exactly the same position as a company that came into existence with these rights and these obligations and limitations on the day when the Waterworks Clauses Act was incorporated. This company is in no better and in no worse position; it was not bound, unless Parliament compelled it to do so, to incorporate the Waterworks Clauses Act into its undertaking; if it did so of its own free will, it probably did so because, on the whole, it was considered that the advantages were equivalent to, and probably more than counterbalanced any disadvantages. We have not been referred to all the numerous advantages which I have no doubt are contained in this Act of the Legislature—advantages possibly for the public as well as for the company, but I have no doubt, in either view, that advantages do exist. If the Act was imposed on the company by the Legislature, equally it seems to me that certain obligations were imposed upon it in return for certain advantages acquired. Therefore I cannot see the supposed injustice of cutting the company off from certain rights which it then enjoyed, rights which up to that date had not returned any very large profit, because the company was not in a very prosperous condition. I do not think the company had any immediate hope of being in a position to pay 10 per cent. at the time, and I do not suppose that it occurred to them that it was giving up anything of very great value when it undertook to limit its dividends to 10 per cent., seeing that up to 1864 it had never paid more than 6 per cent., and there did not seem to be any immediate prospect of paying 10 per cent. It is not a matter of mere benevolence in these cases; a railway company does not lower its rates out of pure goodwill to the public; it expects a larger return, and generally gets it, just as this company have got it. It was prepared, for its own advantage, it seems to me, to fix itself to certain rates. It had not derived any very great advantage from the unlimited right to charge unlimited rates before. It accepted the obligation of fixing its rates, it took on an obligation, or the qualified right rather, to pay dividends to the extent of 10 per cent., which it had never done before, and it took upon it the limitation, which I do not suppose it thought a very stern one at the time, of not paying more than 10 per cent. except in the event of its being able to show that there were deficiencies in previous years to which that dividend might be applied, or which, existing, would justify it in paying a larger dividend.

That seems to me to be the scheme of the Act, and we are doing no injustice in giving that Act its natural construction—namely, that it takes effect, as the language of the section says, "from and after the passing of this Act"—that is, in 1864.

Now Mr. Parker has certainly addressed a very ingenious argument, which I hope I fully appreciated. I cannot be absolutely certain that I did—I thought I understood the argument, but where I failed was to see its direct application to the one point in issue in this case—whether this Act is retrospective in the power conferred to take into consideration the deficit of the dividends before 1864; but this, at all events, does come out clear, that at the bottom of Mr. Parker's argument lies this proposition, that "dividend" in the 75th section means the total divisable sum, and not "dividend" in the popular sense—the sense in which ordinary persons use it—the sum received and paid as a quotient, the sum which they take and receive as they receive interest. That is the sense in which throughout these proceedings it has been used by Mr. Parker's clients in the documents they have tendered to us where they give us the rates of dividend paid throughout, and it is the sense in which it is has been used in the order of the learned judge, and, if I am not mistaken, in the notice of appeal. However, I will not affirm that. Now the order of the learned judge is this: "This court doth order that the defendant company and its directors be restrained until the trial of this action or until further order from declaring or paying any dividend on any of the ordinary stocks of the defendant company;" it is arrested in the attempt to pay a dividend in the popular form. It is restrained "until further order from declaring or paying any dividend on any of the ordinary stocks of the defendant company in respect of or so as to make up any deficiency or alleged deficiency of dividends which may have occurred before the 30th of June, 1864." I refer to that as showing the sense in which the word "dividend" has been used by all the parties in this action. That is not, of course, sufficient. I come to the Act itself, and I am told by Mr. Parker that the word "dividend" in the 75th section means, not dividend in the popular sense, but the sum to be divided—dividend in the technical sense. So I look through the Act, and the first thing I come to is the next section, the 76th section, in which, on Mr. Parker's own showing, "dividend" can mean nothing short of and nothing but dividend in the ordinary and popular significance—"and the dividends and interest arising from such securities shall also be invested." Mr. Parker admitted "dividend" there was dividend in the popular sense. The 77th section does not deal with that particular subject-matter at all, but section 78 does, and here again I find: "When such fund shall, by accumulation or otherwise, amount to the prescribed sum, or one-tenth part of the nominal capital, as the case may be, the interest and dividends thereon shall no longer be invested." And here again I

have Mr. Parker's admission that "dividend" is dividend in the popular sense. Then I come to the 79th section. In the 79th section I again find this: "will enable the undertakers to make a dividend of the amount aforesaid and so from time to time" the "amount aforesaid" being at the prescribed rate of 10 per cent. "Dividend," again, in the popular sense, and then, as the crowning climax, the last place in which "dividend" is referred to in this connection, I find this in section 80: "and in case dividends to the amount hereinbefore limited have been paid, make such a rateable deduction," and so on. There can be no doubt that the only thing that was ever paid here was not the whole thing, but the specific part allotted by way of quotient to the individual shareholder; so that Mr. Parker starts with a strong presumption against him, that in this one particular section 75 the Legislature should use the word "dividend" in the strictly technical Latin sense, whereas in all the others they use it in the popular sense. Then I come to look at the section itself, and it seems to me it is only by a very artificial and refined train of reasoning that you can put on it any sense other than the popular sense. It seems to me, therefore, that the Act is capable of a very simple and natural meaning, applying to the words their ordinary grammatical sense, and that no injustice whatever is done by giving it that sense. In point of fact I think in this case the judgment of the learned judge below, though very short, was perfectly right, and exhausts the question, and I should not have added anything myself except that I thought myself bound in deference to the very ingenious argument of Mr. Parker to say a few words on the matter. In my opinion this appeal must be dismissrd.

ROMER, L.J.—I am of the same opinion, and will only add a very few words. Before the Act of 1864, this company was able to divide, and no doubt did divide, all its profits amongst its shareholders by way of dividend without any limitation. There was no limit as to dividend at all, and accordingly it would have been impossible for the company to have pretended in any one year to have altered the dividend of a prior year, or to have appropriated the profits available for distribution amongst them in any one year to some past year which had been disposed of. In other words, with regard to this company up to the passing of the Act of 1864, there could not be said to have been in respect of dividends any deficiency at all in any true sense of the term. We then come to the Act of 1864, which incorporated the Act of 1847 for the first time, and so far as that Act of 1847 is concerned it may almost be said that there is a new incorporation, at any rate, *quâ* that Act of 1847. It is said on behalf of the appellants here that it was a great hardship incorporating that Act of 1847, and that at any rate it would be an even greater hardship unless they were successful on this appeal. The answer is, this company took the benefit of the new Act with its advantages and its disadvantages.

It had to go to Parliament to get some fresh powers, amongst others the right to incorporate another company and acquire its undertaking, and the Legislature, I presume, thought fit to impose upon this company the obligation of taking the appropriate sections of the Act of 1847 with their benefits and their liabilities, and the bargain was struck, and here we have the company subject now to the provisions of the Act of 1847. By section 27 of the Act of 1864, even if it needed that section to show it, it is perfectly clear that the provisions of the Act of 1847 which we have to consider are only to take effect from and after the passing of the Act of 1864, so far as concerns this company. In other words, they are to have no retrospective effect at all, and indeed it is difficult to see how they possibly could. Before the passing of the Act of 1864 in the prior years of this company there might or might not have been years where it had applied by way of profit amongst its shareholders unlimited dividends exceeding the prescribed rate of 10 per cent., but you could not possibly say, now that the Act of 1847 has been incorporated, you could treat the past years as years in which there was any limitation by way of dividend—any limitation by way of the profits which could be divided between the shareholders by way of dividend. Of course you could not say anything of the kind. There was no limit, and you could not have impeached any one year as having paid more than 10 per cent. or required the company to account for any excess, if any there had been. The provisions, as I have said, of the Act of 1847 were clearly not retrospective, and were only intended to apply, as appears to me, to the coming years so far as concerns this part of the case. Then the appellants say: "Oh, we want to regard the years before 1864 where we, the shareholders, did not as a matter of fact get the full 10 per cent. as being years in which there was a deficiency within the meaning of the phrase as it is used in the Act of 1847." The first answer is, I think, that the Act of 1847, after the incorporation, had no relation whatever to any deficiency in the prior years. As I have pointed out, with regard to those prior years you could not say there was any such thing as a deficiency existing.

And if you look at the wording of section 75, on which the appellants have to rely in order to enable them to distribute dividends in respect of a past deficiency, how is it worded? That section says this, that they must have a limit to the amount they distribute by way of dividend, "unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate," the "yearly rate" there, to my mind, clearly meaning the prescribed rate—prescribed, as I have pointed out for this company, for the first time, to take effect after the passing of the Act of 1864. How could it be said within the meaning of those words that the years before 1864 fall within the provisions of the section. The section shows, to my mind, that it is only dealing with years where there was a limited maximum dividend in respect of which it could be said that there had been a deficiency, and a dividend which, within the words of the section, had fallen short of the prescribed rate. To my mind both the wording of the section and the spirit of it, and the general considerations applicable to the case, show that these years before 1864 cannot be regarded at all as coming within the operation of section 75, or being affected or operated upon, if I may use the expression, by the Act of 1847 at all. It appears to me that Joyce, J., was quite right in the decision he has come to, and that this appeal fails.

COZENS-HARDY, L.J.—I am of the same opinion, and I have very little to add. It is important to remember, dealing with the Act of 1847 alone, that according to its terms it contemplated only waterworks to be thereafter authorized by Act of Parliament, which Act of Parliament should declare that this Act of 1847 should be incorporated therewith, and it is with reference to such a company that section 75, which has been so much discussed, is enacted. Putting it shortly (for I will not read that section again), it prescribes a certain rate of dividend which may not be exceeded, but it provides as a qualification or limitation on that, that there may be a larger dividend required to make up the deficiency of any

previous dividend which shall have fallen short of the said yearly rate. Now on the construction of that section, taking the Act of 1847 alone, it is, I think, plain that there can be no deficiency within the meaning of that section except during the period when there is a "prescribed rate."

Then, however, we come to the Act of 1864, by section 27 of which it is enacted that, amongst other things, section 75 of the Act of 1847 shall apply from and after the passing of this Act to the whole of the undertaking and waterworks of the company. Why is section 75 to be interpreted differently in that case from what it would have been interpreted if the company had been for the first time incorporated by that Act of 1864, which by section 27 made the Waterworks Act apply to it. It seems to me that with respect to this company, as to any other, we are bound to say that there can be no deficiency except during the period when there is a prescribed rate.

In my view it is not necessary to express any opinion upon the point which was so ably argued by Mr. Parker. I will assume that he is right, and though it is not necessary to decide it, the inclination of my opinion is that he is right in saying that whatever sum is in any given year taken and permitted to be divided by way of dividend, is divisible among the then shareholders of the company; but the question before us is really the quantum which has to be divided. In my view we are not concerned here with the persons who are entitled as between themselves to receive the amount which is distributed. I only desire to keep a perfectly open mind upon that point whenever the question may arise.

The motion was by consent treated as the trial of the action.

*Appeal dismissed.*

Solicitors, *Hollams, Sons, Coward, & Hawksley; Waltons, Bubb, Johnson, & Whatton.*

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## High Court of Justice.

Chan. Div. } Farwell, J. } Jan. 22.

*In re* RAYER.
RAYER *v.* RAYER. (*a.*)

*Will—Construction—Annuity without any deduction except legacy duty—Republication after passing of the Customs and Inland Revenue Act,* 1888—*Succession duty—Customs and Inland Revenue Act,* 1888 (51 *Vict. c.* 8), *s.* 21—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 9.

*A testator, by a will made in* 1882, *gave an annuity to H. for life, and after her death he gave annuities to H.'s children; and he charged all said annuities upon his real estate and directed that they should be paid "without any deductions except for legacy duty and income tax" A codicil, dated the* 12*th of July,* 1888, *confirmed the will. The testator died in* 1892, *and H. in* 1900.

*Held, that the codicil operated as a republication of the will as from the date of the codicil; that therefore there was a direction for the payment of the annuities to H.'s children "without any deduction except legacy duty," made at a time when there was no duty called by that name, another duty called succession duty having been substituted by section* 21 *of the Inland Revenue Act,* 1888, *in respect of legacies and annuities charged on the real estate of any person dying after the* 1*st of July,* 1888; *and that the devisees of the annuities were liable to pay the succession duty.*

*Held, also, that the estate duty arising under the Finance Act,* 1894, *was payable out of the testator's residuary personal estate.*

This was an administration action which raised the question as to who was liable for the estate and succession duties which became payable on the death of an annuitant.

The testator, whose will was dated the 10th of August, 1882, devised his real estates to trustees upon certain trusts, and subject thereto he gave an annuity of £250 to his sister Frances Harmer for her life, and after her decease an annuity of £100 to each of her children. He charged these annuities on the said real estates, and subject thereto he devised all his real estates in strict settlement. He directed that all the annuities should be paid half-yearly, "without any deductions except for legacy duty and income tax," and he bequeathed all his residuary personal estates to be held upon trusts similar to his real estates.

By a codicil dated the 12th of July, 1888, the testator, after making certain provisions which are immaterial, concluded: "In all other respects I confirm my said will."

The testator died on the 11th of January, 1892.

F. Harmer died on the 22nd of July, 1900, leaving three children, each of whom became entitled to an annuity of £100 per annum.

The Inland Revenue authorities claimed estate duty and succession duty in respect of the three annuities.

The Customs and Inland Revenue Act, 1888, s. 21, sub-section 2, provides: "The duties chargeable under the Acts now in force for charging the duties on legacies and shares of the personal estates of deceased persons shall not be levied and paid under such Acts in respect of any legacy payable or having effect or being satisfied out of or charged or rendered a burden upon the real or heritable estate of any person dying on or after the first day of July, 1888, or upon any real or heritable estate, or the rents or profits thereof, which such person shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any moneys to arise from the sale, mortgage, or other disposition of any such real or heritable estate, or any part thereof, but the duties under the Succession Duty Act, 1853, and the additional duties under this Act shall be levied and paid in respect of every such legacy (whether given by way of annuity or in any other form) as a succession to personal property."

*O. L. Clare,* for the plaintiff, the first tenant for life under the settlement.

*Butcher, K.C.,* and *Sheldon,* for two of the annuitants.

*Hewitt,* for the third annuitant.

*S. B. L. Druce,* for the defendant tenants for life in remainder and the residuary legatees.

*Withers,* for the trustees and the ultimate tenant in tail in remainder.

FARWELL, J., in giving judgment, stated the facts and read section 21 of the Customs and Inland Revenue Act, 1888, and continued as follows: The effect of sub-section 2 of section 21 of the Customs and Inland Revenue Act, 1888, was that the legacy duties therein mentioned ceased, and succession duties were substituted for them. What the result would have been if the matter had rested there, having regard to what has been said in other cases as to the effect of an Act of Parliament on the construction of a will made prior to the passing of the Act, it is not necessary for me to determine; but Lord Selborne in *Jones* v. *Ogle,* 21 W. R. 236, L. R. 8 Ch. App. 192, at p. 195, points out that in such a case the Act of Parliament

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

does not usually affect the construction of the will. It may, however, in some cases affect the expression of the testator's intention, as will be seen, for example, in the case of *In re Bridger*, 42 W. R. 179, [1894] 1 Ch. 297, a decision under the Mortmain Act of 1891. It is not necessary for me to determine what the effect would have been in the present case, because on the 12th of July, 1888—that is to say, after the Act came into operation, this testator made a codicil by which, after making certain provisions which are immaterial, he expressly confirmed his will. The effect of confirmation is stated by North, J., in *In re Champion*, [1893] 1 Ch. 101, 41 W. R. Dig. 275, affirmed in the Court of Appeal. He says: "It is settled by authority that the effect of such a phrase as 'I confirm my will in other respects' is a republication of the will, and when under the old law a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date. There is ample authority on this point"; and then his lordship goes through all the old authorities. Therefore I have, I apprehend, to treat this case as though there had been simply a devise after the Act of these rent-charges or annuities with a direction in the words that I have read that they are to be paid without any deduction except for legacy duty.

I pause here to observe that when the testator died—namely, on the 11th of January, 1892, the succession duty, which had been substituted for legacy duty, was in fact more onerous than and was different in some respects from the legacy duty. There was 1½ per cent. increase, which has since by the Finance Act, 1894, been merged in estate duty (but that was two years after the testator died), and the succession duty is payable by eight half-yearly instalments, and the legacy duty was payable by four equal yearly instalments; so that the duties are by no means identical. This variation would have caused me considerable difficulty if there had been no codicil confirming the will; but the joint effect of will and codicil is that I have a document directing payment of a rent-charge "without any deduction except legacy duty," made at a time when there was no duty called by that name, but another duty recently substituted for it called succession duty; these two duties are frequently confused the one with the other, even by the Somerset House authorities in their letters relating to the present case. Now it is an important principle in construing wills to give effect so far as possible to all the words used I find here that the testator clearly expresses his intention that the devisees shall bear the burden of some duty, and I can give no effect to this expression of intention unless I regard "legacy" as *falsa demonstratio*, or unless I read "legacy" as equivalent to the succession duty substituted for legacy duty. It is open to me to do this, inasmuch as the word "legacy" is insensible, having regard to existing circumstances, and the words "legacy duty" and "succession duty" are frequently used as interchangeable. I should certainly defeat the expressed intention if I held that the devisees took free from all duty, and I accordingly answer the question by saying that the devisees of the rent-charges must pay the succession duty. The question of estate duty has not been seriously argued; it must, of course, be paid out of the residuary personal estate.

Solicitors, *Wood, Bigg, & Nash; Withers & Withers; Clarke & Calkin; Woodcock, Ryland, & Parker.*

Chan. Div. } Buckley, J. } May 12, 13, 19.

COOPER v. LAIDLER. (*a*.)

*Easement—Light—Threatened injury—Injunction or damages — Jurisdiction — Special circumstances — Oppression—Lord Cairns' Act*, 1858 (21 & 22 *Vict. c.* 27), *s.* 2.

*The plaintiff was the owner of a cottage possessing ancient lights and adjacent to ground wherein the defendant threatened and intended to erect valuable buildings which would (as the court found) materially obstruct the lights and cause the plaintiff substantial damage. The plaintiff had been unwilling to sell his property for a less sum than the cottage, together with its easement of light, would, having regard to its situation in relation to the adjacent ground, in fact command. In an action for an injunction to restrain the erection of the proposed building,*

*Held, that the plaintiff's conduct had not been extortionate, and that there were no circumstances such as would induce the court to award him damages in lieu of an injunction.*

*The* dictum *in* Dreyfus *v.* Peruvian Guano Co., 43 *Ch. D.* 316, 38 W. R. Dig. 63, *that there is no jurisdiction to grant damages in lieu of a prohibitory injunction, must be considered binding.*

This was an action for an injunction to restrain the defendant from erecting buildings on his land in such a manner as to interfere with the plaintiff's ancient lights.

The plaintiff was the owner of a small cottage near Northumberland-street, Newcastle-on-Tyne. The defendant was the owner of a plot of land fronting on Northumberland-street, and situate between that street and the plaintiff's cottage. On this plot the defendant proposed to erect buildings which, in the opinion of the plaintiff, would materially and substantially obstruct the flow of light to certain windows in the cottage.

The erection had not commenced when the plaintiff issued a writ, claiming an injunction. The circumstances are more fully referred to in the judgment.

*Astbury, K.C.*, and *Maugham*, for the plaintiff.

*Hon. F. Russell* (*Buckmaster, K.C.*, with him), for the defendant.—Even if the court should find that the plaintiff's lights have been materially obstructed, he has brought this action for the purpose of enabling himself to extort from the defendant more than the property is really worth. His conduct has been vexatious and oppressive, and the case, therefore, is one in which damages should be awarded in lieu of an injunction: *Shelfer* v. *City of London Electric Lighting Co.*, 43 W. R. 238, [1895] 1 Ch. 287, at p. 316. The plaintiff is asking for an injunction, not for the purpose of protecting rights, but in order to extort from the defendant a greater sum than the property is really worth.

*Astbury, K.C.*, in reply.—In a *quia timet* action there is no discretion to award damages in lieu of an injunction: *Dreyfus* v. *Peruvian Guano Co.*, 43 Ch. D. 316, at p. 333, 38 W. R. Dig. 63; *Martin* v. *Price*, 42 W. R. 262, [1894] 1 Ch. 276. Even if the court has jurisdiction to award damages, the present is a case for an injunction.

He also referred to *Holland* v. *Worley*, 32 W. R. 749, 26 Ch. D. 578; *Scott* v. *Pape*, 34 W. R. 465, 31 Ch. D. 554; and *Greenwood* v. *Hornsey*, 35 W. R. 163, 33 Ch. D. 471.

(*a*.) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

*O. L. Clare, amicus curiæ,* referred to *Home and Colonial Stores* v. *Colls*, 50 W. R. 227, [1902] 1 Ch. 302.

BUCKLEY, J., held that the access of light over the defendant's property to the ancient lights of the plaintiff would be substantially and materially interfered with by the defendant's proposed buildings, but reserved judgment on the question whether damages could be, or under the circumstances of the present case ought to be, given to the plaintiff instead of an injunction.

May 19.—BUCKLEY, J.—Lord Cairns' Act was repealed by the Statute Law Revision Act, 1883, but by section 5 (*b*) of that Act the jurisdiction of the court under Lord Cairns' Act was preserved notwithstanding the repeal: *Sayers* v. *Collyer*, 32 W. R. 200, 28 Ch. D. 103, at p. 107. The scope and effect of that Act have been frequently the subject of judicial comment and decision. The authorities seem to stand as follows: (1) Where a mandatory injunction is asked, the Act gives jurisdiction to substitute damages for an injunction; (2) where the injunction asked is one to restrain a continuing nuisance—that is, where the act has been done and there is an intention to continue to do it, then it would seem that there is jurisdiction to award damages instead of granting an injunction (*Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch., at p. 319; but (3) where no wrongful act has been committed, but an injunction is sought to restrain its commission, the Court of Appeal has expressed a clear opinion in *Dreyfus* v. *Peruvian Guano Co.*, 43 Ch. D., at pp. 333, 342, that Lord Cairns' Act confers no power to give damages in lieu of an injunction. That was the judgment of Bowen, Fry, and Cotton, L.JJ. In *Martin* v. *Price*, again in the Appeal Court, the question whether the court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, was expressed to be by no means free from difficulty, but was not taken as concluded. *Dreyfus* v. *Peruvian Guano Co.* was there referred to as having expressed a clear opinion against the existence of such jurisdiction. In *Martin* v. *Price* the court did not keep the parties waiting while making up their minds whether the view expressed in *Dreyfus* v. *Peruvian Guano Co.* was to be established by decision, but assuming the jurisdiction to exist, held, upon the facts, that an injunction ought to go. The only subsequent reference that I find to the point is in *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch., at p. 315. In that case it was stated, correctly so far as I know, although I have not verified it myself, that since Lord Cairns' Act was passed only fourteen cases were to be found in the books in which damages in lieu of an injunction have, against the will of the plaintiff, been awarded, and it was said that all these were cases in which mandatory injunctions were sought. The one case which I have found in which damages were given instead of a prohibitory injunction is *Holland* v. *Worley*, before Pearson, J., a decision which has been doubted.

Under these circumstances, I might deal with this case upon the footing that the expression of opinion in the Court of Appeal in *Dreyfus* v. *Peruvian Guano Co.* ought, so far as I am concerned, to be treated as concluding the matter, and if so the injunction ought to go. But without resting my judgment wholly upon that, I think that for other reasons, which I proceed to state, an injunction ought equally to go.

An easement of light is a legal right. It is a matter of property, and to quote the well-known words of Lord Kingsdown in *The Imperial Gas Light Co.* v. *Broadbent*, 7 H. L. Cas. 600, at p. 612, 8 W. R. H. L. Dig. 4, where the plaintiff has established his legal right, then, "unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that right's violation." The plaintiff's easement of light is a right at common law. The remedy in equity by way of injunction is a remedy in aid of that legal right. The plaintiff is entitled to an injunction, not in the discretion of the court, but as of course, unless there is something special in the case, such as *laches*, or that the interference with the right is only trivial or occasional. To quote Lindley, L.J., in *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch., at p. 316: "Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances": see further *Martin* v. *Price*, [1894] 1 Ch., at p. 285; *Home and Colonial Stores* v. *Colls*, [1902] 1 Ch., at p. 309. The court has affirmed over and over again that the jurisdiction to give damages where it exists is not so to be used as in fact to enable the defendant to purchase from the plaintiff against his will his legal right to the easement: see, for example, *Dent* v. *Auction Mart Co.*, 14 W. R. 709, L. R. 2 Eq. 238, at p. 246; *Aynsley* v. *Glover*, 23 W. R. 147, L. R. 18 Eq. 544, at p. 552; *Smith* v. *Smith*, 23 W. R. 771, L. R. 20 Eq. 500, at p. 505; *Greenwood* v. *Hornsey*, 33 Ch. D., at p. 477. This may be summed up in the language of Lindley, L.J., in *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch., at p. 315, thus: "Ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that court into a tribunal for legalizing wrongful acts; or, in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict." To refuse to aid the legal right by injunction, and to give damages instead is in fact to compel the plaintiff to part with his easement for money. The court has no right to compel him so to do: see Lord Halsbury's words in *Shelfer* v. *City of London Electric Lighting Co.*, at p. 311. If the injury be trivial and the damages would be measured by a very small sum—say, £20, as in *Dent* v. *Auction Mart Co.*, *Aynsley* v. *Glover*; or £5 or £6, as in *Home and Colonial Stores* v. *Colls*, [1902] 1 Ch., at p. 306, the court may, where there is jurisdiction, give damages instead of an injunction. But except in such cases the owner of the legal right is entitled to the injunction, which is but the equitable remedy to perfect his right.

In the present case the circumstances upon which the defendant relies are, in substance, that his property in Northumberland-street, and the lofty buildings which he proposes to put upon it are much more valuable than the comparatively insignificant cottage property at the back; that the plaintiff purchased the cottage property, or the last few shares in it, recently, because, as the defendant suggests, he knew it would become very valuable and command a high price when the frontager in Northumberland-street wanted to interfere with its easement of light. The defendant has given no evidence, and does not, I think, suggest that the damage will be £20, or any small sum of that kind. I find that the damage will be substantial. The defendant says that the cottage property, as such, is worth a comparatively small sum, say £700, but it appears that when the immediate predecessor in title of the defendant contemplated building, he offered the plaintiff a fancy price, £5,000, for this property, and that the plaintiff refused it. The defendant says that the plaintiff is extorting money by asking for an injunction, and

thus compelling the defendant either to buy at an unreasonable price or to keep his buildings down. This argument, I think, rests on a fallacy. It is not extortion to ask a price which the property for exceptional reasons in fact commands. If a neighbouring owner for the improvement of his property requires an adjacent property, he must submit to pay a fancy price if he is determined to acquired it. The value of the adjacent property is in fact the greater by reason of that state of things. Moreover, when the defendant bought, as he did recently, subject to this easement of light existing as a hindrance to a building scheme, he probably paid much less for his property than if there had not been such existing hindrance. Further, the value of the plaintiff's property is not merely the value of the old cottage, but is such sum as it will fetch having regard, amongst other things, to this existing right to an easement of light. It is not, I think, extortion or oppression that the plaintiff should decline to sell his property except for such price as, having regard to the exigencies of the neighbouring property, it will in fact command. It is no more oppressive in the plaintiff to say that he wants the full sum which his property will command, having regard to the existing easement, than it is in the defendant to say that he must be allowed to build in disregard of the easement. Assuming, therefore, without deciding, that there exists in the present case (where the injury is not committed but only threatened) jurisdiction to give damages in lieu of an injunction, I am of opinion that this is not a case in which that course ought to be taken. I think the plaintiff is entitled to an injunction, and I therefore grant an injunction in the usual form.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Cooper & Goodger*, Newcastle-on-Tyne; *Crossman, Prichard, Crossman, & Block*, for *Dees & Thompson*, Newcastle-on-Tyne.

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K. B. Div. (Bigham, J.) April 23, 27.

CONTINENTAL CAOUTCHOUC AND GUTTA PERCHA CO. *v.* KLEINTWORT, SONS, & CO. (*a.*)

*Banker — Customer — Mistake — Money paid under mistake of fact.*

*The defendants, who were foreign bankers, were in the habit of making advances to K., who then purchased goods which the defendants held as security; when K. found a purchaser he assigned the right to receive the purchase-money to the defendants, who accordingly released the goods. K. also carried on the same system with B. & Co. The plaintiffs bought from K. two parcels, the one released by the defendants and the other by B. & Co. K. instructed the plaintiffs to pay the defendants and B. & Co respectively for the goods so purchased. By mistake the plaintiffs paid both sums to the defendants, who credited K.'s account, notifying K. of their having done so. The defendants acting bonâ fide continued to make advances to K. who knew of the mistake, but did not disclose it, and afterwards became bankrupt. The plaintiffs sought to recover from the defendants the sum which should have been paid to B. & Co. as money paid under mistake of fact.*

*Held, that the defendants were holding the money to the use of the plaintiffs, and that as the defendants were not prejudiced by such payment the sum was recoverable as money paid under mistake of fact.*

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

Action tried in Commercial Court.

This was an action brought to recover the sum of £1,480 15s. 11d., money paid by plaintiffs to the defendants under a mistake of fact.

The facts sufficiently appear in the reserved judgment.

*Scrutton, K.C.*, and *Mackinnon*, for plaintiffs.

*Hamilton, K.C.*, and *Chaytor*, for defendants.

The following cases were cited: *Thomson* v. *Clydesdale Bank (Limited)*, [1893] A. C. 282; *Simson* v. *Ingham*, 2 B. & C. 65; *Buller* v. *Harrison*, Cowper 565; *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 623, 47 W. R. Dig. 9; *Coleman* v. *Bucks and Oxon Union Bank*, 45 W. R. 616, [1897] 2 Ch. 243; *Kelly* v. *Solari*, 9 M. & W. 54; *Newall* v. *Tomlinson*, L R. 6 C. P. 405, 19 W. R. C. L. Dig. 48; *Cox* v. *Prentice*, 3 M. & Sel. 344; *Marriot* v. *Hampton*, 2 Smith, L.C., 11th ed. 421; *Holland* v. *Russell*, 11 W. R. 757, 4 B. & S. 14.

*Cur. adv. vult.*

April 27.—BIGHAM, J.: This action is brought to recover back a sum of £1,480 15s. 11d. paid by the plaintiffs to the defendants under a mistake of fact. The facts are as follows: A firm of Kramrisch & Co. carried on business in Liverpool as importers of rubber. The defendants, who are foreign bankers, were in the habit of making advances to Kramrisch on the security of the shipping documents of the rubber, and when the rubber arrived in this country the defendants continued the advances, holding the rubber itself as their security. When Kramrisch & Co. sold any part of the goods it was their practice to apply to the defendants for a corresponding delivery order, which the defendants gave them, thereby enabling Kramrisch & Co. to fulfil their contract of sale with their buyer. In exchange for the delivery order Kramrisch & Co. gave to the defendants a letter containing the particulars of the sale, the quantity, the price, and the name of the buyer, and by the same letter they assigned to the defendants the right to receive the purchase-money; this assignment Kramrisch & Co. completed by a written notice to the buyer notifying that the money was to be paid to the defendants. Thus, although when the rubber was sold the defendants parted with the goods, they got in place of the rubber the right to receive the price from the buyer. When the buyer paid the price the defendants credited the amount to Kramrisch's account, and thus the transaction ended. Kramrisch & Co. did business in this way not only with the defendants but also with a firm of Wm Brandt, Sons, & Co. The plaintiffs were customers of Kramrisch & Co., and frequently bought parcels of rubber from them, and following the practice I have described they were in the habit from time to time of paying the price to the defendants or to Brandt & Co. as the case might be in accordance with the directions given to them by Kramrisch & Co. In December, 1902, and January, 1903, the plaintiffs had bought from Kramrisch & Co. several parcels of rubber which had been held by the defendants as security for advances made to Kramrisch. The defendants had parted with these parcels of goods, getting from Kramrisch & Co. an assignment of the right to receive the price, of which assignment express notice in writing had been given to the plaintiffs. The goods were delivered to the plaintiffs, and from time to time in the early part of January the plaintiffs made remittances to the defendants on account of the price. The total price of the different parcels so bought by plaintiffs was £9,505 17s. 3d., and the payments made on account amounted to £8,259 2s. 7d. Thus there remained a balance of £1,246 14s. 8d. to

be paid by the plaintiffs to the defendants. It appears that at this time the plaintiffs were also purchasers from Kramrisch & Co. of three other parcels of rubber amounting to £1,480 15s. 11d., against which advances had been made to Kramrisch & Co. by Brandt & Co.; and the plaintiffs were, by virtue of an assignment made by Kramrisch in favour of Brandt, under an obligation to pay the price of these parcels to Brandt. By a blunder on the part of one of the plaintiffs' clerks the fact was overlooked that this £1,480 15s. 11d. was to go to Brandt & Co., and the remittances for the whole amount (the £1,246 14s. 8d. and the £1,480 15s. 11d.) were sent by plaintiffs to the defendants. Thus the defendants received an amount (£1,480 15s. 11d.) which ought to have been sent to Brandt & Co. On the 7th of February Brandt & Co. wrote to the plaintiffs to know why the money for the three parcels of rubber, the £1,480 15s. 11d., had not been remitted to them in accordance with the undertaking created by the assignment. The plaintiffs then discovered the blunder which had been made by their clerk, and on the 10th of February they wrote to the defendants asking to have the matter put right by a return of the money. The defendants refused to return the money, alleging that in effect it had been paid over to Kramrisch & Co. or had been accounted for to them; and further, that on the faith of the representation made by the plaintiffs that the money was available for Kramrisch & Co. in defendants' hands the defendants had been induced to give fresh credit to Kramrisch & Co., and further that whether the plaintiff had or had not induced the giving of fresh credit the state of the accounts between Kramrisch & Co. and the defendants had, in fact, been altered between the dates of the receipt of the money and the notification of the mistake. Shortly after the notification of the mistake Kramrisch & Co. failed; and, thereupon Brandt & Co. called on the plaintiffs to pay the £1,480 15s. 11d. in accordance with the obligation created by the assignment, and the plaintiffs did pay, as, indeed they were bound to do. Thus the plaintiffs had paid the money twice over, the first time in mistake to the defendants, the second time properly to Brandt & Co., and the question now is whether they can recover back from the defendants the amount of the first payment or whether they must be satisfied with a proof against the bankrupt estate of Kramrisch & Co. It seems that before the mistaken remittance was made Kramrisch & Co. had advised the defendants of large sales of rubber to the plaintiffs in addition to those already referred to, and had obtained corresponding deliveries of goods from the defendants. Such sales had in fact been made, but Kramrisch & Co., instead of delivering the goods to the plaintiffs, converted them to their own use so that the plaintiffs owed nothing in respect of them. Of this, however, the defendants were unaware, so that when they received the remittance they believed that it was properly sent to them against the goods with which they had parted. By the letters from the plaintiffs to the defendants in which the remittances were enclosed the defendants were requested to credit the amount to Kramrisch & Co., and in accordance with these letters the defendants did credit Kramrisch & Co.'s account with the remittances, and so advised the plaintiffs when they wrote acknowledging the receipt of the money. Not only did the defendants deal with the remittances in the way they were told to deal with them, but they also advised Kramrisch & Co. of the receipt of the money and that the amount had been passed to their credit. Kramrisch & Co., in answer to this unexpected and agreeable piece of news, wrote back to the defendants saying that they noted the fact and had made entries in their own books in conformity therewith. Of course Kramrisch & Co. knew well that the plaintiffs ought not to have paid the money to the defendants, and that they (Kramrisch & Co) had no right to the credit of which the defendants had sent advice; but they kept their mouths shut. It is necessary to state one other fact. Between the receipt of the money and the notification of the mistake the state of the accounts between Kramrisch & Co. and the defendants underwent considerable changes, the general effect of which was to reduce very considerably the large amount owing by Kramrisch & Co. No doubt in the course of these changes some payments were made by the defendants to Kramrisch & Co., or on their account; but they were far less in amount than the payments in, and they were either made against ample security or were of insignificant amounts. Moreover, not one of the payments to Kramrisch & Co. was in any way induced by the receipt of the money from the plaintiffs. This the defendants themselves admit, and I am myself quite satisfied as a matter of fact that it was so. The receipt of the money in no way caused the defendants to make any payment or to grant any indulgence to Kramrisch & Co. or to favour them in any way. Their business with Kramrisch & Co. would have gone on precisely as it did, even if the money had not been received, for the open account was, at the time of the payment, so large and the subsequent dealings were so small and of such little importance that the mistaken payment could not have influenced, as indeed it did not influence, the defendants in any way. The defendants are still large creditors of Kramrisch & Co.

Then, can the plaintiffs recover back the money from the defendants? I think they can. Certainly, before the defendants had advised Kramrisch & Co. that the money had been credited to their account, it was money in the defendants' hands to the plaintiffs' use. The mere entering of the money to the credit of Kramrisch & Co. by the defendants in their own books gave no title either to the defendants or to Kramrisch & Co. Such entry bound no one. If the mistake had been discovered and notified before the defendants' clerk had made the entry in the defendants' books, the plaintiffs could clearly have insisted on a return of the money. It would not have been competent to the defendants to say that, having received the money with instructions to credit it to Kramrisch & Co., they were either bound as regarded Kramrisch & Co., or entitled as regarded themselves so to deal with it. The notification of the mistake and the countermand of the instructions would have entitled the plaintiffs to a return of the money. The mere entry by a clerk in the books can make no difference; such an act can neither give any right to the defendants, nor until communicated can it give any right to Kramrisch & Co. Then, did the communication to Kramrisch & Co. of the fact of the entry alter this state of affairs; did it vest any right in that firm to the money? If it did, then the money ceased to be money in the hands of the defendants to the use of the plaintiffs, and it became money in the hands of the defendants to the use of Kramrisch & Co. which the defendants were entitled to appropriate toward payment of Kramrisch & Co.'s indebtedness to them. And in that case it is to Kramrisch & Co. that the plaintiffs must look for its return. At this point the difficulty, if there be any, arises. It is said, on behalf of the defendants, that what happened was in fact equivalent to a payment of the money by the defendants to Kramrisch & Co., and a repayment of the money by Kramrisch & Co. to the defendants. And so perhaps it might have been had Kramrisch & Co. thought or supposed that the money was really

intended for them. Kramrisch & Co., however, knew quite well that they were not entitled to the money; they knew that the money ought to have gone to Brandt & Co. How, then, could Kramrisch & Co. say that the money was in defendants' hands to their (Kramrisch & Co.'s) use. They knew it was not; and if they had asked the defendants to pay it over they would have been committing a fraud. Kramrisch & Co.'s duty when they were advised of the payment was to tell the defendants that there had been a mistake and that the plaintiffs had paid money into the defendants' hands which they ought not to have paid. Instead of doing this they said nothing. But are the plaintiffs to suffer on this account? I think not. In my opinion this money was paid into the defendants' hands in such circumstances of mistake as to make it money paid by the plaintiffs to their own use, and it has never ceased to have that character. The defendants must therefore pay it back. I have already said that the defendants were not in any way induced to alter their position by reason of the mistaken payment; and the mere fact that the accounts did change in the ordinary course of business before the mistake was discovered is, in my opinion, immaterial. The plaintiffs are therefore not estopped from setting up the truth—namely, that the money is theirs. It would probably have been otherwise if the mistake had led the defendants to alter their position with regard to Kramrisch & Co. to their own disadvantage. The plaintiffs contended that the payment was made not to the credit of Kramrisch & Co. at all, but in discharge of an original liability of theirs to the defendants, arising out of a supposed but non-existent assignment. I doubt whether, having regard to the fact that in the letter containing the remittance it was described by the plaintiffs as sent for Kramrisch & Co.'s account, this contention is sound; but in the view I take of the case it is not necessary for me to deal with it.

*Judgment for plaintiffs.*

Solicitors for the plaintiffs, *Stephenson, Harwood, & Co.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) April 1, 8.

FIELDING *v.* TURNER. (*a.*)

*Gaming—Using shop for unlawful game—Automatic machine—Unlawful gaming—Gaming Act,* 1845 (8 & 9 *Vict. c.* 109), *s.* 2—*Gaming House Act,* 1854 (17 & 18 *Vict. c.* 38), *s.* 4.

*The appellant kept in his shop an automatic machine which was worked by putting a penny in the slot and then pulling down and afterwards releasing a spring, whereby the penny was set in motion and might fall into one of seven compartments; if it fell into the centre compartment a ticket was automatically delivered entitling the recipient to two pennyworth of goods sold in the shop, if it fell into two other compartments the penny was automatically returned, but if it fell into any of the other four compartments it was retained.*

*Held, that the user of such machine was an unlawful game within the meaning of the Gaming Act.* 1845, *s.* 2, *and the Gaming House Act,* 1854, *and that the appellant had been rightly convicted under section* 4 *of the latter Act of having opened, kept, and used his shop for the purpose of unlawful gaming.*

(*a.*) Reported by ALAN HOGG Esq. Barrister-at-Law.

Special case stated by justices.

The case stated set out the following facts:

The appellant Fielding, who keeps a shop wherein he sells sweetmeats, herbs, and herb beer, had on his shop counter an automatic machine working on the penny-in-the-slot system. A person desiring to work the machine puts a penny in the slot and then pulls down a spring by means of a knob, and then lets the knob go suddenly and the spring flies up and the penny is thus sent on its journey and may go into one of seven compartments. If it goes into either of two compartments the penny is returned to the sender. If it goes into one of four compartments the penny is retained in the machine, and the sender gets nothing for it If the penny goes into the centre compartment (the bull's-eye, as it is called) the sender receives from the machine a ticket entitling him to receive from the appellant two pennyworth of sweets, or it may be cigars or cigarettes. It was proved by the evidence that numbers of boys visited the shop and put pennies into the slot, some of whom won and some of whom lost, but it was admitted by some of the boys that there was skill in working the machine, and that a person who was accustomed to it might win as frequently as he lost.

Three informations were then laid against the appellant under section 4 of the Gaming House Act, 1894. That section is as follows: "Any person being the owner or occupier or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who being the owner or occupier of any house or room shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care and management of any house, room, or place opened, kept, or used for the purpose aforesaid . . . may on summary conviction thereof before any two justices of the peace be adjudged by such justices to forfeit and pay such penalty not exceeding five hundred pounds as to such justices shall seem fit. . . ."

The informations were heard before the Oldham justices, who convicted the appellant and fined him ten shillings, but stated this case.

*Llewelyn Davies,* for the appellant, contended that he could not be convicted unless something more than mere gaming was proved. It must also be proved that it was unlawful gaming, and that the shop was opened for the purpose of gaming. The use of the machine was not gaming, as it was not a mere game of chance, and skill entered into the competition. It was certainly not unlawful gaming, and the house could not be said to be used as a gaming-house within the meaning of the Act.

He referred to *Rex* v. *Rogier,* 2 Dow. & Ry. 431; *Jenks* v. *Turpin,* 13 Q. B. D. 505, 32 W. R. Dig. 84, and the numerous statutes cited in that case.

*R. B. D. Acland,* for the respondent, contended that it was clearly a game of mere chance, and that the shop was kept open for the purpose of gaming. The gaming was rendered unlawful by taking people from their proper avocations.

*Cur. adv. vult.*

April 8.—Lord ALVERSTONE, L.C.J., read the judgment of the court, in the course of which, after referring to the facts, he said: It has been argued that this, if a game at all, was a game of skill, but this contention cannot be maintained. In the proper sense of the word, skill has no effect upon the act done by the person who puts the penny into the slot. No doubt practice may enable a person to acquire knowledge as to strength of the spring, but on the first and

probably on many successive occasions it must be a question of chance into which compartment the penny would fall. It is then suggested that there is no unlawful gaming, because no person competed with the person who put the penny in the slot; but this involves a fallacy, for the owner of the machine may be said to back his chance of the money falling into one of the four compartments in which it would be retained without return. The owner of the machine backed his chance against the person who used it. It is also contended that keeping such a machine in a shop is not keeping or using a room for the purpose of unlawful gaming; but if the operation was unlawful the appellant was rightly convicted of keeping the room for the purpose.

The only substantial question is whether the operation was unlawful within the Gaming House Act, 1854. That Act in its preamble refers to the Gaming Act, 1845 (8 & 9 Vict. c. 109), and section 2 of the latter Act, in our opinion, indicates that a game in which the chances are not alike favourable to all the players, including the person by whom the game was managed, or against whom the players staked, was an unlawful game. The operation of this machine, in our opinion, falls within that definition, and that being so, the operation was one of unlawful gaming, and the appellant knowingly occupied the shop and permitted it to be used for that purpose.

Solicitors, *Keith & Humphries; Chester, Broome, & Griffithes*, for *H. Booth & Sons*, Oldham.

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K. B. Div. (Wright, J.) March 26.

KIRKLAND *v.* PEATFIELD AND ANOTHER. (*a.*)

*Limitations, Statute of—Mortgage of reversionary interest in really—Action on covenant—Remedy—Period of limitation—Real Property Limitation Act,* 1874 (37 & 38 *Vict.* c. 57), *s.* 8.

*The limitation of twelve years imposed by section* 8 *of the Real Property Limitation Act,* 1874, *to actions and suits for the recovery of money charged on land applies to an action by a mortgagee against mortgagors on a joint and several covenant to repay in a mortgage of a reversionary estate in realty, notwithstanding the fact that the estate is still reversionary at the time when the action is brought.*

Case tried before Wright, J., without a jury.

The action was brought to recover the amount of principal and interest due under a joint and several covenant in a mortgage deed. The facts were as follows: Mrs. Lees, by her will dated the 18th of January, 1864, devised her real estate to trustees in trust for her sister, Ann L. Peatfield, for life, and after her death in trust to sell and divide the proceeds between the testatrix's nephews and nieces then living. The defendants were two of such nephews. Mrs. Lees died in August, 1864.

In May, 1881, the nephews and nieces, including the defendants, being entitled to the property subject to the life interest of Ann L. Peatfield, joined in a mortgage of their reversionary interest under the will to the plaintiff to secure the repayment of a sum of money advanced to them by him together with interest.

The mortgage deed contained the usual joint and several covenant by the mortgagors to repay the loan with interest.

Interest was paid up to, but not subsequent to, the 18th of October, 1882.

On the 7th of October, 1902, the plaintiff commenced an action to recover the amount of principal and interest due under the covenant. At this time the tenant for life was still living. The defendants in their defence pleaded that the claim was barred by the Statute of Limitations.

*Germaine, K.C.* (*G. A. Scott* with him), for the plaintiff.—In the first place the reversionary interest of the defendants is personalty, as the will directed the real estate to be sold, and therefore the mortgage is a mortgage of personalty and consequently does come within section 8 of the Real Property Limitation Act, 1874, which limits the right of action to twelve years, but comes within section 3 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), which limits the right to twenty years: *In re Raw, Morris* v. *Griffiths*, 32 W. R. 986, 26 Ch. D. 601. In the next place, even if the mortgage be a mortgage of realty, still the Act of 1874 would not apply. The property mortgaged was property in a reversion, and until the property comes into possession the mortgagee can have no right against the land, therefore section 8 of the Act of 1874 does not apply to the covenant now sued upon. The period of limitation in this case is twenty years as in the case of an ordinary specialty debt.

*Stanger, K.C.* (*F. O. Robinson* with him), for the defendants.—The claim is barred by the Statute of Limitations. The action is brought to recover a sum of money which was "charged upon or payable out of any land within the meaning of section 8 of the Real Property Limitation Act, 1874. That section applies to an action on a covenant in a mortgage as well as to the remedy on the security itself: *Bowyer* v. *Woodman*, L. R. 3 Eq. 313, 15 W. R. Dig. Ch. 91; *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511. The period for limitation is therefore twelve years and not twenty years, and consequently the plaintiff's claim in this action is barred.

WRIGHT, J.—This is an action against mortgagors on their covenant to repay principal and interest thereon, and it is said that the period of limitation within which this action can be brought is twenty years, and not twelve years. It was contended on behalf of the plaintiff that section 8 of the Real Property Limitation Act, 1874, does not apply because this mortgage is not a mortgage of land, but a mortgage of personalty. I feel no doubt, however, that it is a mortgage of an interest in land. That being so, why does not section 8 of the Real Property Limitation Act, 1874, apply? That section provides that "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent . . . but within twelve years next after a present right to receive the same shall have accrued . . . unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given. . . ." It was decided in *Sutton* v. *Sutton*—the principle of which case was adopted in *In re Frisby, Allison* v. *Frisby*, 38 W. R. 65, 43 Ch. D. 106—that the limitation of twelve years imposed by section 8 of the Real Property Limitation Act, 1874, to actions and suits for the recovery of money charged on land applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land. I do not feel that it is open for me to read into section 8 the words of restriction or exception suggested by counsel on behalf of the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

plaintiff. The language of the section is wide enough to include an action on a covenant such as this, and there is therefore no reason to cut it down merely because the mortgage is a mortgage of a reversionary interest. There has been no payment of interest within twelve years of the commencement of this action, and the claim is therefore barred.

*Judgment for defendants.*

Solicitors for plaintiff, *Taylor, Stileman, & Underwod*, for *J. W. & G. E. Kirkland*, Nottingham.

Solicitors for defendants, *Richard F. & C. L. Smith*, for *Bescoby & Williamson*, East Retford.

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## Court of Appeal.

From K. B. Div. (Earl of Halsbury, L.C., Lord Alverstone, L.C.J., and Sir F. Jeune, P.) And K. B. D. (Wright, J.) — Nov. 25, 1901; Jan. 16, 1902; Feb. 4.

SIMPSON *v.* TEIGNMOUTH AND SHALDON BRIDGE CO. (*a.*)

*Tolls—Bicycle—Carriage hung on springs—5 Geo. 4, c. cxiv. s. 78.*

*By a private Act of Parliament passed in the reign of George IV. the defendants were empowered to levy tolls* (inter alia) *for every coach, chariot, hearse, chaise, berlin, landau and phaeton, gig, whiskey car, chair, or coburg, and for every other carriage hung on springs, the sum of sixpence for each wheel, and for each horse or other beast of draught drawing the same the sum of twopence.*

*Held, by* Wright, J., *that a bicycle which had a saddle hung on springs was a carriage hung on springs within the meaning of the section, but that the section only referred to carriages drawn by horses or other beasts of draught, and that therefore a bicycle ridden over the bridge was not chargeable within the section.*

*Held, by the* Court of Appeal *that a bicycle did not come within the class of carriage in respect of which the Act gave power to levy a toll.*

Cannan *v.* Earl of Abingdon, 48 *W. R.* 470, [1900] 2 *Q. B.* 66, *commented on.*

Trial before Wright, J., without a jury.

The special case, stated by consent and by order of Master Archibald, set out the following facts:

1. In pursuance of an Act passed in the 5th year of the reign of George IV. entitled "An Act for building a bridge over the River Teign at Teignmouth, in the county of Devon, and for making approaches to the same," the defendants erected the bridge now known as the Teignmouth and Shaldon Bridge and constructed an approach thereto at each end of the bridge.

2. By section 78 of the said Act it is enacted among other things: "That the said company shall and may . . . cause to be erected and set up a turnpike gate or gates or toll gate or gates upon the said bridge, and the . . . tolls following shall be demanded . . . before any foot passenger, or any horse, mule, ass, or other beast, or any coach, wagon, cart, or other carriage shall pass or return over the said bridge or through the same—that is to say, for every person on foot, with a wheelbarrow or such-like carriage, the sum of 1d. . . . For every coach, chariot, hearse, chair, or coburg, and for every other carriage hung on springs, the sum of 6d. for each wheel, and for each horse or other beast of draught drawing the same the sum of 2d. For every wagon, timber carriage, wain, dray, truck, cart, or other such-like carriage with or without springs the sum of 6d., and for each horse or beast of draught drawing the same the sum of 2d."

3. The plaintiff is a member of the Cyclist Touring Club, and the defendants are the owners of the bridge, and entitled to take the tolls.

4. On the 17th of December, 1900, the plaintiff was desirous of passing over the bridge, riding a bicycle, and tendered to the defendants' servant, the keeper of the toll-gate, the sum of 1d. The keeper refused to allow the plaintiff to pass over the bridge without payment of 2d. as a toll, and the plaintiff paid such a sum to the keeper, the extra sum of 1d. being paid under duress and under protest, in order to obtain passage over the said bridge.

5. The plaintiff contends that the said Act did not authorize the defendants to charge him with a greater toll than 1d. when riding on a bicycle across the bridge.

6. The question for the opinion of the court is, what toll are the defendants entitled to charge the plaintiff with when passing over the bridge riding on a bicycle?

*Macmorran, K.C.* (*Chester Jones* with him), for the plaintiff.

*Foote, K.C.* (*A. B. Shaw* with him), for the defendants.

WRIGHT, J.—I do not think that the case of *Plymouth, Stonehouse, and Devonport Tramways Co.* v. *General Tolls Co.*, 75 L. T. Rep. 467, 45 W. R. Dig. 161, helps me very much in this case. The courts there held that a tramcar drawn by horses was a coach drawn by horses. That was not a very subtle adaptation of the language used in the days when the old Act was passed to the present circumstances. Nor do I think that *Cannan* v. *Earl of Abingdon*, 48 W. R. 470, [1900] 2 Q. B. 66, helps me very much, for there the words cover "all other carriages whatsoever." The case of *Williams* v. *Ellis*, 28 W. R. 416, 5 Q. B. D. 175, is perhaps most in point, though perhaps not easy to reconcile with *Cannan* v. *Earl of Abingdon*. But after all it is necessary to consider the language of the particular Act to see whether, consistently with common sense and without violation of grammar, a bicycle can be said to be within the language of the Act, construed in its general sense. The Act, a local Act of 5 Geo. 4, no doubt uses in some of its sections very general words, and if I were not limited by the particular section which imposes tolls there would be a great deal to be said for the argument that no limitation was to be put on the word carriage, and that everything which for any ordinary purpose could be treated as a carriage, would be within the Act. But the language of the section which imposes the toll is different. It enacts "for every person on foot and if with a wheelbarrow or such-like carriage the sum of 1d."; that seems to be admitted to mean on foot whether with or without a wheelbarrow or such-like carriage. Then after dealing with animals not drawing, it goes on to say: [His lordship here read the passage, and proceeded:] That last part does not apply at all; and I must bring the bicycle, if at all, within the words, "For every other carriage hung on springs the sum of 6d. for each wheel." If I have to determine the case on the consideration of whether a bicycle comes within the words "carriage hung on springs" I must have further facts as to whether this particular bicycle or bicycles generally could be properly described as

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

"carriages hung on springs." I think I must decide the case without reference to that for the present, leaving it open in case it should become necessary to be argued in the future.

It seems to me that I cannot, without doing violence to the meaning of the section, consider that the paragraph which is in question here is concerned with any other carriage except those that are drawn by horses or other beasts of draught. There must be some limits to the adaptation of the language of the old Acts of Parliament to modern circumstances. It is impossible that they can be stretched so as to meet everything that can be invented in modern days. The remedy is amending legislation. It seems plain to me that when read in any ordinary reasonable sense the last two paragraphs of this section deal solely with carriages or vehicles drawn by horses or other beast of draught. I do not think I can construe it otherwise, without doing violence to the ordinary rules of construction, and that is the conclusion to which I come. I am not asked to say whether a bicyclist riding his bicycle is a person on foot. That does not arise in this case. Nor does it arise whether he is a person on foot with a wheelbarrow or such-like carriage. There would be a good deal to say on both sides on either of these questions, and I had better say nothing to prejudice the judgment of those who have to decide them. At present it is enough for me to say that the 2d. toll is not justified.

His lordship on the 16th of January, 1902, heard further evidence as to whether the bicycle in question was a carriage hung on springs, and came to the conclusion that it was, but that as it was not intended for animal draught it was not within the section.

The defendants appealed, and the plaintiff also appealed against the latter part of his lordship's decision.

*Duke, K.C.*, and *A. B. Shaw*, for the appellants.—The point is, is a bicycle fairly within the meaning of the Act? The object of the Act was to give to the company which constructed the bridge a tax on everything that could fairly be called a carriage. *Cannan* v. *Earl of Abingdon* decides that a bicycle is a carriage hung on springs. *Williams* v. *Ellis* was wrongly decided. There is a real likeness in a bicycle to a carriage with regard to its formation.

They also cited *Taylor* v. *Goodwin*, 27 W. R. 489, 4 Q. B. D. 228, and *Plymouth, Stonehouse, and Devonport Tramways Co.* v. *General Tolls Co.*

*Chester Jones* (*Macmorran, K.C.*, with him), for the respondent.—A bicycle was expressly declared to be a carriage for the purposes of the Local Government Act, 1888, by section 85 of that Act. A bicycle does not carry a man; he propels it himself. [He was stopped by the court.]

Earl of HALSBURY, L.C.—I do not see my way to differ from my learned brother Wright on this question. It appears to me that we have the decision of Lush and Bowen, L.JJ., in *Williams* v. *Ellis* on words which, for this purpose, I cannot distinguish from the words with which we have to deal, and certainly I feel great difficulty in saying that I entertain any different view from that which they have expressed. The truth is, that when you are dealing with a question of this sort and endeavouring to find out whether a thing is taxable or not under these Acts, or under this particular Act perhaps I ought to say, the first thing to do is to find out whether there is anything which corresponds in the ordinary and natural course of meaning to the language which the Legislature at the particular time used in making the things mentioned the subject of taxation. I do not think it is a question merely of words, whether the thing was called a coach or not if it was intended to fulfil the functions of a carriage according to the description given in the original Act. I quite agree that the mere fact that it was called by a different name would not matter, because the language would have been used by the Legislature in the sense which everybody could understand, and which would comprehend the thing although it might be called by another name. I think this is the meaning of the general words with which the section concludes, and that although there was a known certain form of coach or carriage which was in vogue at that time, yet in effect the Legislature says, "Well, if there are other things of this sort which are made hereafter, or which we have forgotten to enumerate, they will be equally liable to the tax." But in my view the whole substance of the thing is entirely reversed if in order to render the thing taxable you have to analyze the things done by a carriage and take some one or more of them and say, "this is applicable to this new thing." If that had been so, I do not believe the nature of the taxation would have been the same, and I think it is not immaterial to observe what the taxation was. Whether it is in the form of a rate or whether it is in the form of an imperial tax it is equally taking from the subject some money in "respect of something or another which he does or has the use of," and here the taxation would be for every wheel of the bicycle 6d. I omit the question of it being drawn by horses, because it comes within a different category. It is true that this has been modified by the company. I suppose it would be too monstrous to be thought that a bicycle should be charged a shilling because it has two wheels. I think it is not without importance in considering what was the nature of the thing in the contemplation of the Legislature at the time the Act was passed to observe that the tax of 6d. per wheel is placed upon it. I am quite contented with my brother Wright's judgment, confirmed, as I think it is, by the judgment in *Williams* v. *Ellis* of Lush, L.J., and Bowen, J., as he was at that time; and it is satisfactory to find that the learned judge (Lush, J.) who decided in *Taylor* v. *Goodwin* that a person riding a bicycle furiously might might be convicted of furiously driving a carriage, is the same judge who decided (in *Williams* v. *Ellis*) that a bicycle was not within the particular Act of Parliament under which an application was made to tax it; because it marks the distinction which the learned judge seems to have taken between a taxing Act, and something which is contemplated as being for the protection of the public, and to which therefore the widest possible scope must be given to anything which could by any possibility come within the mischief of the Act of Parliament. Nobody can doubt that a bicycle, whether it was a motor-car bicycle or only propelled by human agency, might be a dangerous thing if driven at an undue speed through a public highway. I confess I am not satisfied with the judgment of Phillimore, J. (in *Cannan* v. *Earl of Abingdon*), because to my mind I think it proceeded upon a wrong principle of construction. I do not think you can analyze scientifically the different functions and objects of each part of the machinery of what is alleged to be a carriage and say, "On, this carries somebody, and this does not carry somebody, and this is propelled by machinery and the other by human agency, and in this case the man's feet reach the ground, and in another case the man's feet are off the ground." I think that that is not only inapplicable to the matter in hand, but I think it proceeds upon a wrong principle of construction.

The broad principle, shortly, must be this: What would in any ordinary sense be considered a carriage,

not by the particular name, but what would be the thing which would be in the contemplation of the Legislature at the time the Act was passed? If the thing so sought to be brought within it would substantially correspond to that thing—called by whatever name you please—I can imagine the tax would apply; but if not, it is not for the court to make an effort by ingenious subtleties to bring within the grasp of the tax something which was not intended—by that I do not mean intended by the word only, but not intended in substance to be the subject of taxation.

Under these circumstances, as I say, I do not at all feel that I can differ from my brother Wright in the conclusion at which he has arrived, and I think, therefore, his judgment ought to be affirmed.

Lord ALVERSTONE, L.C.J.—I think it is better I should give my own reasons for concurring, as I do, with the judgment of the Lord Chancellor, because I do not want anything that I say to be cited in any case in which the terms of the Act of Parliament are not the same. I confess if we were in a position to deal with this question by some general description or definition of the word "carriage," while I do not wish to adopt entirely the view taken by my brother Phillimore, I should have great difficulty in saying that a bicycle may not in many Acts of Parliament be a carriage; but it seems to me that Wright, J., has really considered the question from the right point of view in regard to this Act, which is a charging Act. Now the charging section is with regard to any coach, wagon, cart, or other carriage that shall pass or return over the said bridge they have to pay certain tolls. Then come the classifications; the first one is—"For every person on foot, and if with a wheelbarrow or such-like carriage the sum of one penny." Therefore, as has been truly said by Mr. Duke in arguing this case for the purpose of this Act, a wheelbarrow is treated as a carriage. Then there comes the two charging sections at the end: "For every coach, chariot, hearse, chaise, berlin, landau and phaeton, gig, whisky car, chair, or coburg, and for every other carriage hung on springs, the sum of 6d. for each wheel, and for each horse or other beast of draught drawing the same the sum of 2d." Then: "For every wagon, timber carriage, wain, dray, truck, cart, or other such-like carriage with or without springs the sum of 6d. per wheel." Now, when you come to contrast those two it seems to me impossible to say that a bicycle is more *ejusdem generis*, if I may use that expression, with the last two clauses than it is with the first clause. I think that, as the Lord Chancellor said, looking to the maximum toll on every wheel and the names of the carriages which are there described, and the fact that they are coupled with an extra charge for the beast of burden, other carriages *ejusdem generis* must be something which were thought at the time this Act was passed would come within that class; in the same way "wheelbarrow or such-like carriage" would have to consist of what would come within that class at the time the Act was passed, and therefore under this Act of Parliament. That is all I wish to decide myself. I think a bicycle does not come within that class of carriage in respect of which the company was empowered to make a separate toll for it as a carriage.

Now there are one or two other matters I ought to mention, I think, in order to avoid misunderstanding afterwards. I have already said, I think, for the purpose of many Acts, that a bicycle may be a carriage, and I also think myself, though we have not heard it argued by the other side at present, that a bicycle described like this may be a carriage which is hung on springs, the word "hung" meaning "supported by." One knows the history of the word, and it does not mean hung in the ordinary sense of the word.

With regard to the two cases that have been cited, of course the decision of Lush, L.J., in *Williams* v. *Ellis* really turns entirely upon the same view of *ejusdem generis*, because, although the words were "every other carriage of whatever description," Lush, L.J., considered that as referring to a description of the carriage which had been mentioned in the earlier section, and that it must be "such other carriage of the like description with the carriage previously specified." Now as to the case of *Cannan* v. *Earl of Abingdon* before Phillimore, J., while I have already said that I do not want to be thought as accepting or entirely differing from his definition, the words there were very different indeed. The words were, "for every coach, chariot, berlin, hearse, chaise, chair, cabash, wagon, wain, dray, cart, car, or other carriage whatsoever," and I am by no means sure that if that had been the only charging section in this Act I should not have come to the same conclusion. I think, however, the judgment of Wright, J., is correct, because when you contrast the two charging sections and endeavour to apply the language cited in those two charging sections to the particular article proposed to be taxed here, I am by no means satisfied it comes within the charging section under which the charge was made. I think, therefore, the appeal should be dismissed.

Sir F. JEUNE, P.—I agree with the decisions which have just been given, and I only wish to add that it seems to me that Wright, J., was substantially right on the main ground on which he proceeded. There are three categories in this Act, and I quite agree that what we have to look at is the actual language in this Act. The first category is: "For every person on foot and if with a wheelbarrow or such-like carriage the sum of one penny." Then there are the other two, the first of which applies to a coach, carriage, chariot, hearse, and so on hung on springs, and the second obviously applies to carriages or carts used for the purpose of conveying heavy material which may be moved with or without springs. Now, within which of these three categories does a bicycle most fairly come? I do not feel disposed to hold it comes within any; but if it does come within any, I confess it appears to me to come more within the words "a wheelbarrow or such-like carriage" than it does within any other, for this reason, that the other categories apply only to carriages drawn by horses or other animals.

I agree with the view of Wright, J. The fact that horses are mentioned directly afterwards shews that the class of carriage which the Legislature had in its mind is that of a carriage which in its ordinary way would be drawn by a horse or other beast of burden. It is impossible to get away from that, and that is the view, as I understand it, on which Wright, J., proceeded. As regards the description of a carriage hung on springs I do not wish to express any difference of opinion from the Lord Chief Justice on that point, but I must confess I have very great difficulty in following, although it is a finding of fact, the statement which makes a bicycle, which has a seat supported on a spring, a carriage hung on springs. It appears to me to be a very forced mode of description, and one which would not be resorted to except for the apparent necessity of endeavouring to get a vehicle of this sort—of this somewhat peculiar description—within this particular section. I think that is all that is necessary for me to say, except that I think the judgment of Wright, J., is right, and that the appeal ought to be dismissed.

*Appeal dismissed.*

Solicitor for the plaintiff, *S. J. Williams.*

Solicitors for the defendants, *Bush, Mellor, & Norris.*

[NOTE.—The question as to whether the bicycle was a carriage hung on springs was not argued in the Court of Appeal.]

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) March 19.

SMITH *v.* KYNNERSLEY AND OTHERS. (*a.*)

*Tolls—Bridge—"Sledge, drag, or such-like carriage"—Bicycle—*39 *Geo.* 3, *c. xxviii., s.* 11.

*By section* 11 *of* 39 *Geo.* 3, *c. xxviii. the owners of a bridge across the Severn were empowered to take the following, amongst other, tolls for passage over the bridge: "For every coach, chariot, landau, berlin, hearse, chaise, calash, chair, or other such-like carriage" a certain sum according to the number of horses drawing it; "for every sledge, drag, or such-like carriage, the sum of* 6*d."*

*Held, that a bicycle was not a "such-like carriage" to a sledge or drag, and was not therefore chargeable with a toll of* 6*d.*

Appeal from the judgment of Wright, J., upon a special case stated by consent for the opinion of the court.

Under 39 Geo. 3, c. xxviii., which was an Act passed in 1799 for building a bridge across the River Severn from or near Cressage, in the county of Salop, to the opposite shore, and for making roads and avenues thereto, and which recited that the passage over the Severn by a ford and ferry was often obstructed by floods, and was inconvenient and not suited to the accommodation of passengers from either side, the trustees named in the Act were empowered to erect a bridge known as the Cressage Bridge across the River Severn at a place where there had formerly been a ford and ferry, with approaches thereto; and the trustees accordingly constructed the bridge and the approaches.

By section 11 of the Act the bridge was vested in the trustees, and the trustees were empowered to take the following tolls for passage over the bridge: "For every coach, chariot, landau, berlin, hearse, chaise, calash, chair, or other such-like carriage drawn by six horses, mares, geldings, or mules, the sum of two shillings; and drawn by four horses, mares, geldings, or mules, the sum of one shilling and sixpence; and drawn by two horses, mares, geldings, or mules, the sum of one shilling; and drawn by one horse, mare, gelding, or mule, the sum of sixpence. For every horse, mare, gelding, mule, or ass, and for every pair or yoke of oxen or horned cattle, drawing or harnessed, or yoked, and intended to draw in any wagon, wain, cart, or other such like carriage, the sum of threepence. For every horse, mare, gelding, mule, or ass laden or unladen, and not drawing, the sum of one penny halfpenny. For every horse, mare, gelding, mule, or ass carrying double, the sum of twopence. For every drove of oxen, cows, or neat-cattle, the sum of tenpence per score; and so in proportion for any less number. For every drove of calves, hogs, sheep, or lambs, the sum of fivepence per score; and so in proportion for any less number. For every sledge, drag, or such-like carriage, the sum of sixpence. And for every foot passenger, one penny."

By section 29, when and as often as the bridge should receive such damage from unforeseen accidents that the passage thereof might become dangerous and impracticable, the trustees might provide a ferry across the river, and take the same tolls therefor as the Act authorized in the case of the bridge. By section 33 the bridge was not to be rated or assessed to any public or parochial rate or tax at any other or higher rate or value than the ferry stood rated for the year 1796, nor was the bridge to be deemed a county bridge, so as to subject the county to the repair or support thereof.

The plaintiff was a member of the Cyclists' Touring Club, and the defendants were the trustees of the bridge under the Act, and were entitled to demand and take the tolls. On the 7th of June, 1901, the plaintiff, desiring to pass over the bridge, riding on a bicycle, tendered to the keeper of the toll-gate one penny. The keeper refused to allow the plaintiff to pass over with his bicycle or riding on the same without payment of sixpence as a toll; and the plaintiff paid the sixpence, the extra sum of fivepence being paid under duress and under protest, in order that the plaintiff might obtain passage over the bridge with or riding on his bicycle.

The question for the opinion of the court was what toll the defendants were entitled to charge the plaintiff. If the court should be of opinion that the toll was 1d., judgment was to be entered for the plaintiff for the sum of 5d. with costs; if the court should be of opinion that the toll charged was correct, judgment was to be entered for the defendants with costs.

Wright, J., held that a bicycle did not come within the words "sledge, drag, or such-like carriage" in section 11 of the Act, and he gave judgment for the plaintiff.

The defendants appealed.

*Danckwerts, K.C.*, and *R. Cunningham Glen*, for the defendants.—A bicycle comes within the words of section 11 of 39 Geo. 3, c. xxviii., "sledge, drag, or such-like carriage," and is therefore liable to a toll of 6d. A sledge is a well-known form of carriage without wheels for carrying passengers or goods. "Drag" is defined in Johnson's Dictionary, 1755 edition, as "a kind of car drawn by the hand. The drag is made somewhat like a low car; it is used for the carriage of timber, and then is drawn by the handle by two or more men." A "such-like carriage" must be one having something in common with "sledge and drag." It must be a carriage, with or without wheels, intended to carry passengers or goods. A bicycle fulfils that condition. Secondly, the bridge is vested in the trustees and is not a public highway. No one therefore has a right to cross the bridge except the right given by implication in section 11 upon payment of a toll. The fact that section 33 of the Act made the bridge rateable shows that the trustees have an occupation of the bridge, because the mere right to take tolls without any occupation is not rateable: *Rex* v. *Eyre*, 12 East 416. Unless, therefore, a bicycle comes within section 11, a person was not entitled to bring it across the bridge. That is a strong argument to show that a bicycle must come within section 11.

They referred to *Plymouth, Stonehouse, and Devonport Tramways Co.* v. *General Tolls Co.*, 14 Times L. R. 531; *Taylor* v. *Goodwin*, 27 W. R. 489, 4 Q. B D. 228; *Williams* v. *Ellis*, 28 W. R. 416 5 Q. B. D. 175; *Cunnan* v. *Earl of Abingdon* 48 W. R. 470 [1900] 2 Q. B. 66; *Simpson* v. *Teignmouth and Shaldon Bridge Co., ante*, p. 545, [1903] 1 K. B. 405.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Macmorran, K.C.*, and *Chester Jones*, for the plaintiff.—The words "sledge, drag, or such-like carriage" describe carriages without wheels. A sledge is clearly a carriage without wheels. A drag is defined in Murray's Dictionary as an "overland conveyance without wheels; a rough kind of sledge." It is a vehicle used for drawing timber. A sledge and drag are both drawn by power. A "such-like carriage" is therefore a carriage without wheels. A bicycle therefore does not come within that description.

*Danckwerts, K.C.*, replied.

VAUGHAN WILLIAMS, L.J.—I do not think that we ought to differ from the decision of my brother Wright. The only question we have to decide is whether a bicycle comes within the class or category specified in section 11 of 39 Geo. 3, c. xxviii., "sledge, drag, or such like carriage." I am not quite sure whether the canon of construction laid down by the Lord Chancellor in *Plymouth, &c., Tramways Co.* v. *General Tolls Co.* is quite identical with that laid down by him in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* I think, however, that I am bound to assume that there is nothing inconsistent between the two canons of construction. Mr. Danckwerts has called our attention to the fact that the Act that was under consideration in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* had not the same sort of provisions that the Lord Chancellor was dealing with in *Plymouth, &c., Tramways Co.* v. *General Tolls Co.* The latter case seems to me to be more like the present than *Simpson's case*. At the same time, I do not think that the distinction is such as to require us to apply any different rule from that laid down in *Simpson's case*; and I therefore propose to apply the rule of construction laid down by the Lord Chancellor in that case, where he said: "The broad principle of construction put shortly must be thus: What would, in an ordinary sense, be considered to be a carriage (by whatever specific name it might be called) in the contemplation of the Legislature at the time the Act was passed?" In that passage the Lord Chancellor used the words "carriage in the contemplation of the Legislature." In the present case we have to speak of a "sledge or drag in the contemplation of the Legislature." I do not think that we should leave out of consideration the fact that the schedule of tolls in section 11 was drawn in the form of dividing the vehicles therein mentioned into various categories. Upon looking at the schedule one finds that the carriages mentioned in the first clause and the last clause but one are different. I look to see what are the particular characteristics of the carriages mentioned in the first clause. It is obvious to my mind that the characteristics of the carriages there mentioned are that they are drawn by horses or other animals. When I look at the last clause but one I ask myself what are the characteristics of the carriages there described. It is common to both the earlier and the later categories that the carriages should be drawn. I am not quite clear that the Act intended to draw a distinction in the two categories between carriages with wheels and carriages without wheels. But whichever category one takes it is clear that the carriages intended to be described are carriages to be drawn. Upon that view I do not think that a bicycle comes within the words "sledge, drag, or such-like carriage."

STIRLING, L.J.—I am of the same opinion. The question is whether an ordinary bicycle is chargeable with a toll of 6d. under the words "sledge, drag, or such-like carriage." It is clearly not a sledge or drag. To be chargeable with the toll the carriage must be a "such-like carriage"—that is to say, a carriage *ejusdem generis* with sledge or drag. Is an ordinary bicycle a thing of the same nature as a sledge or drag? In deciding that question we have to apply the principle laid down by the Lord Chancellor in *Simpson* v. *Teignmouth and Shaldon Bridge Co.*—namely, to ascertain "what would, in an ordinary sense, be considered to be a carriage in the contemplation of the Legislature at the time the Act was passed." I ask myself whether a bicycle is of such a character as in an ordinary sense is like a sledge or drag, and the only answer I can give is no.

MATHEW, L.J.—I am of the same opinion. We cannot discard the ordinary rules of construction in construing this section. The clause in the section on which the defendants rely is "sledge, drag, or such-like carriage." To my mind those words were never intended to and do not properly include a bicycle. A bicycle is not *ejusdem generis* with sledge or drag.

*Appeal dismissed*

Solicitor for the plaintiff, *Leslie J. Williams.*

Solicitors for the defendants, *Gustavus Thompson & Son.*

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From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — March 3.

*In re* MAUNDER. (*a.*)
MAUNDER *v.* MAUNDER.

*Will—Construction—Gift over—Death "before becoming entitled"—Entitled "in right" or "in possession"—Vesting.*

*A testatrix gave real estate to her son R. for his life, and after his death specifically among her grandchildren, R.'s sons and daughters, but in the event of any of her grandchildren dying "before becoming entitled" then over.*

*Held, upon the construction of the will, that the words "becoming entitled" meant "entitled in possession."*

*Decision of* Joyce, J. (*ante*, p. 31, [1902] 2 *Ch.* 875), *affirmed.*

This was an appeal from a decision of Joyce, J. (reported in *ante*, p. 31, [1902] 2 Ch. 875).

Mary Maunder, by her will dated in 1889, gave her real and personal estate to trustees upon trust for her son R. for his life, and on his decease she made specific devises of parts of her real estate among her eight grandchildren, the sons and daughters of R. absolutely. The will continued as follows: "If there shall be any residue of my trust estate not disposed of, I direct my said trustees to pay the income thereof to my said son's wife for her life, and after her death to realize such residue and divide the net proceeds amongst all the children of my said son. And in the event of either of my grandchildren dying before becoming entitled to any share of my estate hereinbefore in any way disposed of, I direct that the child or children of such deceased grandchild shall take the parent's share, or, if there shall be no such child or children, then that such share or devise or bequest hereinbefore contained shall vest equally in all my surviving grandchildren."

The testatrix died in 1891, leaving her son R. and seven of her said eight grandchildren her surviving; another grandchild who survived the testatrix, and was also a son of R., had been (in effect), by a codicil made in 1890, substituted as a beneficiary in the

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

place of the grandchild who had died, and there were thus eight surviving grandchildren claiming under the dispositions of the testatrix.

Upon a summons taken out by R., the plaintiff and sole acting executor, to determine the construction of the above clause, Joyce, J., held that dying "before becoming entitled" meant dying before becoming "entitled in possession," and that the gift over might therefore take effect at any time prior to the death of the tenant for life.

One of the grandchildren appealed.

*Warrington, K.C.*, and *George Cave*, for the appellant, referred to the cases cited in the court below.

*P. F. Wheeler, Manby, Gatey*, and *W. H. Cozens-Hardy*, for the various respondents, were not called upon.

COLLINS, M.R.—Upon the construction of this will, I think it clear that the decision of Joyce, J., was right. The clause by which the testatrix directs that after the death of her son's wife the residue is to be divided "amongst all the children of my said son" includes grandchildren who may be born after the death of the testatrix, and this shows that the words "dying before becoming entitled" cannot mean only dying before the testatrix, but must mean dying during the life of the tenant for life. The appeal must be dismissed.

ROMER and COZENS-HARDY, L.JJ., concurred.

Solicitors, *Oldfield, Bartram, & Oldfield; Leslie Antill & Arnold; Marshall & Co.; Young & Sons.*

## High Court of Justice.

Chan. Div. } Byrne, J. } May 7, 8.

GUARDIANS OF THE POOR OF THE BOOTLE UNION *v.* GUARDIANS OF THE POOR OF THE WHITEHAVEN UNION AND OTHERS. (*a.*)

*Local government—Portion of one parish added to another—Order of county council confirmed by Local Government Board—Poor law union of added portion—Local Government Act*, 1888 (51 & 52 *Vict. c* 41), *s.* 57.

*A portion of a parish in one poor law union being added to another parish in another poor law union by an order of the county council, confirmed by the Local Government Board under section* 57 *of the Local Government Act*, 1888, *it follows as a legal consequence that the portion added to the parish becomes included within the poor law union of the parish to which it is added.*

The question in this case was whether a portion of another parish which had been added to the parish of Seascale belonged to the poor law union to which Seascale belonged or still remained in its former union.

The old parish of Seascale, in the county of Cumberland, adjoined that of Drigg and Carleton in the same county. The former parish was wholly situate within the poor law union of Whitehaven, and the latter parish within the union of Bootle. Seascale was also within the rural sanitary district of Whitehaven, and Drigg and Carleton within that of Bootle.

It was desired to alter the boundaries of the parish of Seascale, and application was accordingly made to the county council of Cumberland, which made an order to that effect in 1901, which order with certain modifications was confirmed by the Local Government Board by an order called "The County of Cumberland (Seascale, Drigg and Carleton) Confirmation Order, 1901," under section 57 of the Local Government Act, 1888.

By article 1 of this order (which article was not modified by the board) there was to be added to the parish of Seascale so much of the adjacent parish of Drigg and Carleton as was contained within certain boundaries described in the article, and marked on the map therein mentioned.

Article 2 (which was also not modified) provided that the whole of the parish of Seascale as so extended by that order should be included in and form part of the Bootle rural sanitary district, and that the then boundaries of the Bootle and Whitehaven rural districts should be altered accordingly.

Article 3 provided for the then members of the respective parish councils continuing in office till the next ordinary day of retirement and fixed the future numbers of councillors.

Article 4, as modified by the confirmation order, provided that the person holding the office of rural district councillor for the existing parish of Seascale should continue to hold such office for the enlarged parish upon the Bootle Rural District Council instead of upon the Whitehaven Rural District Council.

There was no provision in the confirmation order expressly dealing with the poor law union of the enlarged parish or of its added portion.

Under these circumstances the guardians of the poor of the Whitehaven Union issued precepts to the overseers of the parish of Seascale requiring them to contribute to the common fund of the Whitehaven Union certain sums calculated as the contribution from the parish as extended by the order—that is, upon the footing that the added portion formed part of the Whitehaven Union, and the overseers of Seascale accordingly made rates, which they proposed to levy, to answer those precepts in which all the rateable hereditaments within the added portion of the parish were assessed.

The guardians of the poor of the Bootle Union thereupon brought this action against the guardians of the poor of the Whitehaven Union and the overseers of the parish of Seascale, claiming a declaration that the added portion of the parish of Seascale was situate within and formed part of the Bootle poor law union, and an injunction to restrain the defendant union from causing the rates to be levied, and the defendant overseers from levying them, upon the occupiers within the added portion of the parish.

*Levett, K.C.*, and *R. C. Glen*, for the plaintiffs.—The order does not purport to make any change in the union of the added portion of the parish. If it did so purport it would be inoperative, as the county council has no such power, nor has the Local Government Board in the circumstances of the case. The case of *Reg.* v. *Keighley*, Local Government Chronicle, 1897, p. 47, shows that a portion may be added to a parish without the burial district of the added portion being changed to that of the parish to which it has been added. The same principle applies to the area of a poor law union.

*Macmorran, K.C.*, and *Naldrett*, for the defendant guardians.—The added portion comes within the same union as the parish to which it has been added as a legal consequence of the addition, because it has become part of the parish to which it is added. The identity of that parish is not destroyed (*West Ham Union* v. *London County Council*. 50 W. R. 275, [1902] 1 K. B. 562), and the enlarged parish remains in the same union as the old parish: *Reg.* v. *Durham County*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

*Council*, reported in Local Government Chronicle, 1897, p. 70. A parish cannot be in two unions at once: Poor Law Amendment Act, 1831, ss. 26, 32.

BYRNE, J.—The order in this case was made under section 57 of the Local Government Act, 1888. It is pointed out that there is no power under the Act for a county council to make an order altering the area of a poor law union as such, though there is power given by section 58 for the Local Government Board to make certain orders with reference to poor law unions where the union is situate in more than one county, and there are other Acts of Parliament expressly enabling the board under certain circumstances to deal with these areas. Now what is the consequence with reference to the area of the poor law union of the addition of this portion of the parish of Drigg and Carleton to that of Seascale? A poor law union consists, and as far as I know always has consisted, of parishes, and in the Acts of Parliament to which I have been referred these unions were made with reference to parishes. I have not been told whether some modern Acts may not have modified this in special cases, but generally speaking the statement is true. Does that mean that a poor law union must consist of parishes not only of the same area, but also of the identical areas of which it consisted at the time of its creation, unless expressly altered by some authority having power to alter its area? In *West Ham Union* v *The County Council of London*, where by an order of the Local Government Board a portion of a parish had been added to another parish in which a pauper had acquired a settlement, and where the question was raised whether the order had destroyed the identity of the parish which had been added to, the present Master of the Rolls said, "This case seems to me to fall outside the line of cases cited as authorities for the appellants' contention, which do not prevent us from saying that a mere accretion of a small portion of the parish of Wanstead to the parish of West Ham, where such accretion does not purport to destroy the identity of West Ham, does not in fact have that effect." And Romer, L.J., said, "The parish of West Ham has not been destroyed, but still exists as a parish notwithstanding that some portion of another parish has been added to it." And Mathew, L.J., takes a similar view. So that you may have a parish added to by virtue of an order, yet remaining the same parish with the same name. I think that that is the case here. The poor law union of Whitehaven still includes the parish of Seascale. That parish is of different dimensions from those of which it formerly consisted, but the identity of the parish has not been destroyed, and I do not see my way to hold that a portion only of the parish of Seascale is included within the area of the union of Whitehaven. But it is said that, there being no express power to change the area of the union, the county council and Local Government Board could not by this procedure do anything which would have that effect. The answer is that although the actual acreage of the union is enlarged, the area reckoned by parishes is not increased. Why, then, should not the legal consequences of the addition of a portion to the parish follow? It is true that there is no express power given by the Act to alter the area of the poor law union, but there are no words in the Act to negative the legal consequences arising from the addition made under statutory authority. Certain anomalies result from the position created, but I understand that Local Government Board can deal with matters of that description, and, I suppose, an application can at any time be made to invoke those powers should these anomalies prove burdensome. I ought not to part with this case without referring to to the case of *Reg.* v. *Keighley*, where the learned judge came to the conclusion that no direction to alter a burial district had been given by an order altering the parish boundaries. That case does not apply here, because here the county council could not have ordered the poor law area to be altered.

*Action dismissed.*

Solicitors, *Leonard H. West*, for *John Clark*, Broughton-in-Furness; *Speechley, Mumford, & Craig*, for *Atkinson & Bennett*, Whitehaven.

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Chan. Div. } March 18, 19.
Farwell, J. }

ROBINSON v. GIFFARD AND OTHERS. (*a*.)

*Estate tail—Grant by Crown for services rendered—Consideration—Reversion in Crown—Power to disentail—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 18—34 & 35 *Hen.* 8, *c.* 20, *s.* 2.

*An estate tail granted by the Crown to a subject "for divers good causes and considerations" (with reversion to the Crown in case of lack of heirs who can take under the grant) comes within the exceptions mentioned in section* 18 *of the Fines and Recoveries Act*, 1833, *and* 34 & 35 *Hen.* 8, *c.* 20, *and is therefore not barrable.*

Special case.

By a grant by a writ of Privy Seal, dated the 24th of July, 1675, King Charles II. "for divers good causes and considerations us hereunto especially moving and of our especial grace, certain knowledge and mere motion" gave and granted certain fee farm rents issuing out of lands in certain counties to trustees upon trust, as to £100 per annum, part thereof, for the use of Mary, relict of Richard Pendrell, for life, and after her death for the use of the heirs of the body of Richard Pendrell, and for want of such heirs for the use of his Majesty. It was not stated in the grant for what consideration it was made, but it was alleged that Richard Pendrell had assisted King Charles II. in his escape from the battle of Worcester in 1651.

By a decree made on the 10th of December, 1846, in *Giffard* v. *Withington* (unreported) it was declared that the annuities specified in the deed of grant were of the nature of real estate and well entailed by the deed.

On the 5th of November, 1856, Robert McLaren, one of the heirs of the body of Richard Pendrell, purported to execute a disentailing assurance of a third part of the annuity in favour of George Robinson, and similar deeds were executed by James Withington on the 7th of November, 1857, and by McLaren and Withington on the 18th of March, 1859, by which the remaining two-thirds were granted to George Robinson.

Robinson died in 1880, having devised all his real and personal estate to the plaintiff, Walter Robinson, who was in receipt of the annuity till 1900, when payment was stopped by the defendant, Walter Giffard, who was the trustee of the deed of grant of 1675.

Robert McLaren was still living, and his grandson, Robert McLaren, was added as defendant to represent the heirs of the body of Richard Pendrell other than the elder McLaren.

The questions submitted for the opinion of the court were:

(1) Whether the several indentures of the 5th of November, 1856, the 7th of November, 1857, and the

(*a*.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

18th of March, 1859, were effectual for the purpose of barring and defeating all and every or any of the estates in tail either at law or in equity of Robert McLaren and James Withington of and in the annuity of £100, and the estates in tail in remainder expectant on the determination of such estates.

(2) Whether Walter Robinson was entitled under or by virtue of the said indentures to payment of the annuity during the joint lives of Robert McLaren and James Withington, and to payment of a moiety or any and what other portion thereof during the life of either of them.

*Upjohn, K.C.*, and *Martelli*, for plaintiff.

*Underhill*, for Giffard.

*H. M. Humphry*, for the other defendants.—Though the services rendered were not stated in the grant, there was ample record in existence in the state papers of the reign of Charles II. and on the tomb of Richard Pendrell, as to what those services were. The services would be presumed by the court. In the case of *Duke of Grafton* v. *The London and Birmingham Railway Co.*, 5 Bing. N. C. 27, the estate tail was granted by the king in consideration of natural love and affection, not for services rendered to the Crown, as in this case.

FARWELL, J., said that the first point raised, whether the estate was an estate tail, was concluded by the decree of the Vice-Chancellor in the case of *Giffard* v. *Withington*, so that it must be deemed that there was an estate tail created by the grant. The second point raised, whether that estate tail could be barred or not, depended on section 18 of the Fines and Recoveries Act, 1833, which ran as follows: "The power of disposition hereinbefore contained shall not extend to tenants of estates tail, who, by an Act passed in 34 & 35 Hen. 8, intituled 'an Act to embar feigned recovery of land wherein the king is in reversion,' or by any other Act are restrained from barring their estates tail." He was therefore thrown back to 34 & 35 Hen. 8, c. 20. Two points were taken on this. It was said that, taking the Act of Parliament and the reading in Co. Litt. 372, *b* 6, together, Charles II., at the time he received the services of the Pendrells after the battle of Worcester was not king *de facto*, and that they were not therefore subjects within the meaning of the Act, because he was a fugitive, and the power of the Crown was really in the hands of the Protector. In his opinion that was not the true view. Subsequent legislation when Charles II. was restored proceeded to wipe out the legislation of the Commonwealth, and declared what was still believed the law, that the assent of the king was necessary to an Act of Parliament, and accorded with a statement in 3 Inst., at pp. 6, 7, that "there must always be a king by law." In his opinion, therefore, Charles was, for the purposes of the Act under discussion, a king to whom services might be rendered within the meaning of the Act. A reference had been made to the Statute of Treasons and to the distinction between a king *de facto* and *de jure*. But this particular case was not of that class of cases, and depended on other matters. It really became necessary during the Wars of the Roses and the various civil wars which took place in earlier times that there should be some security for people who wanted to live quietly, and that they should not be deemed traitors in one year and loyal in the next. Consequently provision was made to enable allegiance to be rendered to a king *de facto*, who was not king *de jure* then, but might become so afterwards. It could not be said, therefore, that the terms of the Act of Henry VIII. had not been complied with. There was this, of course, to be considered, that, unless the king *de jure* did in due course become king *de facto*, he never could have made a grant which would have had any effect on the revenues of the Crown. But inasmuch as he did become king *de facto*, then having regard to the legislation which he had referred to, he was king *de jure* from the death of Charles I., and therefore services might be rendered to him by subjects within the meaning of the Act.

The other point was this: It was said that the wording of the grants produced from the Record Office showed that there was consideration for the earlier grants, but that the grant of 1675 was simply "for divers good causes and considerations." But the answer to that seemed to be that it must be inferred from the evidence that these "divers good causes and considerations" were the services referred to in the former grants. It was a matter of common knowledge and perhaps of judicial cognizance that when the king first returned there were certain difficulties in finance, and he could not grant rewards to his subjects then, but time had to elapse and they had to take what they could get. The true results of the documents before the court was that the grant of 1675 was a final grant to which the others were temporary, and up to which they led. The result was that the grant was within the exception in section 18 of the Fines and Recoveries Act, and within 34 & 35 Hen. 8, c. 20, and was therefore not barrable.

It was not arguable, however, that each individual had not the right during his life to dispose of his interest. The grant would be good during the lifetime of the grantor. As to one moiety the grantor was still alive, and the plaintiff was entitled to that moiety during the life of the grantor, but as regards the other grantor there was no evidence whether he was alive or dead, and there must be an inquiry.

Solicitors for plaintiff, *Francis & Johnson.*

Solicitors for Giffard, *Nussey & Fellowes.*

Solicitors for defendants, *Petch & Co.*

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Chan. Div.
Buckley, J. } Feb. 25, 26.

*In re* D'ESTE'S SETTLEMENT TRUSTS.
POULTER *v.* D'ESTE. (*a.*)

*Conflict of laws—Power of appointment—Execution—Domiciled foreigner—Will valid by law of domicil but invalid by English law—General bequest—Construction—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 27.

*Although a will executing a power takes effect as operating on the instrument containing the power, and must be read as if it was interpolated into that instrument, yet being a will, it must, in the absence of a contrary intention, be construed according to the law of the domicil of the testator. In such construction, if the domicil of the testator be foreign, section 27 of the Wills Act, which is a rule for the construction only of wills of which an English court is the court of construction, has no place, in the absence of any express direction that the will is to be construed according to English law.*

*A French subject domiciled in France, having a power of appointment over a fund under an English instrument, left all her property to her husband by a will which was valid according to French, but invalid according to English law. The will contained no express reference to the power, and no express direction that it was to be construed*

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

*according to English law. Administration with the will annexed was granted in England.*

*Held, that the power had not been exercised.*

In re Price, 48 *W. R.* 373, [1900] 1 *Ch.* 442, *distinguished.*

Adjourned summons.

By the marriage settlement, dated the 17th of August, 1874, of the Baroness D'Este, trustees were directed to stand possessed of certain British and colonial investments transferred to them by the Baroness in contemplation of her marriage, on trust for herself and her husband for their respective lives, and after the death of the survivor for the issue of the marriage as therein mentioned, and if there should be no such issue, as she should (if covert) by will appoint, and in default of appointment, in the event which happened, for her next-of-kin according to the statute as if she had died possessed thereof domiciled in England, intestate, and without having been married.

She married Baron D'Este in England on the 18th of August, 1874. He was at that time, and has ever since continued to be, a French subject, domiciled in France. At the date of the marriage she was a British subject, domiciled in England.

Baroness D'Este died, during a temporary visit to this country, on the 17th of February, 1902. There never was any issue of the marriage.

On the 12th of September, 1876, she had made an unattested holograph will in French form and in the French language. The relevant passage was translated as follows: "I appoint Baron D'Este my general and universal legatee. I consequently bequeath him all the personal and real property that shall belong to me at my decease and shall compose my estate. He shall enjoy and dispose of the same absolutely as from the day of my death."

On the 28th of August, 1902, administration with the will annexed was granted to the Baron by the Probate Division.

At the date of her death the only property of the Baroness, other than that over which she had the power of appointment, consisted of cash standing to her credit at her bankers in England, and certain property in France.

Baron D'Este claimed the capital of the property comprised in the settlement. The trustees accordingly took out the present summons asking whether the power had been validly exercised.

It appeared that the will had been, according to French law, validly executed. A power of appointment is foreign to the principles of French law, and, consequently, there are no rules of construction applicable to a French will, by virtue of which general expressions would be held to exercise a power. In general, therefore, if a French court had to determine the question whether certain words or phrases exercised a power conferred by an English instrument, it would apply English law. If, however, the will had to be construed according to French law, the words used would exclude property over which the testatrix had only a power of appointment.

*Ingpen, K.C.*, and *Ashworth James*, for the trustees.

*Astbury, K.C.*, and *F. A. Milne*, for Baron D'Este.—According to French law the will was well executed, and on that footing administration with the will annexed has been granted in England. The will, in addition to its testamentary effect, operates as an exercise of a power; to that extent it must be read as part of the settlement creating the power, and must be construed according to the law of the settlement, which is English: *D'Huart* v. *Harkness*, 13 W. R. 513, 34 Beav. 324. Section 27 of the Wills Act is now part of the law of England, and applies to all testamentary exercises of English powers: *In the Goods of Alexander*, 8 W. R. 451, 29 L. J. P. & M. 93. The same doctrine was laid down in *In re Price*, 48 W. R. 373, [1900] 1 Ch. 442, and the particular words in the will in that case were immaterial to the decision.

They also referred to *In the Goods of Joys*, 30 L. J. P. & M. 169, 9 W. R. Pro. Dig. 7; *In re Kingdon*, 34 W. R. 634, 32 Ch. D. 604; *Povey* v. *Hordern*, [1900] 1 Ch. 492, 48 W. R. Dig. 208; *Barretto* v. *Young*, [1900] 2 Ch. 339, 48 W. R. Dig. 143; *De Nicols* v. *Curlier*, 48 W. R. 269, [1900] A. C. 21; and *Bremer* v. *Freeman*, 5 W. R. 618, 10 Moo. P. C. 306.

*Buckmaster, K.C.*, and *Maugham*, for persons entitled in default of appointment.—The document must be construed according to the law of the domicil of the testator, which was French. By French law it did not exercise the power. The Wills Act is not applicable to the wills of foreigners: *Bremer* v. *Freeman*.

*T. T. Methold*, in the same interest.

*Astbury, K.C.*, replied.

BUCKLEY, J., stated the facts, and continued: At her death the general power of appointment existed. The question I have to decide is whether by her French will she has exercised that power.

In the first place, it is plain that where an English instrument contains a power exercisable by will, that power may be exercised either by a will executed in accordance with the law of this country or by any instrument recognized by the law of this country as being a will. A will executed by a domiciled foreigner according to the law of his domicil is in this country recognized as a valid will although it is not executed in accordance with the law of this country. Accordingly the will of this French lady is a valid will, and, as such, has been admitted to probate. The question, then, is whether that will has exercised the power. The will refers neither to the power nor to the property, and, unless this French will can have the benefit of section 27 of the Wills Act it cannot be contended that it exercised a power. The question, therefore, resolves itself into this, is section 27 available?

In the next place, it will be noticed that for the purpose of such a will as this you must exclude sections 9 and 10 of the Wills Act, otherwise the thing would be no will. According to section 9 the will must be attested by two witnesses. This will was not. According to section 10, to exercise the power of appointment it must be executed in the manner required for the execution of a will. It is not so executed; therefore if sections 9 and 10 apply, this is not a will at all. But it is said although sections 9 and 10 are excluded, as they are plainly by reason of the fact that our law recognizes a will not executed according to our law, but executed according to the law of the domicil of the testatrix, that to such a will section 27 is nevertheless applicable. It appears to me that that is not the case. Section 27, as I understand it, is a rule of construction. It is a section which requires that in reading a document you shall attribute to its language a meaning which, but for that section, it would not bear. It is a rule of construction applicable to documents as to which this court is a court of construction. What would be the court of construction to determine the effect of this French will? In my opinion, this being a foreign instrument executed by a foreigner in her domicil, *primâ facie* it would have to be considered according to the law of the domicil. That is not, indeed, disputed. But it is said, and said truly, that where you have a power executed by will,

the thing which you look at must no doubt be a will, for otherwise it is not an exercise of the power; but when you have got it and read it, it takes effect, not as a will, because, *ex hypothesi*, the property does not belong to the testator, but it operates with reference to the settlement containing the power. To an extent that is true. Then it is said that I must take this French document and read it, not as a will in the sense in which I have explained, but as if the directions contained in that document were introduced into the instrument which contained the power. That is quite right; but how must I read it? I have to introduce into the instrument which contains the power referentially a foreign document. I have to see that the power was exercised according to the meaning expressed by the donee of the power. Now, how am I to ascertain the meaning of the donee of the power? I must ascertain it according to the law of the place applicable to the document and to the domicil of the person executing the document, and that is to be taken as the law governing its construction. If I do that, I have then to read the French will and say on the principle of French construction, excluding, therefore, section 27, which is a rule for English construction, what the testatrix meant. The evidence as to the French law is that powers of appointment are unknown in France. If a court of construction in France were to read this document it would have to be informed by evidence what a power of appointment is in our law; and having learned what it is it would have to apply the proper principles of construction in France to ascertain whether or not this property has passed under this instrument. Section 27, which is a rule of construction here and not there, as it appears to me, would have no place in the discussion. You may state the proposition in either one of two ways. Sections 9 and 10 of the Wills Act must be excluded, or otherwise this is not a will at all. If you exclude those you exclude them because, although they form part of the Wills Act, they do not apply to such a will as this, and you must exclude also section 27. Or you may state it in the other form, that in a French court the rule of construction under section 27 is not a rule applicable at all.

I have thus discussed the matter upon principle; but the point really is governed, I think, by the decision of Stirling, J., in *In re Price*, 48 W. R. 373, [1900] 1 Ch. 442. I do not propose to deal with any of the earlier authorities; the learned judge went through them there. As I understand the decision in *In re Price*, the learned judge decided, in the first place, that a will valid according to the law of the domicil of the testator is a valid will for the purpose of the power contained in an English instrument giving power to dispose of property by will; and secondly, he decided that, inasmuch as that will contained the words "It shall thus be considered in England the same as in France," that the testatrix had said or might say in effect, if you choose you are to read the language of this my will upon those principles of construction which would be applicable in England to a will. If she had said so, she would in effect have said, "for the purpose of this my will you may take it I am meaning to dispose of not only my property, but also of that which I have by way of power; in other words, I mean you to introduce section 27." In the absence of those words, as I understand the learned judge, he would have arrived at a contrary conclusion. If there had not been words to introduce the English rule of construction he would have thought that the will did not deal with it. He says upon this last point that the question is one of construction; "in general a will is to be construed according to the law of the domicil of the testator," and then he cites from Dicey (Conflict of Laws, p. 695): "But this is a mere canon of interpretation which should not be adhered to when there is any reason, from the nature of the will or otherwise, to suppose that the testator wrote it with reference to the law of some other country." And then, as to that the learned judge goes on to say that there is in the will something to show that the testatrix wrote it with reference to the law of England, because the testatrix had said it was thus to be considered in England the same as in France. He says: "I think it is indicated upon the face of the will that she wrote it with reference to the law of England as well as the law of France. Therefore I think that I am entitled to apply the rules of construction which would by English law be applied." And he applies it; but I think in the absence of these words he could not have so applied English rules of construction.

I hold, therefore, that this lady's will did not exercise the power.

Solicitors, *Nicholl, Manisty, & Co.; Burne & Wykes; McC. Poulter; T. D. Boulton.*

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K. B. Div. (Bigham, J.) — May 6, 13.

BOARD OF TRADE *v.* SAILING SHIP GLENPARK (LIMITED). (*a.*)

*Ship — Seaman — "Distressed Seamen" — "Sufficient evidence"—Merchant Shipping Acts*, 1894, (57 & 58 *Vict. c.* 60), 1898 (61 & 62 *Vict. c.* 44).

*The owners of a vessel which had been wrecked paid the shipwrecked crew the balance of wages due to them. Some of the crew were maintained and provided with a passage to the United Kingdom by the Governor of South Australia, acting by the Marine Board of South Australia, on behalf of the Crown. The wages paid were in excess of the expense thus incurred.*

*The Board of Trade, on behalf of the Crown, under the Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 193, *sued the shipowners to recover the expenses so incurred.*

*Held, that such seamen were "distressed seamen" within the meaning of the Merchant Shipping Acts*, 1894 *and* 1898, *and that the possession of wages was immaterial; "sufficient evidence" in section* 193, *subsection* 3, *of the Merchant Shipping Act*, 1894, *means conclusive evidence.*

Action tried in Commercial Court.

This was an action brought by the Board of Trade under sections 193 of 57 & 58 Vict. c. 60. to recover a sum of money from the owners of *The Glenpark*, being expenses incurred in maintaining and sending a party of shipwrecked sailors from Australia to England.

The facts appear from the following statement:

1. The defendants were at all material times the registered owners of *The Glenpark*, a British ship within the meaning of the Merchant Shipping Act, 1894. 2. In May, 1900, *The Glenpark* left Barry (Cardiff) on a voyage to Cape Town and (or) any ports or places within the limits of 75 deg. north and 60 deg. south latitude, the maximum time to be three years' trading in any rotation and to end in the United Kingdom or Continent of Europe between the Elbe and Brest inclusive, at master's option. 3. On the 29th of January, 1901, *The Glenpark*, in the

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

course of the said voyage, left Port Germein, in South Australia, on a voyage to Algoa Bay, her crew consisting of twenty-six hands all told—namely, master, two mates, cook, steward, carpenter, sailmaker, boatswain, five apprentices (one of whom acted as third mate), twelve A.B.'s, and one ordinary seaman. 4. On the 1st of February, 1901, *The Glenpark* struck on a sunken rock near Wedge Island, in Spencer Gulf, South Australia, and became a total wreck. The crew lost the whole of their effects except the clothes they were wearing, but were saved and taken in the ship's boats to Port Victoria, in South Australia, arriving there on the 2nd of February, 1901. The log and agreement with the crew were lost with the vessel. 5. Between the 2nd of February and the 4th of February, 1901, the crew were subsisted at Port Victoria by the Governor of South Australia on behalf of the Crown, acting by the Marine Board of South Australia, at a cost (excluding that incurred in respect of the master) of £13 1s. 6d. On the 4th of February, 1901, the crew were provided with passages from Port Victoria to Port Adelaide by the same authority at a cost (excluding that incurred in respect of the master) of £20 16s. 7. The crew on their arrival on the 4th of February at Port Adelaide were (except the master) subsisted there by the same authority at a cost of £26 5s., and were also provided by the same authority with necessary clothing. 8. On the 6th of February, 1901, the representatives of the owners of *The Glenpark* at Port Adelaide, in the presence of the superintendent of the Mercantile Marine Board of South Australia, paid each member of the crew the balance of wages due to him under the agreement with the crew up to to time the vessel was lost. 9. The majority of the said crew obtained employment at Port Adelaide, but eight members thereof failed to obtain any employment and were provided with passages to the United Kingdom by the same authority at a cost of £63 2s. 6d. 10. As regards each member of the crew (excluding the master) the total expenses incurred on his behalf by the said authority are altogether the sum of £236 5s. 1d. 11. The Board of Trade, on behalf of the Crown, paid the said sum of £236 5s. 1d. to the said authority as money due to them in respect of expenses incurred on account of distressed seamen within the meaning of section 193 of the Merchant Shipping Act, 1894, and the Board of Trade contend that they are entitled, on behalf of the Crown, to recover the whole of that sum from the defendants under the same section. 12. The defendants have paid to the plaintiffs, and the plaintiffs have accepted, both without prejudice, various sums amounting in all to £136 6s. 2d. in respect of the expenses of members of the crew, fourteen in number, and with regard to the expenses of such members the defendants have admitted liability; and no question of further payment in reference to such members now arises. As regards these fourteen members of the crew, the wages so paid to them were in every case less than the amount expended on their behalf as hereinbefore mentioned. The said sum of £136 6s. 2d. is, in fact, greater by £1 5s. 6d. than the amount of the said expenses, but the difference is for the purpose of this case to be treated as immaterial. The balance of the total sum of £236 2s. 1d. mentioned in paragraph 10 of this case—namely, £99 18s. 11d., has never been paid to the plaintiffs by the defendants in whole or in part, and the plaintiffs now claim such balance from the defendants in this action. Such balance represents the amount of expenses incurred on behalf of the eleven remaining members of the crew other than the fourteen members above mentioned, the wages paid to whom as aforesaid were in every case greater than the expenses so incurred.

*Sir R. B. Finlay, A.G., Sir E. Carson, S.G.*, and *Sutton*.—The seamen were "distressed seamen" within the meaning of the Merchant Shipping Act; the possession of wages makes no difference; and the provision in section 193, sub-section 3, of the Merchant Shipping Act, 1894, as to the production of the account and proof of payment for and on behalf of the Board of Trade being "sufficient evidence that the expenses were incurred or repaid under this Act by or on behalf of the Crown" means the evidence to be conclusive evidence.

*Danckwerts, K.C.*, and *Leslie Scott*.—If a seaman has sufficient money—that is, sufficient money to support himself—he cannot be a "distressed" seaman. To be "distressed" a sailor must be in distress, and by reason of one of the causes—*e.g.*, shipwreck. A sailor need not be distressed the whole time; it is possible for one to cease to be distressed and afterwards to again become distressed. "Sufficient evidence" (sub-section 3 of section 193) means sufficient in absence of proof to the contrary. These words are not strong enough to enable the Board of Trade to shut out evidence: *Barraclough* v. *Greenhough*, 15 W. R. 21, L. R. 2 Q. B. 612. The Board of Trade can pay in some cases where they cannot impose the liability on the owners.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 190, provides that: "The Board of Trade may make regulations with respect to the relief, maintenance, and sending home of seamen and apprentices found in distress abroad, and may by those regulations in this Act referred to as the distressed seamen regulations . . . make such conditions as they think fit with regard to that relief, maintenance, and sending home, and a seamen shall not have any right to be relieved, maintained, or sent home except in the cases and to the extent and on the conditions provided by those regulations." Section 191 provides: "The following authorities . . . governors of British possessions, British consular officers of her Majesty in foreign countries shall . . . provide for the maintenance until a passage home can be procured of . . . seamen who by reason of having been discharged or left behind or shipwrecked from any British ship are in distress in any place abroad." Sub-section 4: "The authority shall be paid in respect of the expenses of the maintenance and conveyance of distressed seamen such sum as the Board of Trade may allow, and those sums shall, on the production of the bills of disbursements with the proper vouchers, be paid as hereinafter provided." Section 193: "(1) Where any expenses on account of any such distressed seaman or apprentice as follows—namely (*a*) . . . (*b*) . . . either for his maintenance, necessary clothing, conveyance home, or, in case of death, for his burial, or otherwise in accordance with this Act are incurred by or on behalf of the Crown, or are incurred by the government of a foreign country, and repaid to that government by or on behalf of the Crown, those expenses, together with the wages, if any, due to the seaman or apprentice, shall be a charge upon the ship, whether British or foreign, to which such distressed seaman or apprentice belonged, and shall be a debt to the Crown from the master of the ship or from the owner of the ship for the time being, and also, if the ship be a foreign ship, from the person, whether principal or agent, who engaged the seaman or apprentice for service in the ship. (2) The debt, in addition to any fines which may have been incurred, may be recovered by the Board of Trade on behalf of the Crown either by ordinary process of law or in the court and manner in which wages may be recovered by seamen. (3) In any proceeding for such recovery the production of the

account (if any) of the expenses furnished in accordance with this Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade, shall be sufficient evidence that the expenses were incurred or repaid under this Act by or on behalf of the Crown."

The Merchant Shipping Act, 1898 (61 & 62 Vict. c. 44), s. 4: "Section 193 of the Merchant Shipping Act, 1894 (which relates to the recovery of expenses incurred on account of distressed seamen) shall extend to expenses incurred under that Act on account of any distressed seamen within the meaning of that Act, except where it is certified, in pursuance of section 188 of the Act, that the cause of a seaman being left behind is desertion or disappearance, and paragraphs (*a*) and (*b*) in sub-section one of the said section one hundred and ninety-three shall be repealed."

*Cur. adv. vult.*

May 13.—BIGHAM, J., read the following judgment: The first question which I have to determine in this case is whether those men who received wages in excess of the expenses incurred on their behalf were "distressed seamen" within the meaning of the Act of Parliament (the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60). The defendants say that they were not, upon the ground that the Act was not intended to assist men who are in a position to assist themselves. It is necessary, therefore, to look at the terms of the Act. Part II. deals with the rights and duties of owners, masters, and crews of seagoing ships registered in the United Kingdom. One sub-division of this part is headed "Distressed Seamen," and it comprises sections 190 to 193 of the Act inclusive. By section 190 the Board of Trade is empowered to make regulations for the relief, maintenance, and sending home of seamen found in distress abroad; and the section enacts that no seaman shall have any right to be relieved, maintained, or sent home except in the cases provided by those regulations. In pursuance of the directions in this section the Board of Trade has made regulations, and by No. 86 it is declared that the persons to be relieved shall include seafaring persons who, having been engaged in merchant ships, are shipwrecked and found in distress in foreign ports. No relief, however, is to be afforded to shipwrecked seamen who refuse to work their passage home or who refuse to accept reasonable employment (regulation No. 90), nor are shipwrecked seamen who stand by the wreck to salve property to be considered as distressed seamen during the time they are so earning money (regulation No. 95). Thus the regulations mention who are and who are not to receive relief. Then section 191 of the Act directs how distressed seamen are to be relieved. The duty of affording relief is cast upon governors, consular officers, and others who are named in the section, and who are referred to in the Act as the authorities. This section directs such an authority to find a passage home for, and in the meantime to maintain, any seaman who, by reason of having been shipwrecked, are in distress in any place abroad, and enacts that the authority shall be paid, in respect of the expenses incurred, such sums as the Board of Trade may allow. Section 193, as amended by section 4 of the Merchant Shipping Act, 1898 (61 & 62 Vict. c. 44), directs that the amount of such expenses shall be a debt to the Crown from the shipowner and shall be recoverable by the Board of Trade on behalf of the Crown by ordinary process of law. These are all the material provisions, and there is nothing in any of them which in terms excludes from the category of distressed seamen those who, being shipwrecked, happen at the date of the disaster to be entitled to arrears of wages. Nor do I find anything from which I can imply such an intention. In a sense, no doubt, a shipwrecked sailor who happens to have money in his pocket or a valuable ring on his finger or a right to arrears of wages is not in so bad a plight as his shipmate who has none of these advantages; but both of them are, in my opinion, "seamen who by reason of having been shipwrecked are in distress" within the meaning of section 191 and of regulation No. 86. If the Legislature had intended to exclude from the benefits of the Act men who had means of their own at their command I think it would have said so. In the connection now under consideration the definition of distress is not to be found in the man's slender purse, but in the fact that he has been cast from his ship in a foreign country. I therefore come to the conclusion that all the men mentioned in this case were "distressed seamen" within the meaning of the Act.

Another question was raised during the argument—namely, whether the production of the account of the expenses, together with proof of payment thereof by the Board of Trade, was not of itself conclusive against the defendants. Having regard to the view I take on the first point, it is not necessary for me to decide this question; but I think it better to do so, for I may thereby save difficulty in future cases. By sub-section 3 of section 193 of the principal Act it is provided that in any proceedings for the recovery of the debt the production of the account (if any) of the expenses furnished in accordance with this Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade shall be sufficient evidence that the expenses were incurred or repaid under this Act by or on behalf of the Crown. I think "sufficient evidence" here means conclusive evidence, and for these reasons: The authority who makes the payments in the first instance acts in the interest of the shipowner as well as in that of the seaman. This is shown by such regulations as the 91st, 96th, and 97th, which direct the authority to confine the relief to what is actually necessary. And by sub-section 4 of section 191 the Board of Trade has a right to revise the account and to disallow in favour of the shipowner such items as it may think fit. The authority abroad and the Board of Trade at home are both to protect the shipowner from any undue burden. With provisions such as these for his protection I do not think the Legislature meant to allow the shipowner to dispute either the propriety of the demand made upon him or its amount. The production of the account and proof of its payment are therefore, in my opinion, meant by sub-section 3 of section 193 to be conclusive of the right of the Board of Trade to recover.

*Judgment for the plaintiffs.*

Solicitor for Board of Trade, *R. E. Cunliffe.*

Solicitors for defendants, *Rowcliffes, Rawle, & Co.*, for *Hill & Dickinson*, Liverpool.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — April 29.

LONDON AND NORTH-WESTERN RAILWAY CO. v. HINCHCLIFFE. (*a*.)

*Railway—Passenger—Fare—Travelling beyond station to which ticket is taken—Fare for whole distance more than sum of intermediate fares—Right of company to*

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*charge difference between fare paid and the through fare.*

*The defendant, who intended to travel from Huddersfield to Manchester, took a ticket only to Stalybridge, an intermediate station. The fare from Huddersfield to Manchester was 2s. 3d., and to Stalybridge 1s. 6d., and the fare from Stalybridge to Manchester 7d. At Stalybridge the collector took defendant's ticket and demanded 9d., being the difference between the fare which the defendant had paid and the through fare from Huddersfield to Manchester. This the defendant refused to pay, but tendered 7d., the local fare between Stalybridge and Manchester. This was not accepted, but he was permitted to proceed by the same train to Manchester. By the regulations printed in the company's time-tables a passenger using a ticket for any other station than that for which it was issued was liable to pay the difference between the sum actually paid and the fare between the stations from and to which he travelled; and passengers could not re-book at an intermediate station by the same train. In an action by the company to recover 9d.,*

*Held, that the conditions were part of the contract, and that the defendant was bound to pay the difference between the sum he had paid and the through fare from Huddersfield to Manchester.*

Appeal by the defendant from a decision of his Honour Judge J. Heaton Cadman, sitting at the Huddersfield County Court.

The action was brought by the railway company for the purpose of having it determined whether or not persons travelling from Huddersfield to Manchester were entitled to take a ticket to an intermediate station and then, travelling on by the same train, pay the fare from the intermediate station to Manchester.

The facts were as follow:

The defendant, intending to travel from Huddersfield to Manchester, took a ticket to Stalybridge, an intermediate station, gave up his ticket there, and then offered the fare (7d.) from Stalybridge to Manchester. This was refused, and the defendant travelled on by the same train to Manchester. The fare from Huddersfield to Manchester was 2s. 3d.; from Huddersfield to Stalybridge 1s. 6d.; and from Stalybridge to Manchester 7d. Therefore, by taking two tickets, one from Huddersfield to Stalybridge (1s. 6d.), and one from Stalybridge to Manchester (7d.), the fare for the whole distance would be 2s. 1d., or 2d. less than the fare if one ticket had been taken from Huddersfield to Manchester. The company sued the defendant for 9d., and he thereupon paid 7d. (the local fare between Stalybridge and Manchester) into court.

The county court judge held that as the defendant continued his journey from Stalybridge to Manchester, the company were entitled to assume that he did so on the company's terms—namely, to pay 2s. 3d. for the entire journey, and, therefore, that they were justified in treating the payment of 1s. 6d. to Stalybridge as part payment only or payment on account of the through fare from Huddersfield to Manchester, and were entitled to payment from the defendant of the difference—namely, 9d. He accordingly gave judgment for the company for 2d. with leave to take the 7d. out of court, and granted leave to appeal.

Among the "General Regulations and Conditions" printed in the company's time-tables were the following: "Using ticket for any other station.—Any passenger using or attempting to use a ticket for any other station than that for which it is available will be required to pay the difference between the sum actually paid and the fare between the stations from and to which the passenger has travelled, or, at the option of the company, the fare from the station to which he has booked to the end of his journey." "Tickets must be shown to the company's servants, and delivered up to them when demanded. . . . Parties cannot re-book at an intermediate station by the same train. . . ."

*Lowenthal*, for the defendant.—The only contract that existed between the parties to which any of the printed regulations and conditions applied, and subject to which the ticket was issued, was that to carry the defendant to Stalybridge. When he arrived there the contract was at an end, and after that time the company could have treated him as a trespasser and have had him removed from the train (*Butler* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 36 W. R. 726), but they did not do that, and must therefore be taken to have waived the tort. By permitting him to travel on by the same train there arose an implied contract by the company to carry him to Manchester, on which contract the company could sue him on a *quantum meruit* for the legal fare between Stalybridge and Manchester. That being so, the company were only entitled to recover the amount of the fare between the two last-named stations.

He cited *Great Western Railway Co.* v. *Pocock*, 28 W. R. 49, 41 L. T. Rep. 415, and *London and Brighton Railway Co.* v. *Watson*, 27 W. R. 614, 4 C. P. D. 118, and submitted that the present case was distinguishable from *Great Northern Railway Co.* v. *Palmer*, 43 W. R. 316, [1895] 1 Q. B. 862.

*Gregson* v. *Potter*, 27 W. R. 840, 4 Ex. D. 142, was also referred to, and sections 109 and 145 of the Railway Clauses Act, 1845.

*Montague Shearman, K.C.* (*E. G. Hills* with him), for the company.—The defendant had entered the train with the intention of travelling the whole distance, and was therefore bound to pay the full amount of a through ticket. The company relied on conditions as to using a ticket for a different station than that to which it was issued, and if the defendant merely accepted the company's offer to carry him to Stalybridge, and the contract, as the defendant would have it, came to an end there, then the defendant was in this dilemma, that he had accepted the offer subject to the condition of the company that if he used his ticket for any other station he must pay the full fare from Huddersfield to that station. In either view of the contract, therefore, the company were entitled to charge him 9d. for travelling on from Stalybridge to Manchester.

Lord ALVERSTONE, L.C.J.—In this case, whatever may be the result of other proceedings, I think the judgment of the county court judge was right. The company were really suing on a *quantum meruit*. They might have sued the defendant for trespass, but they waived the tort, which possibly they were entitled to do, and decided not to turn him out of the carriage because he had not a ticket. Therefore, having elected to carry him, the question is whether or not the *quantum meruit* on that contract under those circumstances is limited to the 7d. which is the local fare from Stalybridge to Manchester. It seems to me the local fare from Stalybridge to Manchester is only applicable to the matter of a common law contract with a person who has booked from Stalybridge to Manchester, and apart from any rights the passenger has under the Railway and Canal Traffic Act. It cannot be said the person who has come in a train intending for this purpose to travel from Huddersfield to Manchester, and who has remained in the train and has never re-booked, and has therefore availed himself of a contract which the company held out to carry passengers by that train at the fare of 2s. 3d. from Huddersfield to Manchester, is entitled to say, "I

claim to be in the same position as a person with whom the company has made a fresh contract"—namely, a contract to carry him from Stalybridge to Manchester. It may be (but that we have nothing to do with) that by getting out of the train and being very sharp, and getting the booking clerk to issue a ticket to him, a man may give up his ticket at Stalybridge and take a fresh one and be able to go on, but that is not the case we have to deal with. We have to deal with the case of a man who intended to travel from Huddersfield to Manchester by a train as to which the contract price is 2s. 3d., and who avails himself of the facilities offered by that train, and then says, "The measure you are to charge me is what you would have charged me had I booked by that train from Stalybridge, and not Huddersfield." I think it was quite open to the county court judge to find that in that case and under those circumstances the measure of the *quantum meruit* was the difference between what he would have had to pay had he said "I will take a ticket to Manchester," and what he did pay when he said "I will take a ticket to Stalybridge," Of course it will be understood that I have decided this case upon the conditions being part of the contract, which prohibit re-booking by that train and therefore he was not doing something which the railway company by their conditions allowed him to do, and the conditions did not entitle him to use the Stalybridge ticket for anything except Stalybridge. I am not deciding anything which will prevent the parties from taking proceedings, if they can take any such proceedings under the Railway and Canal Traffic Act, 1854, and the Acts amending it. I think this was the proper measure or might be the proper measure of the *quantum meruit*, but in this case there is no illegality in that being awarded. The judgment of the county court judge must be affirmed.

WILLS, J.—I am of the same opinion, but I am inclined to think it does not make any difference whether he originally intended to book for Manchester or only Stalybridge, because when he elected to stay in the train and go on by that train without re-booking be elected to propose to the company that they should make it one through journey for him from Huddersfield to Manchester, and if so then the company by accepting that altered state of things, instead of turning him out and requiring him to re-book, made a further contract that they would carry him the whole distance from Huddersfield to Manchester, and therefore were entitled to charge the whole fare.

CHANNELL, J.—I am of the same opinion. When you look at the matter the company's terms for the passenger who travels through in the same train and does not get out to re-book and start on a fresh journey are 9d., and I see no reason why, if a gentleman does not make a fresh contract with them, but acts, as my brother has said, as a through passenger, he should not be charged that fare.

*Appeal dismissed; leave to appeal given.*

Solicitors for the appellant, *James, Mellor, & Coleman*, for *Learoyd & Co.*, Huddersfield.

Solicitor for the company, *C. Andrewes.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) April 7.

SAUNDERSON *v.* COLLINS. (*a.*)

*Bailment—Bailor and bailee—Carriage lent to bailee—Damage to carriage by servant of bailee not in course of his employment—Liability of bailee for damage.*

*The plaintiff, a coach builder, lent the defendant a dog-cart whilst he repaired the defendant's trap. The bailee's servant, not acting in the course of his employment, negligently injured the lent dog-cart by driving it into a tramcar.*

*Held, that the bailor could recover damages from the bailee for the injury done to his dog-cart.*

The Coupé Co. *v.* Maddick, [1891] 2 Q. B. 413, 40 W. R. Dig. 11, *followed.*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The plaintiff appealed from a decision of the learned judge of the Newcastle-on-Tyne County Court in favour of the defendant.

The action was brought by a coachbuilder to recover a sum of £22 18s. 6d. for damage to a four-wheeled dog-cart lent by him to the defendant whilst his (the defendant's) dog-cart was being repaired. On the 30th of June the defendant had had the plaintiff's dog-cart out from about three o'clock to five and it was then put away in the coach-house. On that evening there were bonfires in honour of the King's Coronation and the defendant's coachman, without the knowledge or permission of his master (the defendant), got the key of the coach-house and took out the dog-cart and drove it about, taking with him three or four companions. They were all the worse for drink, and as they were returning between eleven and twelve o'clock that evening the coachman drove the horse and trap round a corner on the wrong side of the road and ran into a tramcar, and the dog-cart was badly injured. The defendant stated that he gave his coachman no authority to take the trap out and that he knew nothing of the occurrence till a policeman knocked him up in the night; that the key of the coachhouse was kept in the hall table drawer, and that on the occasion in question he did not give the key to the coachman. Before the county court judge it was argued on behalf of the defendant that he was not responsible for the damage done because the coachman acted altogether outside the scope of his employment and there was no evidence that the defendant had been guilty of any negligence; and it was submitted that plaintiff's remedy was against the coachman, and *Mears* v. *London and South-Western Railway Co.*, 6 L. T. Rep. 190, 11 C. B. N. S. 850, 10 W. R. C. L. Dig. 17. was relied on. For the plaintiff it was contended that the defendant was liable because the plaintiff had left the dog-cart in the defendant's custody, and as bailee the defendant was liable for the negligence of his servant, and that the case of *The Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413, 40 W. R. Dig. 11, covered exactly the present case.

The county court judge held that if the case of *The Coupé Co.* v. *Maddick* could not be distinguished, he was bound by it to give judgment for the plaintiff; but he distinguished it on the ground that the defendant's servant in wrongfully taking the trap out of his master's coachhouse and damaging it was doing a tortious act in respect of which both the plaintiff and the master had a right of action. He accordingly gave judgment for the defendant, and the plaintiff appealed.

*Wallace, K.C.*, and *Mundahl*, for the plaintiff.—The distinction which the learned county court judge drew between the facts of this case and that of *The Coupé Co.* v. *Maddick* is not one of substance. It was admitted that the coachman was the defendant's servant, and the defendant as bailee is liable for any damage caused to the plaintiff's dog-cart. The position of a bailee is made very clear and the cases dealing with the question are collected in the

judgments given in *The Winkfield*, 50 W. R. 246, [1902] P. 42. If the plaintiff had sued the coachman, then the decision in *Mears* v. *London and South-Western Railway Co.* would have been an authority no doubt in his favour, but it is not necessary to consider that case here because *The Coupé Co's. case* clearly decided that the bailor had a good cause of action against the master.

*Manisty, K.C.*, and *Meynell*, for the defendant.—The plaintiff cannot rely on *The Coupé Co's. case*, because there the contract under which the carriage was supplied was one for a year, and the contract was one of time. Here the dog-cart was lent free for a short time only, while repairs were done to the defendant's dog-cart. The obligation of a mere bailee to take reasonable care is limited, so far as concerns his servants, to acts done by them within the scope of their employment. In *The Coupé Co.'s case* the defendant had used the carriage that afternoon and the wrongful act of the servant consisted in not taking it back at once to the stable. Up to a certain point, therefore, the coachman was acting within the scope of his employment under orders from his master, but here the man secretly took the horse and dog-cart out and drove off to see the bonfires without authority of any kind to do so. In *Mitchell* v. *Crassweller*, 1 W. R. 153, 13 C. B. 237, which was decided in 1853, it was laid down, and repeatedly followed, "that a master is responsible for an injury resulting from the negligence of his servant whilst driving his carriage, provided the servant is at the time engaged in his master's business, even though the accident happened in a place to which his master's business did not call him"—that is simply the ground of the decision in *The Coupé Co.'s case*—"but if the the journey upon which the servant starts be solely for his own purposes and undertaken"—as was the case here—"without the knowledge or consent of his master, the latter is not responsible." Moreover in *Storey* v. *Ashton*, 17 W. R. 727, L. R. 4 Q. B. 476, it was held that the master was not liable, because the servant was not doing the act, in doing which he had been guilty of negligence, in the course of his employment as servant.

Lord ALVERSTONE, L.C.J.—I wish to say in this case one word about the position of this court. It is so perfectly well known that I think it is scarcely necessary, but I should like to say it in deference to the very able arguments which have been addressed to us. Sitting here as a Divisional Court of the King's Bench Division, and I hope doing some useful work, it really would be very injurious to our functions if it was supposed that because we endeavour to constitute a court of authority in these cases we should therefore have imposed upon us the duty to make a refining distinction between cases which have decided substantially the points argued before us, one way or the other. All I say is this. It is impossible to distinguish the case of *The Coupé Co.* v. *Maddick* on the ground and distinction which Mr. Manisty has presented to us. If, of course, the real reasoning of the judgment had been that the servant in that case was acting within the scope of his authority, it would be no authority at all against Mr. Manisty; it would be a case which would not be *pari materia* at all; but in that case the learned county court judge had decided, on the authority of *Storey* v. *Ashton*, that the bailee was not liable because the act done was not within the scope of his authority, and Mr. Manisty has very strongly urged before us the principles on which masters are not liable on those cases. That judgment was overruled, and therefore it is impossible to say that the decision proceeded upon the basis that in such a case there was no liability to the hirer. And more than that, other reasons are given in the judgment showing that Cave and Charles, JJ., thought that in the contract of bailment as between bailor and bailee such circumstances as are there referred to—namely, the act of the servant beyond the scope of his authority—did not prevent the bailee being liable.

Now I do not want to say anything about that case, because, as I have already said, it is not a wise thing when you are following a case to enter into judgments for or against it unless it can be distinguished. In my opinion it cannot be distinguished upon any of the grounds Mr. Manisty has pressed upon us; it must be distinguished (if his contention is valid) in the Court of Appeal.

I think in this particular case the judgment in the case of *The Coupé Co.* v. *Maddick* was binding upon the county court judge and is binding upon us, and therefore the judgment should be reversed.

WILLS and CHANNELL, JJ., gave judgment to the same effect.

*Appeal allowed; execution stayed pending appeal.*

Solicitor for the defendant, *E. A. Fuller*, for *Dickinson, Miller, & Dickinson*, Newcastle.

Solicitors for the plaintiff, *Cree & Son*, for *Hugh Burns*, Newcastle.

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## IN BANKRUPTCY.

K. B. Div. (Wright, J.) March 23.

*In re* NEPEAN.
*Ex parte* RAMCHUND. (*a.*)

*Bankruptcy — Scheme of arrangement — Proof — Debt carrying interest exceeding 5 per cent.—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-section* 9; *s.* 23.

*Under a scheme of arrangement which provides for a dividend on all debts provable in bankruptcy, a proof including interest at a rate exceeding 5 per cent. should be admitted in full, and no part thereof rejected or postponed for the purpose of dividend until all the other creditors have been paid in full.*

Appeal by a creditor under a scheme of arrangement from the partial rejection of his proof by the official receiver.

A scheme of arrangement with the creditors in accordance with the terms of the Bankruptcy Act, 1890, had been approved by the court.

The friends of the bankrupt had raised a sum of £1,800, and the scheme provided that as large a dividend was to be paid upon all debts provable in bankruptcy as the sum collected would admit of. It was admitted that the sum collected was sufficient to pay a composition of 7s. 6d. in the £1 on all the debts proved, even if the appellant's proof were admitted in full. The appellant's proof was for money lent, and interest at a rate exceeding 5 per cent.

The official receiver admitted the proof to the extent of the principal sum advanced and interest thereon at 5 per cent., but rejected it in so far as it consisted of interest at a rate exceeding 5 per cent Such rejection was based on the terms of section 23 of the Bankruptcy Act, 1890:—

"Where a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall for the

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

purposes of dividend be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

The creditor appealed.

*E. Clayton*, for the creditor.

*S. G. Lushington*, for the official receiver.

WRIGHT, J.—I think on the whole I ought to hold that this scheme means what the legal effect of its language is. When it uses the expression "dividend" on the amount provable against the estate it uses those words in the same sense in which they are used in section 3, sub-section 9, of the Bankruptcy Act, 1890. That, clearly, is debts provable, and not merely debts provable for immediate dividend. That being so, I think the scheme here, if fairly construed, especially if construed according to the facts of the case, means that the whole of the provable debt—that is, the debt, including interest not only up to 5 per cent., but the whole interest in this case—is to be provided for. The only remaining question is, supposing the scheme clearly enough indicates that, is it a competent provision or a void provision? It seems to me clear, that it is competent for the parties, in framing one of these schemes with the approval of the creditors and the court, to exclude some of the provisions which would have effect in the case of bankruptcy without a scheme. I do not see any reason why it should not be competent for them to exclude section 23 of the Act of 1890. I see in the case of *In re Athlumney, Ex parte Wilson*, 47 W. R. 144, [1898] 2 Q. B. 547, that was the view which I took. I see no reason to alter that view. It is possible for a scheme to exclude that section, and I think, fairly read, this scheme has excluded the section. Therefore the motion must be allowed.

*Appeal allowed.*

Solicitor for the appellant, *John Bartlett.*

Solicitors for the respondent, *Radcliffe, Cator, & Hood.*

## House of Lords.

From C. A. (England). Nov. 11.

MASON *v.* OGDEN AND OTHERS. (*a.*)

*Will — Residuary devise — "All other my freehold property"—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 25.

*A devise of "all other my freehold messuages or tenements at W. and elsewhere" is a "residuary devise" within the meaning of section* 25 *of the Wills Act*, 1837.

*Decision of the* Court of Appeal—*In re* Mason, Ogden *v.* Mason, [1901] 1 *Ch.* 619, 49 *W. R. Dig.* 202—*affirmed.*

Appeal from a decision of the Court of Appeal (Rigby, Vaughan Williams, and Stirling, L.JJ., [1901] 1 Ch. 619, 49 W. R. Dig. 202), reversing a decision of Kekewich, J. (48 W. R. 493, [1900] 2 Ch. 196).

T. W. J. Mason, by his will dated the 27th of January, 1862, devised all his freehold house and shop and all and singular other the premises used by him at the time of his decease at Wimbledon to his son Thomas, and the will proceeded: "And as to all other my freehold messuages or tenements at Wimbledon aforesaid and elsewhere, and all my leasehold estates whatsoever and wheresoever, I give, devise, and bequeath the same unto my dear wife for and during the term of her natural life for her own use and benefit." And after the death of his wife the testator gave the last mentioned freehold and leasehold hereditaments upon the trusts as therein mentioned.

The testator died in May, 1865, possessing at the time of his death freehold property at Wimbledon in addition to that which was specifically devised to his son, and also freeholds at Kingston. He had no copyholds. His will and codicil thereto were attested by his son, so that the specific devise to the son failed. The question was whether this specifically-devised property passed under the devise of "all other" the testator's freehold property or was undisposed of.

Kekewich, J., on the authority of *Springett* v. *Jennings*, 19 W. R. 575, L. R. 6 Ch. App. 333, held that the devise of "all other my freehold tenements at Wimbledon and elsewhere" was not, within the meaning of section 25 of the Wills Act, 1837, a residuary devise; but this decision was reversed by the Court of Appeal.

*Warrington, K.C.*, and *George Henderson*, for the appellants.

*Renshaw, K.C.*, and *C. H. Sargant*, for the respondents.

Earl of HALSBURY, L.C.—It has been truly observed that this is a very short point, and I confess I have not been able from the first to entertain much doubt about it. I think the judgment of the Court of Appeal is right, and ought to be affirmed.

I am quite content to say that all the three learned judges of the Court of Appeal appear to me to have proceeded on the same line of thought, in which I concur. I should be very sorry indeed to place upon this remedial statute (which is intended to do the very thing which it is suggested this language does not do—that is, to enable the testator to sweep up everything not properly disposed of before) such an artificial meaning as to take away from the persons intended to be benefited that which they were meant to have. To my mind, there is no doubt in the world that what the testator meant to do was that which I think he has done. He has made a perfectly good residuary devise within the meaning of section 25 of the Wills Act, 1837; and therefore I think the judgment is right. I do not want to add anything to what the learned judges in the Court of Appeal have said, because I think they have gone over the whole ground and disposed of the entire question. It appears to me that the argument on the other side rests on a somewhat narrow and artificial construction of the words, looking at what was meant to be done by that section.

Therefore I move that the judgment appealed from be affirmed, and that the appeal be dismissed with costs.

Lord SHAND.—I entertain the same opinion. I cannot profess to have had any acquaintance with the Wills Act, 1837, prior to the discussion which has taken place to-day, or with what seems to me the peculiar and special state of the law as it existed before that statute; but it appears to me that the reasoning of the learned judges who have dealt with this matter on appeal commends itself to one's good sense.

I confess, so far as I am concerned, I am very strongly moved by the fact that the testator had no copyholds, and I cannot see what good was to be got by putting in the residuary clause "copyholds" when

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

he had none to dispose of. That seems to me to be the whole point in this case. Assuming that universality is required in order to make effectual a proper provision of residue, that requirement is fulfilled where the terms used plainly embrace and describe the whole estate of which the testator died possessed. I can see that the terms of the judgment of Mellish, L.J., in *Springett* v. *Jenings*, if strictly followed, would warrant Kekewich, J's., judgment in this case; but I agree with Rigby, L.J., and the other learned judges in the Appellate Court that the observations of Mellish, L.J., are to be read with reference to the particular instrument before him, and do not apply to a case like this, where the testator had by the terms of his will disposed of the whole estate of which he was possessed.

As stated by counsel for the respondents, the word "other" does not seem to make the difficulty which I should have supposed it did but for the authorities. According to these authorities, the word "other" in this disposition does not affect or limit the force of the residuary clause, which would sweep in the property which the testator did intend specially to convey, but which turned out to be ineffectually conveyed because of the circumstance that the beneficiary was unfortunately made a witness to the execution of the will.

I have no hesitation, therefore, in agreeing with your lordships in holding that the judgment should be affirmed with costs.

Lord DAVEY.—I confess I should not have been sorry if this House had seen its way to affirm the decision of Kekewich, J., because it had the effect of giving to Thomas Frederick Mason in his quality as heir-at-law the property which he had lost—that is to say, the property which had been devised to him, and which he would have taken as devisee but for the unhappy accident of his having witnessed his father's will. But I think, on a consideration of the words of the 25th section, this House should affirm the decision of the Court of Appeal.

The question really is reduced to a very small one, although it is of importance to the parties. The testator gives certain freehold property at Wimbledon to his son—a devise which fails; and then he says, "And as to all other my freehold messuages or tenements at Wimbledon aforesaid and elsewhere and all my leasehold estates whatsoever and wheresoever," I give them upon other trusts. Now, the real question is whether the gift of "all other" the testator's freehold messuages and so forth is a residuary gift. One asks oneself, Why not? The gift is precisely the same (that is not disputed) as if he had said, "And as to the residue of my freehold messuages and tenements at Wimbledon and elsewhere." In form it certainly is a residuary gift. Why is it not to be treated as a residuary gift under section 25? Well, the only legal reason I have heard is that it does not possess the attribute of "universality," whatever may be meant by that; and the judgment of Mellish, L.J., in *Springett* v. *Jenings* is referred to in support of that proposition. All that I understand that very learned judge to have meant by his expression, which perhaps was not chosen with the felicity which usually distinguishes his judgments, was that a clause which is relied on as a residuary clause must be so framed as to sweep in by its terms the whole of the property to which it applies. I can attach no other meaning to the word "universality." When you are speaking of a residuary gift of personal estate, the clause must be so framed as to be capable of carrying every description of personal estate not otherwise disposed of by the will; and when you are speaking of a residuary gift of real estate generally, it must be so framed as to carry in every atom of real estate; but why we may not have a residuary gift of freehold estate I am at a loss to understand. It is not necessary that a residuary gift shall comprise every kind of property which the man has; for example, you may have a residuary gift of personal estate. The words in the Wills Act are, "shall be included in the residuary devise (if any) contained in such will." Why is it necessary to construe that as meaning a residuary devise of real estate? A residuary devise of real estate has no more the attribute of "universality" than a residuary gift of personal estate or a residuary devise of freeholds. On the other hand, a devise of freeholds has this attribute of "universality" if it is framed in such words as to be capable of sweeping in every description of freehold estate which is not otherwise disposed of.

I think it is not necessary for the construction of section 25 of the Wills Act, 1837, to say that the residuary devise there spoken of must be a residuary devise of the whole of the real estate; and the construction which has been put upon the section by the Court of Appeal, and which your lordships have favoured, seems to me to meet the particular mischief and the particular defect in the previous law which the section was devised to remedy. Therefore I agree with the judgment proposed by the Lord Chancellor.

Lord ROBERTSON.—I concur.

*Appeal dismissed.*

Solicitor for the appellant, *H. J. Mannings.*

Solicitor for the respondents, *H. S. Bridge.*

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## Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) And K. B. Div. (Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — March 31; June 16.

*In re* A SOLICITOR.

*Ex parte* INCORPORATED LAW SOCIETY. (*a.*)

*Solicitor—Misconduct—Report of committee to court—Dismissal of charge—Right of complainant to be heard in person—Solicitors Act,* 1888 (51 & 52 *Vict. c.* 65), *s.* 13.

*By section* 13 *of the Solicitors Act,* 1888, *an application to strike the name of a solicitor off the rolls, or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to and heard by the Committee of the Incorporated Law Society, who shall embody their finding in the form of a report to the court, "provided that any person who but for this Act would have been entitled to apply to the court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply, although the committee is of opinion that there is no* primâ facie *case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report of the committee before the court."*

*Held, that an application to the court under the proviso in the above section must be made by counsel.*

Hearing of a report made by the Committee of the Incorporated Law Society under the Solicitors Act, 1888.

(*a.*) Reported by W. F. BARRY and ERSKINE REID, Esqrs., Barristers-at-Law.

It appeared that applications were made by one C. R. Trueman and others that a solicitor should be required to answer allegations contained in certain affidavits.

The committee, having heard the applications and the evidence, found that the charges made by Trueman were not made out, but they found against the solicitor on the other charges, and made a report accordingly.

March 31.—*B. A. Cohen*, for the Incorporated Law Society, read the report.

The solicitor, appearing in person, denied that he had been guilty of professional misconduct and submitted that the Statutory Committee had in regard to the charges made by persons other than Trueman arrived at a wrong conclusion, and that there was no evidence on which the court ought to find against him.

Trueman claimed to be heard in person on the charges he had made before the committee against the solicitor. He contended that by section 13 of the Solicitors Act, 1888, he was entitled to apply to the court personally to strike a solicitor off the rolls, and he cited *In re Lilley*, [1892] 1 Q. B. 759.

Lord ALVERSTONE, L.C.J.—We think it better to deal first with the application made to the court by the complainant to be heard upon this motion, especially as it is an important matter and one in which we are reaffirming, not laying down, the old practice of the courts in such matters. The section of the Solicitors Act, 1888, which we have to deal with here is as follows: "Provided that any person who but for this Act would have been entitled to apply to the court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply although the committee is of opinion that there is no *primâ facie* case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report of the committee before the court." That preserves the right of a person in the complainant's position in two matters; either he may himself apply on the ground that he has a charge against the solicitor, or when the report is before the court, which is a new right, he shall be allowed to be heard upon it. It has been for many years the practice where applications are made against solicitors to require that they shall be conducted by counsel. The statute is only a modified, improved, and amended procedure whereby the report of the Statutory Committee is brought before the court, and then action is taken upon it. As far back as 1833 there is an authority to which I wish to refer, the case of *Ex parte Pitt*, 2 Dowl. 439. I refer to it not only because it is an authority on which this court has acted continuously before the Act of 1888, but because the reasons of the judgment are of as full effect and weight to-day as at the time when the judgment was delivered. In that case a gentleman applied in person for a rule to show cause why certain attorneys should not be required to answer certain matters contained in a certain affidavit. That was a much less stringent or a less serious application than the application to strike off the rolls. Those who are old enough to remember the old practice will remember that there were two applications—one to strike off the rolls, and the other to answer the matters of an affidavit—one being more serious than the other, and the court was dealing there with the less serious case, and the application was made to four judges, and Lord Denman, after consulting the other judges and the Master of the Crown Office, said this: "The motion against an attorney being in the nature of a criminal information, the court requires that it should be made by a gentleman at the bar, and it cannot be made in person. Otherwise we have not the sanction of a barrister for the propriety of such an application. We cannot therefore hear you make this motion. The only case in which it appears that the court ever interfered where the application was made in person was where a party demanded protection of the court against an attorney; and as it then appeared on his affidavit that the attorney had been guilty of great misconduct, the court of its own accord directed that he should answer the matters stated on the affidavit of the applicant." In my opinion, for the purpose of entertaining such an application as the complainant desires to make, either to allege that the committee have not gone far enough or that further action ought to be taken by sending the matter back, the court are entitled to the same safeguards that have always been thought necessary in this matter. I desire to add, if we were dealing with the question of costs, if anybody were asking the complainant to pay costs, then either here or elsewhere the complainant would be entitled to be heard in person against such an application. It is when a person seeks to put into force the amended jurisdiction of this court, now governed by the statute of 1888, the words "entitled to be heard" mean entitled to be heard in the way that is in accordance with the practice of the court, and I think in this matter it is not possible for us to hear the complainant in person.

WILLS, J.—I entirely agree. I have had very considerable experience in cases of this kind, as for a long period when at the bar I represented the Law Society, and during the fifty years or rather more that I have been in the profession I have never known a case in which an application of this kind was heard, either before or since the Act of 1888, in which the matter was not conducted by counsel. I think the reasons given by Lord Denman in *Ex parte Pitt* are quite as strong at the present time as they ever were before. I think it is a thoroughly sound practice and ought to be adhered to.

CHANNELL, J.—I entirely agree.

An application by Trueman for an adjournment in order to instruct counsel was refused.

The Court then delivered judgment on the report and came to the conclusion upon the evidence that the charges which the committee had found against the solicitor were not proved.

They therefore held that the solicitor was not guilty of professional misconduct.

Trueman appealed against the refusal to hear him in person.*

June 16th.—The appellant, in person, said that he did not desire to be heard upon the question of striking the solicitor off the rolls or of requiring him to answer the allegations contained in an affidavit, but merely to have the form of the report amended.

The solicitor, who appeared in person, was not called upon.

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* A preliminary objection was taken that this was an appeal from an interlocutory order and did not lie without leave. The Court said that in order to appreciate the point they would hear the facts of the case. Having heard the facts, the Court said that it was unnecessary to decide the preliminary objection, as they agreed with the Divisional Court upon the main point under appeal, and that it must not be taken that they decided that the order was not an interlocutory order from which an appeal could be brought without leave.

COLLINS, M.R.—In my opinion, for the reasons given by Lord Alverstone, L.C.J., and Wills, J., in their judgments in the Divisional Court, there is no ground for this appeal. The case made in the court below was not the same as the case made here. It is evident from the report of the arguments and the judgments in the Divisional Court that the appellant claimed to be heard in person upon the charges made by him against the solicitor. So far as the appellant is claiming to do under the modern machinery that which used to be done under the old machinery by a motion in court calling upon the solicitor to show cause why he should not answer the matters of an affidavit or why he should not be struck off the rolls, he can only be heard if he appears by counsel. The practice which existed under the old procedure has not been altered under the modern system. If, on the other hand, the appellant was not urging matters against the solicitor, but was only applying to be heard upon some question of costs, he would be entitled to be heard in person. It is obvious that what the appellant was seeking to do in the Divisional Court was to prefer a charge against the solicitor. He cannot now alter his ground and by so doing improve his position. What we have to decide is the same question as that which was decided in the Divisional Court, and we decide that question in the same way as that court decided it.

MATHEW, L.J.—I am of the same opinion. It is perfectly clear from the report of the case in the court below that the appellant claimed to be heard in person upon the charges he had made against the solicitor before the committee. The Divisional Court declined to hear him unless he appeared by counsel. An application to strike a solicitor off the rolls is an application of a very serious kind, and it is of importance to maintain the old rule that such an application can only be made upon the authority of counsel. I hope that that rule will be adhered to.

COZENS-HARDY, L.J., agreed.

*Appeal dismissed.*

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From Chan. Div.
(Vaughan Williams, Romer and Cozens-Hardy, L.JJ.) April 30.

*In re* COLEY.
HOLLINSHEAD *v.* COLEY. (*a.*)

*Will—Construction—Gift to wife of named person—Wife living at date of will—Second wife.*

*If there is in a will a gift to the wife of a person, who has to the knowledge of the testator a wife living at the time, the* primâ facie *presumption is that the gift refers to that wife and not to any subsequent wife, and the only question in each case is whether there is a sufficient context in the particular will before the court to negative that* primâ facie *presumption.*

In re Burrow's Trusts, 10 *L. T. Rep.* 184, 12 *W. R. Ch. Dig.* 113, *approved.*

In re Lyne's Trust, *L. R.* 8 *Eq.* 65, 17 *W. R. Ch. Dig.* 186, *disapproved by* Romer *and* Cozens-Hardy, L.JJ.

This was an appeal from a decision of Kekewich, J.

The facts were as follow: By her will, dated the 12th of February, 1869, Ann Coley gave her residuary estate upon trust to pay the income thereof to her son, William Coley, during his life, "and from and after his decease to pay the same into the proper hands of his wife for her life, if she shall continue his widow, and she shall not anticipate, charge, or incumber the same; and from and after her decease or second marriage, whichever shall first happen, I direct the trustees and trustee for the time being hereof to divide the said principal moneys and all other (if any) my residuary estate unto and among such of his children as shall live to attain the age of twenty-one years equally, share and share alike as tenants in common and not as joint tenants, each child to have a vested interest at twenty-one years of age or on death under that age leaving lawful issue him or her surviving. But if my said son shall die without leaving lawful issue surviving who shall become entitled under the preceding trusts, I direct the trustees and trustee for the time being hereof after the decease or second marriage of his said widow to divide the whole of my residuary estate unto and among such of my nephews and nieces as shall be living at my decease, and shall live to attain the age of twenty-one years or shall die under that age leaving lawful issue him or her surviving equally, share and share alike as tenants in common and not as joint tenants." The will also contained a proviso empowering the trustees "after the decease or second marriage of any legatee entitled for life or during widowhood, whichever shall first happen," to apply the interest of the presumptive shares of grandchildren or nephews or nieces of the testatrix towards their maintenance.

The testatrix had one child only, the said William Coley, who married in 1861 his first wife, Mary Ann Coley. The testatrix died on the 16th of August, 1870. Mary Ann Coley survived her and died on the 12th of February, 1899. William Coley on the 12th of October, 1899, married his second wife, the defendant Lizzie Coley. He died on the 28th of August, 1902. There was no issue by either marriage. There were several nephews and nieces of the testatrix living at her decease, all of whom had attained twenty-one.

An originating summons was taken out by the surviving trustee of the will to determine whether the defendant Lizzie Coley was entitled to a life interest in the residuary estate of the testatrix.

Kekewich, J., held that on the true construction of the will Lizzie Coley was not entitled to a life interest.

The defendant Lizzie Coley appealed.

*Younger, K.C.*, and *Nepean*, for the appellant, cited *Boreham* v. *Bignall*, 8 Hare 131; *In re Lyne's Trust*, L. R. 8 Eq. 65, 17 W. R. Ch. Dig. 186; *Longworth* v. *Bellamy*, 40 L. J. Ch. 513, 19 W. R. Ch. Dig. 127; *In re Burrow's Trusts*, 10 L. T. Rep. 184, 12 W. R. Ch. Dig. 113; *Firth* v. *Fielden*, 22 W. R. 622; *In re Drew, Drew* v. *Drew*, 47 W. R. 265, [1899] 1 Ch. 336; *In re Browne's Policy, Browne* v. *Browne, ante*, p. 364, [1903] 1 Ch. 188.

*Micklem, K.C.*, and *Romer*, for a niece of the testatrix, were not called upon to argue.

*R. J. Parker*, for the trustee.

VAUGHAN WILLIAMS, L.J.—In my judgment the decision of Kekewich, J., must be affirmed. We have to decide whether by the words used in this will the testatrix meant to describe the particular person who was the wife of her son both at the date of the will and at the date of the death of the testatrix, or any person who might at any time be standing in that relationship with her son. It has not been disputed here that when a wife is mentioned in a will, and there is a wife living at the date of the will and at the date of the testator's death, *primâ facie*, unless there is something in the context to negative the presumption, these words will be taken to refer to

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

that particular wife. Of course that view may be negatived, and it has been said, I think, by Stirling, J., in *In re Drew*, that there is some conflict of authorities on the point. I doubt, myself, whether there is any material conflict of authorities. You start with that *primâ facie* rule of construction, and if you get any case which negatives that *primâ facie* rule of construction then you have a conflict of authorities, but I think there is really none here. It is said that there is a conflict between *Boreham* v. *Bignall* and *In re Lyne's Trust*, but it is not really a conflict of authorities. These two cases present a strong similarity to each other, but it cannot be said that there is a conflict of authorities because in the case of one will one conclusion was arrived at, and in the case of another will which was very like it the court came to another conclusion. It seems to me that each one of these cases in which the general rule of *primâ facie* presumption was applied must be treated as having been decided on the words of the particular will as modified by the surrounding circumstances. I hope, therefore, that I am right in saying that I am not seeking either to follow or not follow any case decided on a particular will in arriving at the conclusion at which I now come. I start with the *primâ facie* presumption, and I look to see whether there is sufficient in the will to displace it. Counsel for the appellant put their argument in the only possible way in which, it seems to me, it could be effectively put. They said that if this will is looked at as a whole it is seen that the guiding principle of the testatrix in making the will is to provide for those who are dependent on her son. Whether those persons were dependent on him as being the children of one wife or another wife, her object was to provide for those who stood in the family relation to her son—those persons who remained after his death members of his family. There are indications of some such scheme, but I do not think there is sufficient to justify us in refusing to give to the word "wife" here, its *primâ facie* and natural meaning. In these circumstances I agree with Kekewich, J., that "wife" in this case means the wife in existence at the dates of the will and of the death of the testatrix, and that a second wife cannot take anything. The appeal must be dismissed.

ROMER, L.J.—I agree. Personally I do not see any difficulty in this case. It is settled that if there is in a will a gift to the wife of a person and that person has at the time to the knowledge of the testator a wife living, the gift refers to that existing wife and not to any subsequent wife that person may have, unless there is sufficient context to show that the testator is referring to any subsequent wife and that the gift has a different meaning from its *primâ facie* one. There must, however, be sufficient context to show that; and the only question here is whether there is such sufficient context. I think that there is not. The gift here was to the son for life and after his death to the wife of the son during widowhood; and there was at the date of the will a wife of the son who was known to the testatrix, so that *primâ facie* she must be taken as referring to that wife. Then after the death of the son and the wife there is a gift to the children of the son—that is to say, the gift in remainder of the *corpus* is not limited to the children of the existing wife, but extends to the children of the son by any wife. In my opinion there is no sufficient reason for departing from the *primâ facie* meaning of the word "wife" in this will. I cannot see why a testator should not wish to give a life interest to an existing person as the wife of another person and at the same time desire to give the *corpus* after the death of that wife to the children of her husband whether by that wife or by any other wife. It seems to me that the two gifts here are perfectly consistent with one another, and we cannot infer from the gift to the children that the word "wife" in the first gift is to have a different meaning from the *primâ facie* one. I think, therefore, that on the facts this case is clear. I wish to add that I think that the decision in *In re Burrow's Trusts* was right. The circumstances of *In re Lyne's Trust* are not clear, and that case may be distinguishable, but to my mind it was not rightly decided, and that seems to have been the opinion of Sir George Jessel in *Firth* v. *Fielden*. The report of that case is not satisfactory, as it does not set out the judgment, but I gather that *In re Lyne's Trust* was not followed. In my opinion the decision of Kekewich, J., was right and the appeal must be dismissed.

COZENS-HARDY, J.—I agree. The general principle to be applied to the construction of a gift of this kind is well settled, but it is said that there is in this particular will a context which enables us to give a larger meaning to the word "wife" than its *primâ facie* meaning. I agree with what Romer, L.J., has said with regard to *In re Burrow's Trust*, which was, if I may say so, in my opinion, rightly decided by Kindersley, V.C., and as at present advised I do not agree with the decision in *In re Lyne's Trust*.

Solicitors, *C. F. Twist*, for *Hughes & Masser*, Coventry; *Sharpe, Parker, Prichards, Barham, & Lawford*, for *E. C. Newey*, Birmingham.

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From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — March 17.

DOUGHTY v. LOMAGUNDA REEFS (LIMITED). (*a*.)

*Company—Sale of assets to another company—Shares in purchasing company—Voluntary winding up—Dissentient member—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

*Appeal from the decision of* Buckley, J. (*reported* ante, *p.* 29, [1902] 2 *Ch.* 837), *dismissed on technical grounds.*

This was an appeal from a decision of Buckley, J. (reported *ante*, p. 29, [1902] 2 Ch. 837).

The defendant company was a limited company, one of whose objects, as stated in its memorandum of association, was to sell its undertaking.

The defendant company entered into an agreement with the Lomagunda Development Co. to sell to the latter company its undertaking and all its property except £200 in consideration of shares in the purchasing company and of an indemnity to itself and its liquidators against certain obligations. The £200 was to be kept to defray the costs of the agreement and of the winding up of the company, and the balance was to be handed over to the purchasing company.

This agreement was approved at an extraordinary general meeting of the company, and at the same meeting was passed a resolution (subsequently duly confirmed) to wind up the company voluntarily.

The plaintiff, who was a shareholder in the company, objected to the sale and claimed that it was *ultra vires* unless his interest was purchased under section 161 of the Companies Act, 1862.

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Buckley, J., held that the sale was a sale by the defendant company under its memorandum of association and not a sale in disguise by its liquidator. The sale was therefore valid and the action must be dismissed.

The plaintiff appealed.

*Hart*, for the appellant.

In the course of the argument their lordships intimated that they could not decide that the agreement was *ultra vires* in the absence of the purchasing company.

The plaintiff declined to incur the expense of bringing the purchasing company before the court by amendment.

*Astbury, K.C.*, and *Holmes*, for the respondent, were not called on to argue.

THE COURT (COLLINS, M.R., and ROMER and COZENS-HARDY, L.JJ.) dismissed the appeal, without expressing any opinion as to the rights of the parties, on the ground that the relief claimed by the plaintiff could not be granted in the absence of the purchasing company, as to grant such relief would involve a declaration that the agreement for sale was void.

Solicitors, *Michael Abrahams, Sons, & Co.; Ingle, Holmes, & Sons.*

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — March 6.

THE GAS LIGHT AND COKE CO. *v.* THE CANNON BREWERY CO. (*a.*)

*Gas—Arrears of gas rent due by outgoing tenant—Purchase by incoming tenant of outgoing tenant's business and interest in premises—Right to recover from incoming tenant—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 16—*Metropolis Gas Act*, 1860 (23 & 24 *Vict. c.* 125), *s.* 39—*Gas Light and Coke Co's Act*, 1872 (35 & 36 *Vict. c. xxiii.*), *s.* 18.

*By section* 18 *of the Gas Light and Coke Co.'s Act*, 1872, *it is provided that "in case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay such arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant and shall have paid to the owner, lessee, or mortgagee in possession or to the outgoing tenant of such premises a consideration for so doing; but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant, as required by this Act, on being required by him to do so."*

*Held, that, by virtue of the above section, arrears of rent left due for gas supplied to a tenant of premises who has sold the lease thereof and the goodwill of the business he carried thereon to an incoming tenant, who continued the trade or business of the outgoing tenant on the said premises, may be recovered by action by the gas company from the incoming tenant.*

*Decision in* Gas Light and Coke Co. *v.* Mead (45 *L. J. M. C.* 71, 24 *W. R. Dig.* 111) *overruled.*

This was an appeal by the plaintiffs from the judgment of the Divisional Court (Lord Alverstone, L.C.J., and Darling and Channell, JJ.), confirming the decision of the learned judge of the Clerkenwell County Court.

The action was for the sum of £10 1s. 3d. in respect of gas supplied by the plaintiffs, and the question raised was whether, having regard to section 18 of the Gas Light and Coke Co.'s Act of 1872, the plaintiff company had a right to sue a successor in premises for arrears of gas rent left unpaid by his predecessor in cases falling within the exceptions contained in that section, or whether their only remedy was to cut off the supply of gas under section 16 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15).

It appeared that up to the 18th of June, 1901, one J. R. Lowles had been the lessee and occupier of a house in the Harrow-road, where he carried on business as a grocer and retail wine and spirit and beer merchant. On that date Lowles sold his interest in the premises and the goodwill of his business to the defendants, and gave up possession, leaving £10 1s. 3d. due for arrears of gas supplied to him by the plaintiffs. The defendants entered into possession and contined to carry on the business on the premises. The gas company thereupon sued the defendants in respect of these arrears, and the learned county court judge gave judgment for the defendants on the authority of *The Gas Light and Coke Co.* v. *Mead*, 45 L. J. M. C. 71, 24 W. R. Dig. 111, which judgment the Divisional Court affirmed.

The plaintiff now appealed.

Section 18 of the Gas Light and Coke Co.'s Act, 1842 (35 & 36 Vict. c. xxiii.), provides that: "In case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay such arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant and shall have paid to the owner, lessee, or mortgagee in possession or to the outgoing tenant of such premises a consideration for so doing; but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act on being required by him to do so."

Section 16 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), provides that: "If any person supplied with gas by virtue of this or the special Act neglect to pay the rent due for the same to the undertakers, the undertakers may stop the gas from entering the premises of such person by cutting off the service pipe . . . and recover the rent due from such person."

Section 39 of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), provides that: "In case any consumer leave the premises where gas was supplied to him without paying to the gas company the rate or meter rent due from him, the gas company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears; but the gas company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act on being required by him so to do."

*Danckwerts, K.C.* (*R. E. Vaughan Williams* with him), for the appellants.—The decision in the case of *The Gas Light and Coke Co* v. *Mead* was wrong. The gas company are not, in such a case as this, entitled to refuse to supply gas to an occupier of premises on account of the previous occupier having left the premises while owing arrears for gas supplied to him whilst

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

he was in occupation. The gas company are only empowered by section 16 of the Act of 1847 to cut off the supply of gas to the premises while the person in default is in occupation of the premises. The power to cut off or refuse supply to the premises does not extend to premises after the person owing the arrears has ceased to occupy the premises. That being so, the gas company would have no remedy in this case unless they are intended to have power under section 18 of their Act of 1872 of recovering by action arrears of gas in cases included in the exceptions to that section. The only reasonable construction to place on the word "require" in that section is that the company have a right to recover the arrears from the incoming tenant: see *Paterson* v. *Gas Light and Coke Co.*, 45 W. R. 39, [1896] 2 Ch. 476. Rigby, L.J., in referring in his judgment at p. 42 to the words of section 18 beginning "shall not require" says: "I gather from that, that they," the gas company, "are to have a right to require payment from the incoming tenant in the cases that are provided for by the words of that section; and as correlative to that right they are to have the duty of supplying the incoming tenant as required by this Act on being requested by him to do so."

*A. H. Spokes*, for the respondents.—Section 18 does not make use of the word "recover"; it says "require." The true construction of this section is not that in cases coming within the exceptions therein the gas company are given any right to recover from the incoming tenant the arrears incurred by the outgoing tenant, but merely that in the two excepted cases they may make the payment of such arrears by the incoming tenant a condition precedent to the supply of gas to him. It is not a reasonable construction of the section to say that it imposes a personal liability on the incoming tenant in respect of the debt contracted by the former occupier. *The Gas Light and Coke Co.* v. *Mead* is an authority in support of this contention, and the decision in that case ought not lightly to be overruled.

*Danckwerts, K.C.*, replied.

VAUGHAN WILLIAMS, L.J.—The question we have to decide in this case is whether or not, having regard to the terms of section 18 of the Gas Light and Coke Co.'s Act, 1872, that company have a right to sue a successor on premises for arrears left unpaid by his predecessor in cases falling within the exceptions introduced by the word "unless" in section 18. [His lordship here read section 18.] It has been argued on behalf of the respondents that the section uses, not the word "recover," but "require," and that with regard to the cases falling within the exceptions the right of the company is not to recover these arrears by action under sections 70 and 71 of their Act of 1868, but merely to insist upon the payment of the arrears as a condition precedent to any future supply. In support of this argument our attention was called to the case of the *Gas Light and Coke Co.* v. *Mead*, and I must say that that decision is a direct authority in favour of that argument. That case was decided by Blackburn, J., and Lush, J. We therefore, in dealing with the argument before us, have to consider, before we can reject that argument, whether or not the decision in the *Gas Light and Coke Co.* v. *Mead* was right.

Now, in my judgment, that decision was not right. It is said that that decision, given in 1876, ought not to be lightly overruled. I quite agree there, but at the same time, if, when we come to look at the decision, we arrive at the conclusion that it is wrong, our duty here is to give effect to that conclusion. Now, when we look at the judgments in that case we must, in order really to understand them, read the observations made by the learned judges in the course of the argument. Blackburn, J., there observes, at p. 73, as follows: "Under 10 Vict. c. 15 there was no compulsory enactment for the supply of gas, but a permissive power. Then it was provided that if the consumer did not pay his supply might be cut off. Then under 23 & 24 Vict. c. 125, ss. 14, 15, and 16, supply was compulsory, but you must make a contract; and section 39, upon that state of things, was inserted in favour of the incoming tenant, providing that his supply should not be cut off for his predecessor's arrears, unless he had agreed to pay them." Now it seems to me that when we look at the judgment of Blackburn, J., in the light of that observation, it is perfectly plain that he assumed that section 16 of the Gasworks Clauses Act, 1847, did give the gas company a right to cut off the supply of the successor for his predecessor's arrears; but if we look at that section we shall see that it does nothing of the kind. [His lordship here read section 16 of the Act of 1847.] That section does not give the power of cutting of the gas from the premises of an occupier by reason of the default of his predecessor. Then we come to the Metropolis Gas Act of 1860, section 39 of which deals with the case of an outgoing and an incoming tenant. [His lordship then read this section.] Therefore, it seems to me that the result of section 16 of the Act of 1847 and section 39 of the Act of 1860 combined, is that the gas company are in all cases bound to supply the occupier of premises notwithstanding that arrears are due from his predessor in respect of gas supplied to him, unless there be collusion between the outgoing and the incoming tenant. I have gone thus at length into these sections to enable me to deal with the argument put forth that the intention of section 18 of the company's Act of 1872, by using the word "require," was to enable the gas company to impose the payment by the incoming tenant of an outgoing tenant's arrears as a condition precedent to supplying him with gas; but the real truth of the matter is that the gas company has no such power. The only case in which the gas company can refuse by reason of the non-payment of these arrears to supply the new occupier with gas, is where he is acting in collusion with his predecessor, by which I understand is meant a case where he is acting in concert with his predecessor in doing something to prevent the gas company recovering. It has been suggested in the course of the argument that there might be a possible case of that kind where the succession is not a real succession, but the outgoing tenant continues to have an interest of some sort or kind in the premises notwithstanding that he has left them.

Under such circumstances it seems to me plain that the gas company would have really no effective remedy. It is plain that they could not use as a lever to compel payment of the arrears a refusal to supply the occupier with gas, because the words at the end of section 18 compel that this shall be done and that the supply shall remain. Under these circumstances some meaning must be given to the word "require" in section 18, and it seems to me that the only reasonable one is that which is put upon it by Rigby, L.J., in his observations in the course of his judgment in the case of *Paterson* v. *The Gas Light and Coke Co.*

I agree with the learned judges in the court below in the present case that those observations of Rigby, L.J., cannot be treated as a judgment on the point; it seems to me that they are *obiter*. The learned judge puts it in the clearest way that his view is that in the cases included in the exceptions in section 18, the gas company is to have the right of suing or pro-

ceeding against the then occupier for the arrears of his predecessor. It does not seem to me, if one takes into consideration the reason for it, that there is in such a case any hardship upon the successor. It would be a very much more harsh procedure if the gas company were to be entitled to refuse to supply the occupier with gas, or were to be entitled, in a case where the supply had begun, to cut it off on account of the debt of the predecessor; and it seems to me that at the same time the Act of Parliament made the supply of gas compulsory, and only relieved the gas company from the supply in the one case of collusion between the outgoing and the incoming tenant, it would have been very unreasonable to leave the gas company without any remedy at all. It seems to me that there is no real remedy left to the gas company unless one reads the word "require" as covering the word "recover," and the having personal recourse to the then occupier for the arrears due by his predecessor. Under these circumstances I think we ought not to follow the decision in the case of *The Gas Light and Coke Co.* v. *Mead.*

It is now only necessary to make one observation as to the power of recovery given to the gas company by their Act of 1868 (31 & 32 Vict. c. cvi.). Section 71 reads as follows: "Whenever any person fails to pay any gas rent or meter rent or sum due and payable by him to the company, the company may recover the same in any court of competent jurisdiction for the recovery of debts of like amount, and the remedies of the company under this section shall be in addition to their other remedies for the recovery of the rent or sum." It seems to me that under that section, having regard also to section 18 of the Act of 1872, the Gas Light and Coke Co. have in this case the right to proceed against the successor, which is the Cannon Brewery Co., for the debt of the predecessor. The Cannon Brewery Co. come within the exceptions mentioned in section 18 of the Act of 1872, for they in fact have bought the goodwill and interest of the outgoing tenant in premises. For these reasons I think this appeal must be allowed.

STIRLING, L.J.—This case, is certainly not free from difficulty, whether we regard the simple language of the Act or whether we look at the cases in which section 18 has been considered by various courts. It is no doubt an extraordinary thing and an unusual provision on the part of the Legislature that a person who has not incurred a debt shall be held liable to pay it; but nevertheless there may be cases in which justice requires that that should be done. What we have to ascertain is whether the language with which we have to deal is sufficient to enable us to hold that that intention is to be attributed to the Legislature in the present case. Section 18 provides shortly that where an outgoing tenant has left his premises with arrears due to the gas company in respect of the supply of gas, the company is not to require from the next tenant payment of the arrears except in two circumstances, under one of which the case which we have now to consider falls. Then it goes on to provide that the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing tenant and the incoming tenant, supply gas to the incoming tenant on being required by him to do so.

The question that we have therefore to consider is whether that section imposes an obligation on the incoming tenant to pay the arrears in the two excepted cases, or whether the payment of those arrears only forms a condition precedent to the supply of gas to the incoming tenant. The result of the argument on behalf of the respondents is this, that unless the company can insist on not supplying the gas until the arrears have been paid they have got no other remedy; that is to say, that even if the incoming tenant requires a supply and the company proceed to supply him, he is not liable for the arrears, and the only remedy the company has is to refuse to supply him and so put pressure upon him to pay the arrears. Now I do not think that that is the fair consequence of the language used, and in support of my opinion I have certainly, as it seems to me, the opinion in the first place of Lush, J., in the case of *The Gas Light and Coke Co.* v. *Mead*, because he there says: "If we were only to look at the construction of the company's own private Acts, without reference to previous legislation upon the subject in the public Acts which are incorporated with them, the inference would be an obvious one that a liability existed in this case which the magistrate could enforce." So that his opinion was that the construction which he gave to the Act was only to be derived from the consideration of the prior public legislation on the subject of gas supplied. In the next place there is the opinion which Rigby, L.J., has expressed in his considered judgment in the case of *Paterson* v. *The Gas Light and Coke Co.*, and this is to the same effect. So that we have, as it seems to me, the opinion of two learned judges on the natural meaning of the language which is found in this section.

What is now contended is, and it was so held in the case of *The Gas Light and Coke Co.* v. *Mead*, that the history of the previous legislation shows that the right was only to abstain from supplying. Now, in the first place, there seems to me great difficulty in so holding upon the language of the section in itself, because the provision is that "the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act on being required by him to do so." That is to say, in the absence of collusion gas shall be supplied to the incoming tenant in accordance with the Act upon his requiring them so to do.

Now, when we come to examine the grounds of the decision in *Mead's case*, it appears to me that they are rested on this, that there existed under the prior Acts a right on the part of the company to cut off the supply. Now the only right to cut off the supply which existed under the prior legislation was that conferred by section 16 of the Gasworks Clauses Act, 1847. That appears to me to be limited to the case where the premises on which the gas is supplied are the premises of the person who had been supplied with the gas, and is inapplicable to such a case as the present, where the supply has been to one person, and the title of the occupier against whom the rate is sought to be enforced is an independent title, and the premises have ceased to be the property of the person who had made default in paying for the gas supplied. I think that the reasoning of those learned judges was less satisfactory than that of Rigby, L.J., in the case of *Paterson* v. *The Gas Light and Coke Co.*

For these reasons I think that this appeal ought to be allowed.

MATHEW, L.J.—In this case the question submitted to us from the Divisional Court is whether or not the decision in the case of *The Gas Light and Coke Co.* v. *Mead* can be upheld, and I am of opinion, when the ground of that decision is looked into, that the case is not one which ought to be treated as a binding authority, because the learned judges appear not to have adverted to the fact that under the enactments of the statute with which they were dealing the company was prohibited from cutting off the supply of gas. [His lordship here read section 18.] Now what is the

meaning of the word "require" in the case where there has been an agreement between the outgoing and the incoming tenant that the latter shall pay the arrears? Surely it is quite clear the word "require" there means "insist on their right to be paid"; that on the incoming tenant failing to pay he shall be in the same position as the outgoing tenant, and the company shall be entitled to insist on the arrears being paid by the incoming tenant. This section further contains the additional exception—not found in section 39 of the Act of 1860—namely, "unless the incoming tenant shall continue the trade or business of the outgoing tenant and shall have paid to the owner, lessee, or mortgagee in possession or to the outgoing tenant of such premises a consideration for so doing." The result of the meaning of the word "require" in regard to this exception is the same as in regard to the other. Then the section contains a proviso that, notwithstanding such arrears, the company shall, in the absence of collusion between the outgoing and incoming tenant, supply the incoming tenant with gas. The section therefore recognizes the right of the incoming tenant to be supplied with gas. That appears to me to be a clear interpretation of the section. We have in addition to the valuable judgment of Rigby, L.J., in *Paterson* v. *The Gas Light and Coke Co.*, the statement of Lush, J., in the case of *The Gas Light and Coke Co.* v. *Mead*, as to the way in which he interpreted this section by considering the history of the earlier legislation, and the application of the earlier legislation does not appear to me to have been as clear as it might have been. I think, therefore, this appeal ought to be allowed.

*Appeal allowed with costs.*

Solicitors for appellants, *Bedford, Monier-Williams, & Robinson.*

Solicitors for the respondents, *Boulton, Son, & Sandeman.*

## High Court of Justice.

Chan. Div. } Jan. 24.
Kekewich, J. }

*In re* T —— (DECEASED). (*a.*)

*Trustee — Trust estate — Unauthorized investments — Jurisdiction of the court to allow trustees to hold unauthorized investments—Practice.*

*It is not the practice of the court to allow trustees to take an investment, which is not authorized by the trust instrument, upon the ground only that it is beneficial to the beneficiaries. But the court will in some cases, justified by practical necessity, in the exercise of its extraordinary jurisdiction, go beyond the express terms of the instrument creating the trust, with regard to investment.*

This was a summons in which a tenant for life under certain wills comprising considerable personal estate applied to the court to sanction a change of investment not authorized by the instrument of trust upon the ground that the proposed change would be beneficial to the beneficiaries. The facts sufficiently appear from the judgment.

*Warrington, K.C.*, and *Northcote*, for the applicant.

*Hornell*, for the remaindermen.

*Brabant*, for the trustees.

(*a.*) Reported by C. B. CAMM, Esq., Barrister-at-Law.

The case was argued before Kekewich, J., in chambers, but his lordship delivered the following judgment in court.

KEKEWICH, J.—The applicant is tenant for life under certain wills of a large amount of personal estate. Subject to that life interest the property goes to the applicant's children other than her eldest son, she having a power of appointment in the usual form. That power has been extensively exercised, and the appointees have settled their shares so that their children born or unborn have become interested. In order to raise money for purposes which need not be specified the applicant has insured her life for large amounts in first-class offices and has mortgaged her life estate to secure interest and premiums. It is proposed that the trustees of the wills should take over this security. The policies afford an ample margin as regards capital, and the income of the trust estate is largely in excess of the interest and premiums, so that the transaction may be regarded as perfectly safe. The advantage consists in this. In order to take over the security the trustees should realize trust investments which may be taken to yield 3 per cent. per annum, but the mortgage interest is calculated on a rate of 3½ per cent. per annum, and the amount of the mortgage debt is such that the difference of ½ per cent. would make a large addition to the applicant's income. That this would be a boon to her personally goes without saying. But the application is in nowise based on her personal benefit. She has been in the habit of making an allowance to her husband, who is without means, and also to her eldest son, who, as already mentioned, is not interested in the trust estate. She wishes to make some provision for him, because, unfortunately, the reason for his exclusion from interest in the trust estate has ceased, and he also is without means. The wish to make such provision is not the only motive for the application, but it is one of considerable weight. Those other reasons may thus be summarized. All the children (excluding, as henceforward is done, the eldest son), or perhaps all but one daughter, are more or less dependent on the mother, and that one daughter receives an annuity under one of the covenants now to be mentioned. The mother has by settlements made on the marriages of the children covenanted to make annual payments, and she has been in the habit of making voluntary allowances to those entitled under the covenants and the other children. These covenanted payments and voluntary allowances are generous, and perhaps in excess of prudence, having regard to the mortgage debt, or rather to the interest thereon and the premiums, which together form a large deduction from the lady's income, but they are not out of proportion to the ultimate beneficial interests of the children in the settled property. She finds it difficult to maintain these payments and allowances, and also to keep up the house in which she resides, and which she naturally wishes to keep up as a family home. She foresees increasing demands on her purse, and she is at loss to know how to meet them without an increase of income. The proposed transaction would give that increase to so substantial an extent as to enable her to do what she desires, and it is not open to doubt that this would be for the benefit of the children, the position of each of whom is stated in the affidavits.

It being impossible to suggest that the proposed investment is authorized by the instruments of trust, the question is whether, assuming it to be safe and beneficial, the court can or ought to sanction it. Generally speaking the function and duty of the court is to administer the trusts which are placed under its control, and not to exceed the limits of investment or application fixed, on their true construc-

tion, by the instruments creating the trusts. There is authority, to be presently mentioned, for saying that there are exceptions to this general rule, but it will be convenient first to state what, according to my experience, has been the practice of the court. The statement must necessarily be according to my experience, because applications of this character are almost universally disposed of in chambers, and although there is, of course, an interchange of opinion between the judges on such subjects, the detailed facts and circumstances of each particular case can be thoroughly known only to the judge to whom the application is made, and he alone is responsible for the ultimate order. It may be assumed that judges have differed in their views of their powers and duties and in the exercise of them, but I do not believe that there has been any substantial variation from the practice which has prevailed in my own chambers. The most common application for going beyond the administration of a trust according to the instrument creating it, is one for advances for the benefit of an infant out of capital. I have never hesitated to do this, where satisfied that the advancement is certainly beneficial, and where the infant is contingently interested, as, for instance, entitled only on attaining majority, I have included in the advance the sum necessary to effect a policy of insurance to cover the contingency. This is an illustration of the maxim that necessity has no law. Another frequent application has been of this character. A testator engaged in trade has failed to make provision for its continuance, and perhaps has even directed it to be realized, but realization, except at break-up prices, is found to be impossible, whereas the business yields an income for the maintenance of the family, which would otherwise be left without adequate support. It is proposed to carry on the business, and perhaps even to apply some part of the estate in purchase of stock-in-trade. Applications to this end require exceeding care, which must not cease with the first order; but the exercise of such extraordinary jurisdiction has the sanction of established practice and is generally justified by beneficial results. Almost equally frequent of late years have been applications for the sale to a joint stock company of the business owned by a testator, or in which he had a share, where no power for that purpose can be found in the will. The inherent difficulty here lies in the circumstance that a newly-formed company cannot pay more than a small proportion of the purchase-money in cash, but can only offer shares or debentures in which the trustees of the will are seldom authorized to invest. Here again it behoves the judge to be cautious down to the most minute details, but if he is satisfied that for the want of working capital or other reason the business cannot be carried on as perhaps the testator intended it should be, and that no sale for cash is possible, so that the proposed scheme affords the only practicable means of extricating the family from their embarrassments, there is no sufficient objection to its sanction by the court. But I have uniformly declined to allow the trustees to hold the shares and debentures as proper investments of the trust estate. Immediate realization is generally impossible and sales can probably be effected to reasonable advantage only in small parcels, judiciously put on the market. Thus far I have considered retention, sometimes extended by successive orders and as regards some of the shares and debentures over a considerable period, which has occasionally been fixed with reference to the majority of a son engaged in the business likely to accept them in satisfaction of his portion, but realization as the ultimate object to be distinctly kept in view has always been insisted on. Analogous to this class of cases is that where what is called reconstruction of a company is contemplated. This seldom occurs unless the original company has proved a failure in some way or to some extent, and the object is by the introduction of new capital or otherwise to place the concern on a sound and profitable footing. This may be, and often is, a matter of exceeding urgency. In granting applications for leave to concur in the reconstruction and to accept shares or debentures in the new company, the question of retaining them has always been dealt with on the same lines, and realization at the first convenient opportunity has ever been directed and enforced.

One other illustration may perhaps be usefully mentioned. A testator possessed of a mortgage of freehold estate settles the mortgage debt with other property. Possibly he contemplates that the mortgage may be paid off and provides for the investment of the money received, together with his other property, in different modes, not including the purchase of real estate. Circumstances arise which render it necessary for the trustees of the will to enforce their security, and, the mortgage debt not being forthcoming, and a sale being practically impossible, they apply to the court for leave to commence an action of foreclosure. The court sanctions it if satisfied that this is the best thing to do; but, an order of foreclosure absolute having been obtained, the court does not sanction the trustees to continue the holding the freehold estate now vested in them as part of the property settled by the testator's will. The court insists on sale, not perhaps immediately or at enormous sacrifice, but as soon as possible, because to do otherwise would be (using the language of Buckley, J., in a case to be presently mentioned) to authorize trustees to take, on the ground that it is a beneficial investment, that which the testator has not authorized.

The above are illustrations of the exercise by the court, justified by practical necessity, of jurisdiction going beyond the mere administration of trusts according to the terms of the instruments creating them. Others might be given, the applications, or, rather, the circumstances inducing them, exhibiting large varieties, but those mentioned suffice to explain the scope of the practice of the court.

There might be added illustrations of the refusal of the court to exercise this extraordinary jurisdiction, but there is no occasion. All the cases of refusal may be grouped under one of two classes. Either, notwithstanding the advantage (actual and prospective) of what is proposed to be done, there is no urgency for it, and the existing state of things may, without great mischief, be allowed to remain; or the terms on which the advantage can be gained are such that the court would, by accepting them, create a new trust in lieu of that which it is administering.

Turning now to the authorities, about *The West of England and South Wales District Bank* v. *Murch*, 31 W. R. 467, 23 Ch. D. 138, decided by Fry, J., little need be said. The judgment of the learned judge, so far as it concerns us, is entirely based on an executor's power to compromise, which is not here in question. *In re Crawshay*, 33 SOLICITORS' JOURNAL, 126, 60 L. T. Rep. 357, decided by North, J., may also be treated briefly. That was a proposed sale of the business of a testator to a joint stock company, one of the terms being the allocation of shares and debentures of that company among the persons interested under the will in the properties proposed to be sold. This scheme is obviously and entirely different from one for sale of a business in consideration of shares and debentures to be issued to the trustees for retention for a limited time and ultimate realization, and it was in fact an application to the court to sanction a compulsory taking by beneficiaries of shares and debentures in lieu of their proper proportions of the estate. It was a monstrous pro-

position, and would not, I believe, have received the shadow of sanction from any judge. North, J., refused it without hesitation. This is his language: "I should not be administering the trusts created by the testator if I consented to this scheme; I should be altering his trusts and substituting something quite outside the will." *In re Morrison*, 49 W. R. 441, [1901] 1 Ch. 701, was a case of different character. There it was proposed to sell the business of a testator to a joint stock company in consideration of shares and debenture stock, which it was intended the trustees should hold as long as they should think fit, as if the same had formed part of the estate of the testator. Buckley, J., refused the application saying that, in his opinion, "there does not reside in this court any power to authorize trustees to take, on the ground that it is a beneficial investment, that which the testator has not authorized." I entirely agree with him, but note that the gist of the decision lies in the words "on the ground that it is beneficial," and to omit to give due weight to this is to misinterpret it. The alternative of holding the shares and debenture stock for a limited period with a view to realization was not suggested to or by the court, and it may be that such alternative would have been unacceptable to the parties concerned or practicably impossible. The case is no authority for saying that the alternative order could not have been properly made. It is not for me to say that in the subsequent case, now to be noticed, Cozens-Hardy, J., ought to have made an order in the alternative form, but at any rate, if I may venture to say so, he took a prudent course in leaving the matter to be dealt with by the Court of Appeal. This is the case of *In re New's Settlement*, 50 W. R. 17, [1901] 2 Ch. 534, where there were applications in no less than three estates. The trustees of each estate held shares in the Wollaton Colliery Co. (Limited), the reconstruction of which, for urgent and good reasons, was proposed. One set of trustees had power to invest in shares and debentures, but the other two had not. The Court of Appeal held that the trustees of all three might have liberty to concur in the reconstruction, but that those trustees who had no power to invest in shares or debentures of such a company as was intended to be formed must undertake to apply to the court for leave to further retain the shares and debentures received under the scheme of reconstruction if they desired to retain them beyond one year from the time when the reconstruction was carried out. The judgment of the Court of Appeal was delivered by Romer, L.J. He required that the then existing evidence should be supplemented so as to make clear the points urged in the course of argument as to the importance of further capital being provided by the proposed reconstruction of the company, the issue of debentures by the new company and the difficulties which would arise if the trustees were obliged to stand aloof and take no part in any reconstruction. This no doubt was done and such evidence must be taken to be essential to the decision. So far as the last point to which evidence was to be directed is concerned, there is no occasion to dwell on it, because it points directly and solely to the power of compromise which is recognized in the judgment, and, as already stated, there is nothing of this kind here. The foundation of the exercise of jurisdiction by the court is to be found in an interlocutory observation by Romer, L.J., speaking, no doubt, on behalf of the other Lords Justices as well as himself. He says: "The principle seems to be this: that the court may on an emergency do something not authorized by the trust. It has no general power to interfere with or disregard the trust, but there are cases where the court has gone beyond the express provisions of the trust instrument—cases of emergency, cases not foreseen or provided for by the author of the trust where the circumstances require that something should be done. There is a passage in the considered judgment ([1901, 2 Ch., at p. 545) which substantially expresses the same view in different language, and both passages must be taken to be controlled by the caution respecting the exercise by the court of extraordinary jurisdiction. Observe that the Lord Justice adds, "It need scarcely be said that the court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate."

But the really important observation with reference to the case in hand is that the Court of Appeal, while sanctioning the concurrence of the trustees in the scheme of reconstruction, did not sanction the retention of shares or debentures by the trustees who had no power of making an investment of that character. They made the very order which, as already explained, it has been the practice of the court to make, at least in my chambers, in cases of this character. It was argued before me that the decision in *In re New's Settlement* introduced a novel principle or rule, and that in many cases where the court has refused to sanction proposals going outside the administration of the trusts according to the terms of the instrument creating them, the result would have been different if the judge had had the decision in *In re New's Settlement* before him. From that I entirely dissent. The decision is valuable and useful as giving the authority of the Court of Appeal to what otherwise depended on the practice of the court and to some extent the views of particular judges, but it does not purport to enlarge the jurisdiction of the court or justify the court sanctioning any scheme which might not have been sanctioned without it. In this particular case I have nothing more than a proposal to sanction a change of investment, not authorized by the instrument of trust, on the ground that it will be to the advantage of the beneficiaries. From what I have mentioned at the outset of the judgment, it might be urged that this ground is somewhat too broadly stated, but even assuming that such advantage is proved, I have just that application which Buckley, J., in *In re Morrison*, distinctly said could not be granted. Does the judgment of the Court of Appeal afford any reason for departing from what was said by that learned judge? I can find none.

There was a new point made before me, it was mooted before, but I am not aware of any judicial *dictum* on it, and it is not noticed in the arguments or in the judgments in any of the cases cited. The point is that the jurisdiction of the court has by implication been enlarged by section 3 of the Judicial Trustee Act, 1896. This enactment enables the court to relieve a trustee either wholly or partially from liability for a breach of trust. This can only be done where the court is convinced that the trustee has acted honestly and reasonably, and ought fairly to have been excused for the breach of trust and for omitting to obtain the direction of the court in the matter in which he committed such breach. This last provision postulates a duty in the trustee to obtain the direction of the court, and negligence in the omission to do it, which negligence may nevertheless be excused. It is difficult to see how a trustee could be excused for such negligence if the court, when in possession of all the facts, were convinced that he could not have been with any propriety or on any terms directed to commit the breach of trust which he in fact committed. That, however, need not be further discussed. The point made is that inasmuch as the court now has authority to excuse a trustee from liability for a breach of trust committed, or, in other

words, to bind the beneficiaries to accept what was done as if it were no breach of trust at all, therefore the court must have power to exercise that authority by anticipation, and to excuse a trustee from liability for a breach of trust contemplated. I am not convinced. The statutory provision, though, if I may venture to say so, not a good example of clear and careful legislation, has undoubtedly proved useful; but to extend it, as proposed, by implication, and to say that the court can sanction any dealing with trust property, however discordant from the trusts declared, provided only it be honest and reasonable, would be a subversion of principle. If the Legislature intends to confer that power on the court it must do so in express and unambiguous terms.

There will be no order on the summons. I doubt whether the action is so constituted as to justify my giving any direction respecting the payment of costs out of the estate. The trustees are, of course, entitled to take theirs as costs, charges, and expenses properly incurred, but even as regards them I do not as at present advised see my way to giving any directions.

Solicitor, *J. Bertram.*

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Chan. Div.
Farwell, J. } May 8, 9.

MULLIS *v.* HUBBARD. (*a.*)

*Local government—Buildings—Erection of premises in advance of building line—Plans submitted to urban authority—Approval of plans—Written consent—Action by private individual—Public Health (Buildings in Streets) Act,* 1888 (51 & 52 *Vict. c.* 52), *s.* 3.

*By the Public Health (Buildings in Streets) Act,* 1888, *s.* 3, *it is not lawful, without the written consent of the urban authority, to erect or bring forward any house or building in any street beyond the front main wall of the house or building on either side thereof, and any person offending is liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority. The defendant prepared plans which showed that the buildings he intended to erect would be brought forward beyond the front main line, and these plans were produced before, and passed by, the urban authority. The plaintiff, who was the owner of the adjoining premises, alleged special damage, and claimed a mandatory injunction.*

*Held* (1) *that the plaintiff as a private individual had no right of action under the above section; and* (2) *that the resolution of the urban authority approving the plans constituted "written consent" within the meaning of the said section.*

This was an action under section 3 of the Public Health (Buildings in Streets) Act, 1888, by which buildings are not allowed to be brought forward beyond the front main line of the street without the consent of the urban authority.

The plaintiff and defendant were burgesses of the town of Loughborough.

On the 12th of November, 1900, plans of a building were submitted to the corporation of Loughborough on behalf of the defendant.

On the 20th of November the borough surveyor certified that the plans were in accordance with the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the bye-laws of the corporation, and on the 26th of November they were approved by a committee of the corporation subject to an amendment. At the same time the chairman of the committee stamped the plans with the words "Approved subject to amendment." This amendment was carried out.

On the 3rd of December, 1900, the corporation, at a general meeting, approved of the proceedings of the committee, adopted the resolutions passed by it, and the minutes of this meeting were subsequently signed.

The defendant completed his building in accordance with the amended plans early in 1901. It was admitted that the building was brought forward beyond the front main wall of the adjoining premises of the plaintiff.

Thereupon the plaintiff applied to the corporation, but they declined to move in the matter. The plaintiff now brought this action alleging special damage and claiming a mandatory injunction and costs.

*Upjohn, K.C.,* and *McCurdy,* for plaintiff.—The written consent of the corporation was not obtained by the defendant. Moreover, the defendant had not only erected a building beyond the building line, which was an indictable offence at common law, but he had also continued the offence after notice, for which a statutory penalty was provided.

They referred to *Rumball* v. *Schmidt,* 30 W. R. 949, 8 Q. B. D. 603; and *Mayor of Blackpool* v. *Johnson,* [1902] 1 K. B. 646, 50 W. R. Dig. 97.

*Butcher, K.C.,* and *Chubb,* for defendant.

FARWELL, J.—The plaintiff and defendant in this action describe themselves as burgesses of Loughborough. The plaintiff asks for a declaration that the erection of a stable and coachhouse or building by the defendant is contrary to and in violation of the Public Health (Buildings in Streets) Act, 1888, and further asks for a mandatory injunction to compel the defendant to pull it down, and damages and costs. The stable in question was built as long ago as the beginning of 1901 and the writ was not issued until the 23rd of December, 1902. In applications under any ordinary equitable or common law right, it is difficult to see how the plaintiff after such a lapse of time would have any chance of getting a mandatory injunction such as he asks for. This is the first time, as far as I am aware, that any private individual has attempted to assert a private individual right arising out of this clause or any similar clause in the Public Health Act. The question turns on whether the words in section 3 of the Act constitute a general prohibitory clause creating a new offence for which an indictment will lie, or whether they constitute a prohibitory clause specifying only a particular remedy in each case as stated by Lord Mansfield in *Rex* v. *Wright,* 1 Burr. 543. The latter view has hitherto been accepted as the law. Taking now the section of the Act of Parliament without referring to the authorities, the case is reasonably clear. Section 156 of the Public Health Act, 1875, commences by saying "It shall not be lawful in any urban district without the written consent of the urban authority to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice on this behalf from the urban authority." Apart from the decisions on the section I should have thought that it was abundantly clear that the offence was the building or erecting or bringing forward of any house or building in any street, without the

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

written consent of the urban authority. That is first of all prohibited, and then "any person offending against this enactment shall be liable to a penalty." This means that he is liable to a penalty for doing the particular act and the only act which is prohibited.

To my mind this section is absolutely clear, and I do not think that there is anything in the two cases which have been referred to that is not consistent with this view. It is impossible, I think, to adopt the plaintiff's construction. It is absurd to say that the Act of Parliament has in one part of a section created an offence without a penalty, and in another part of the same section created a penalty without an offence. Some ordinary rules of draughtmanship are to be assumed to have been followed by the draughtsman. If the two parts are read together, as I understand Grove, J., to say, it seems to me plain that there is an offence to which a penalty is fixed, and it therefore comes within the rule laid down by Lord Mansfield. The first case which is said to be inconsistent with this view is *Rumball* v. *Schmidt*. The decision in that case was on the old section 156, but I do not think it really makes any difference. The learned judges there arrived at the conclusion that you can run the two portions together so as to make a kind of compound offence, of the erection and the continuing it, after written notice. The case in the Divisional Court (*Mayor, &c., of Blackpool* v. *Johnson*) also seems to me to be inconsistent with the plaintiff's view. I have heard arguments this morning as to the general intent and meaning of the Public Health Act, and it is said that I ought to find here some intention to protect the individual as distinct from the whole of the inhabitants of the borough or district. In my opinion that is not the true view. If the next-door neighbour has any common law rights they are left untouched, and he can assert them. If he has no common law rights, it seems to me that the Legislature under the Public Health Act intended not to create rights in individuals but general rights for the benefit of the inhabitants of a particular borough or district. The very words of this section appear to me to exclude any notion of an individual right because the urban authority is the sole arbiter whether the house shall or shall not be brought forward. If it gives its written consent, the next-door neighbour has no ground of complaint. The urban authority would not have been allowed to override the rights of the individual, had it been intended to create rights in the individual. The intention was to provide for the public health by seeing that the streets were not unduly narrowed and that there was no undue blocking of way or air. It would lead to disastrous results if, when, as in this case, the urban authority refused to interfere, the numerous individuals in a street were allowed to bring their private actions.

On the second point it seems to me that the urban authority had in fact given their consent, seeing that resolutions had been passed approving of the plans of the building, and these resolutions were signed by the mayor and passed and confirmed by the proper officer. When the written consent of the urban authority is spoken of it appears to me that the proper way to testify that consent is by resolutions approving of the particular plans, if those plans do fairly show that which is required. It appears to me to be somewhat extravagant to hold that there must be an express resolution specifying that consent is given to build beyond the front wall of the house on each side. Therefore the action fails and is dismissed with costs.

Solicitors for the plaintiff, *Field, Roscoe, & Co.*

Solicitors for the defendant, *F. Fitz-Payne.*

K. B. Div. (Ridley, J.) — March 31.

ATTORNEY-GENERAL *v.* MURRAY. (*a.*)

*Inland revenue—Estate duty—Policy of insurance—Settled property—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (d).

*In* 1866 *Sir H. P. effected a policy of assurance on his son's life, C. E. P.* (*who was born in the year* 1855). *All the premiums were paid by the father. In* 1884 *C. E. P. married, and the policy was brought into his marriage settlement by Sir H. P., with the approbation of C. E. P. In* 1897 *Sir H. P. died, and in* 1900 *Sir C. E. P. died, and the insurance company paid the amount of the policy to the trustees of the settlement. The Crown claimed duty in respect of the policy on the death of Sir C. E. P. as property passing on his death.*

*Held, that the policy fell within the words of section* 1, *sub-section* 1 (d), *as being an "interest purchased or provided by the deceased . . . in concert or by arrangement with any other person," and that the fact that the policy was void under* 14 *Geo.* 3, *c.* 43, *did not affect the matter, as the insurance company had paid the policy-money.*

Attorney-General *v.* Dobree, 48 *W. R.* 413, [1900] 1 *Q. B.* 442, *and* Attorney-General *v.* Robinson, [1901] 2 *Ir. R.*, 67, *followed.*

This was the hearing of an information claiming duty at the rate of 6½ per cent. upon a policy of assurance which became payable at the death of Sir Cuthbert Peek, Bart.

The special case set out the following facts:

On the 25th of July, 1866, Sir Henry William Peek effected a policy for £10,000 in his own name on the life of his son, Cuthbert Edgar Peek (who was born in 1855), to commence at the age of twenty-one years, with the Commercial Union Insurance Co. (Limited). Ten premiums only of £359 17s. 4d. were to be paid, the first on the 25th of July, 1866, and the last on the 25th of July, 1875, all which Sir Henry Peek duly paid.

By the terms of the policy it was declared that the capital stock and funds of the company were liable to pay to the assured £10,000 on proof of the death of Cuthbert Edgar Peek after attaining the age of twenty-one years, and the policy entitled the holder to participate in profits according to the regulations of the company.

In 1884 Cuthbert Edgar Peek was married to Augusta Louisa Brodrick, a daughter of Viscount Middleton, and on the occasion of the marriage he brought into settlement certain property (including the moneys secured by the policy) as his property, and separate settlements of the husband's fortune and the wife's fortune were executed.

The settlement of the property of Cuthbert, which was dated the 2nd of January, 1884, after reciting (*inter alia*) that Sir Henry Peek was entitled to the policy of assurance in the Commercial Union Insurance Co. for an original sum of £10,000, which with bonuses amounted to a sum of £12,000 or thereabouts, and that upon the treaty for the intended marriage it was agreed that Sir Henry Peek should assign the said policy and the moneys assured by and payable thereunder to the trustees of the settlement, it was witnessed that in pursuance of the agreement and in consideration of the intended marriage Sir Henry Peek, with the approbation of Cuthbert Edgar Peek and Augusta Louisa Brodrick, assigned to the trustees all that the policy on the life of Cuthbert Edgar Peek in the Commercial Union Insurance Co. for the sum of

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

£12,000 and all other moneys assured or to become payable under same. And it was agreed that the policy should be held upon the trusts of the settlement, which trusts included a trust, after the failure of children or issue, in favour of Cuthbert Edgar Peek absolutely.

Cuthbert Edgar Peek (who succeeded to the title on the death of his father on the 26th of August, 1898) died on the 6th of July, 1901. On his death the Commercial Union Insurance paid to the defendants as trustees of the settlement £14,196 17s. in respect of the policy for £10,000 and the bonuses thereon. The Crown claimed that estate duty under the provisions of the Finance Act, 1894, ss. 1 and 2 (1) (*d*), or both or either of them, became payable by the defendants on the above sum of £14,196 17s. as "property passing or deemed to pass on the death" of Sir Cuthbert Edgar Peek.

Section 2 of the Finance Act provides as follows: "Property passing on the death of the deceased shall be deemed to include the property following—that is to say, (*d*) Any annuity or other interest purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

*Sir R. Finlay, A.G.*, and *Vaughan Hawkins*, for the Crown.—This case is covered by the authority of *Attorney-General* v. *Dobree*, 48 W. R. 413, [1900] 1 Q. B. 442, and *Attorney-General* v. *Robinson*, [1901] 2 Ir. R. 67. It is admitted that the policy was void under the provisions of 14 Geo. 3, c. 48, but in point of fact the policy was paid, and everyone knew it would be paid, and directly it was paid all the rights and interests under the settlement came into play.

They also cited *Worthington* v. *Curtis*, 24 W. R. 228, 1 Ch. D. 419.

*Danckwerts, K.C.*, and *R. J. Parker*, for the defendants.—The case here is distinguishable from the two cases quoted by the Attorney-General by the fact, first, that the policy being admittedly void there was nothing that could form the subject of a settlement; and, secondly, that in no point of view was the policy provided by Sir Cuthbert Peek.

*Sir R. Finlay, A.G.*, replied.

RIDLEY, J.—I think in this case the Crown is entitled to judgment. I think that the point is practically decided by the two cases quoted by the Attorney-General—namely, *Attorney-General* v. *Dobree* and *Attorney-General* v. *Robinson*. The distinction that may be drawn between this case and those two decisions seems to me not to be material. It is argued first of all by Mr. Danckwerts that in this instance the policy was one which could not have been enforced by reason of the provisions of 14 Geo. 3 in relation to insurances, but it seems to me that that point is disposed of when you know that the money was paid. It is not a question of whether they had a right to recover it, but a question of whether it was actually paid, and so it was; and, as pointed out by the Attorney-General, it was fully expected it would be so, by all the parties. I do not think that *Worthington* v. *Curtis* (the case quoted by the Attorney-General) can be got rid of in the way endeavoured by Mr. Danckwerts. That is a case which shows that when the money is once paid it is subject to all the rights and obligations which attach to it, although at first, and as between the insured and the insurance company, it could not have been recovered.

Now, that being so, it appears to me that this policy-money comes within section 2 (1) (*d*). I will not stop to consider whether it is also within section 1, for it is not necessary for this decision. I have a suspicion that it might be so, but it certainly appears to me that it comes within section 2, sub-section 1 (*d*). If the policy had been one upon the life of the deceased, on which he had paid the premium money himself, on which he had paid his own charges, it would have been within sub-section (*c*); but in this case it is not within that clause because the premiums were paid by the father, Sir Henry Peek, so far as it was necessary that they should be so paid. For this reason it is not within sub-section (*c*), but it is within sub-section (*d*), being an "interest purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person." It is said that here it is not provided by him because it was the father who took out the insurance and the father who paid the premiums, but although that is perfectly true, when one looks at the settlement one finds that the provision made by that instrument is this—that "in pursuance of the agreement and in consideration of the marriage the said Sir Henry William Peek, as settlor, with the approbation of the said Cuthbert Edgar Peek and Augusta Louisa Brodrick, hereby assigns unto the original trustees," and so forth. Now I cannot help thinking it was quite clear that in the case of a marriage settlement such as the present, where funds are found upon each side—on the bride's side and on the bridegroom's side—if the father provides the money to arise from a policy such as the present with the concurrence and by the approbation of his son, it clearly does fall within the words of this section—namely, that it is "provided by the deceased either by himself alone or in concert or by arrangement with another person." I cannot help thinking that this does not require any "benevolent" construction, but merely the ordinary reading of those words in the sense which one would attach to them. I do not see any difference that arises between this case and the two former ones, except the distinction which has been drawn by Mr. Danckwerts, and with which I have dealt. I therefore do not go into the general considerations which are covered by the judgment of Palles, C.B. (in the Irish case), and of Channell, J., in *Attorney-General* v. *Dobree*. For these reasons I think the duty recoverable.

Solicitor for the Crown, *Solicitor for Inland Revenue*.

Solicitor for the defendants, *Johnsons, Long, & Co.*

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K. B. Div. (Wright, J.) — Feb. 20.

CHANDLER'S BREWERY CO. (LIMITED) v. LONDON COUNTY COUNCIL. (*a*.)

*Local government—Housing of the working classes—Compulsory acquisition of lands—Covenant running with land—Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *s.* 21.

*By the Housing of the Working Classes Act*, 1890, *s.* 21, *wherever the compensation payable in respect of any lands, or of any interest in any lands, proposed to be taken compulsorily in pursuance of the Act requires to be assessed, the estimate of the value of such lands or interests shall be based upon the fair market value as estimated at the time of the valuation being made of such lands.*

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

*Held, that a covenant in which a tenant of a brewery company bound himself to take all his beer from the company was a covenant which had to be taken into account in ascertaining the value of the land for the purposes of the Act.*

Special case stated under the Housing of the Working Classes Act, 1890.

The following facts appeared from the case stated by the arbitrator:

The county council, by the London (Garden-row, Roby-street, Baltic-street, and Honduras-street) Improvement Scheme, 1899, had acquired certain premises in which the brewery company were interested as assignees of a lease dated the 30th of January, 1889, by which the premises known as 2, Middle-row were demised for the term of thirty years from the 25th of December at the yearly rent of £47, subject to certain covenants, which in addition to the usual covenants contained a covenant to use the premises as a beer-house only.

This lease was subsequently assigned to G. C. Porter and William Henry Duseldorf, trading under name of Chandler & Co., and they by an underlease dated the 24th of March, 1897, in consideration of the sum of £800 paid by one Thomas Sorrell, demised the premises to Thomas Sorrell for the term of twenty-two years less ten days from the 25th of December, 1896, at the following rents—viz., first, a yearly rent of £47; secondly, such sums as the lessors might expend in maintaining the insurance of the premises against damage by fire; and, thirdly, the sum of £200 in any and every year in which the lessee, his executors and administrators, should (contrary to the covenant hereinafter contained) directly or indirectly deal with persons other than Chandler & Co., or the persons or person for the time being composing the firm of Chandler & Co. or their successors in business or nominees for any porter, stout, or ale, beer, or other malt liquors which should be sold or disposed of or consumed in or upon the said demised premises . . . and also subject to the covenants in the lease, which covenants in addition to the usual covenants included a covenant that the lessee, his executors, administrators, and assigns, would, during the said term, deal exclusively with the firm of Chandler & Co., their successors and nominees, for all porter, stout, ale, beer, or other malt liquors which should be sold or disposed of or consumed upon the said premises. . . ."

The interest of George Charles Porter and William Henry Duseldorf became vested in the claimants, the Chandler's Wiltshire Brewery Co. (Limited).

It was contended before the arbitrator by the company that they were entitled to the fair market value of their interest in the premises having regard to the existence of the covenant and to the profit they might properly anticipate they would make from the existence of these premises during the continuance of the term; and it was on the other hand, contended by the council that under the terms of the Housing of the Working Classes Act, 1890, the company were only entitled to compensation for the loss of their interest in the land acquired, and that the benefit, if any, of the covenant was not an interest in land within the meaning of the Act.

The arbitrator, at the request of the parties, made his award in the alternative, stating the amount to be paid to the company according to whether the existence of the covenant should be taken in consideration or not, and he accordingly determined that if the claimants were entitled to be compensated in respect of the damage sustained by them by reason of the determination of the covenant in the underlease the amount to be paid by the local authority for their interest in the premises was £653, but if the company were not so entitled then the amount was to be ten shillings.

*Bray, K.C.*, and *Kisch*, for the brewery company.

*Cripps, K.C.*, and *Corrie Grant*, for the county council.

The arguments sufficiently appear from the judgment.

The following cases were cited in the course of the argument: *Clegg* v. *Hands*, 38 W. R. 433, 44 Ch. D. 503; *Bourne* v. *Liverpool Corporation*, 33 L. J. Q. B. 15, 11 W. R. C. L Dig. 87; and *Lord Mayor of Dublin* v. *Dowling*, 6 L. R. Ir. 502, 29 W. R. Dig. 115.

WRIGHT, J.—The question in this case is not at all an easy one to decide as regards the way in which it may work out in detail. It is whether under section 21 of the Housing of the Working Classes Act, 1890, the value of a covenant tying a public-house is to be considered under the words "whenever the compensation payable in respect of any lands, or of any interests in any lands proposed to be taken compulsorily in pursuance of this part of this Act requires to be assessed, the estimate of the value of such lands or interests shall be based upon the fair market value as estimated at the time of the valuation being made of such lands, and of the several interests in such lands." The question stated in the award is wrong in form, because it describes the question as a question whether damage is to be considered. That is not the right question. It is rather, What is the value of the interest of the claimants in the land? No objection is taken to the award upon that technical ground; therefore I must try and deal with the question of substance. It seems to me that the market value of an interest in land must or may vary according to what covenants do or do not attach. Here the claimants were the assignees of a lease under which they had to pay their superior lord £47 a year. They sublet it as a tied house at the same rental, namely, £47 per annum; therefore they got no benefit from it except the benefit of this tying covenant. When they come to have their interest as assignees of the lease assessed, there is nothing to assess unless the value of this covenant is to be taken into account; and that is really the question which the parties have come here to try, not the way in which it ought to be assessed, if it is to be assessed. An interest such as that of the claimants must, I think, vary in its market value according to what covenants do or do not attach. Here, as I have said, there is no market value apparently, and so the arbitrator has practically found apart from this covenant. But this covenant, according to the authorities, runs with the land, and does, according to the finding of the arbitrator, add some £653 to the value of the interest of the claimants. In many cases I cannot conceive that the covenant running with the land ought not to be taken into consideration in ascertaining the value for the purposes of this Act. Covenants restrictive of building on the same land, or on other neighbouring land, must affect the value of the particular land in question; covenants not to use for trade, and all sorts of other covenants which may be easily imagined, may materially affect the value of the land and of any interest in it. I do not think it is any sufficient answer to point out that the value given by such a covenant as that in question is, or may be, a bare trading value. That is obviously the case, because it may depend on the landlord's trade, or the tenant's trade, or upon many other different circumstances. I do not think that that is enough to enable me to say that the benefit of the covenant is no more

than a right to damages. Mr. Cripps admits that the covenant must be taken into consideration to some extent; he was a little unwilling to admit it at first, but I think he was quite right in doing so. Here it is plain on the finding of fact that a man in the market would give more because of the covenant. Obviously he would give nothing for this lease apart from the covenant unless a larger rent than £47 could be got for it from an underlessee. He would give something for the claimant's interest with this covenant attached to it, because he could resell or reassign to the brewers. I cannot see any distinction in law between trade covenants and other covenants, provided that they run with the land. Of course there are many trade covenants which do not run with the land; but when covenants run with the land, as it has been held that this covenant does, I am unable to draw any distinction between them except as regards quantum, which is not in question here. I think, therefore, that the award must be taken as standing with regard to the sum mentioned.

*Order accordingly.*

Solicitor for the brewery company, *James E. Mason.*

Solicitor for the county council, *W. A. Blackland.*

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Prob. Div. & Adm. Div. Divorce. } March 2.

TWENTYMAN *v.* TWENTYMAN. (*a.*)

*Divorce—Maintenance—Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 32.

*The Court has no power under section* 32 *of the Matrimonial Causes Act,* 1857, *to order a lump sum to be paid to the petitioner for maintenance.*

Motion upon the registrar's report on a petition for permanent maintenance.

The petitioner and the respondent were married in August, 1900, and a child was born in August, 1901. The marriage was dissolved on the petition of the wife on the ground of the husband's cruelty and adultery and a decree absolute was pronounced on the 10th of November, 1902.

A petition for maintenance was then filed under section 32 of the Matrimonial Causes Act, 1857, in answer to which the husband stated that his income amounted to £443 per annum and no more.

The registrar reported that the respondent was possessed of certain securities, the market value of which amounted on the 30th of January, 1903, to £23,578, considered together with a leasehold house and furniture valued at about £625 Some of the securities, whose estimated value was about £5,304, produced no income at all. The registrar recommended that a sum of £8,000 should be realized by sale of securities and assigned to trustees of a deed to be settled by one of the conveyancing counsel of the court in trust to pay the income arising therefrom to the petitioner for her life for the maintenance of herself and child, and on her death for the benefit of the said child.

The petitioner moved to confirm the registrar's report with an amendment that £100 of the £8,000 therein mentioned should be paid to the petitioner in cash. The respondent moved that the report should be varied by reducing the sum of £8,000 to £4,000, and by ordering that the sum of £4,000 or £8,000 should be paid to trustees on trust to pay the income to the petitioner during her life, and upon her death in trust to pay the capital to the respondent, his executors, administrators, and assigns.

*Cannot,* for the petitioner.—*Morris* v. *Morris,* 31 L. J. P. & M. 33, 10 W. R. P. & D. Dig. 24, is an authority that a lump sum may be awarded by way of maintenance. It has been followed in *Stanley* v. *Stanley,* 47 W. R. 272, [1898] P. 227; *Kirk* v. *Kirk,* [1902] P. 145, 50 W. R. Dig. 145.

*Barnard,* for the respondent.—Section 32 of the Matrimonial Causes Act, 1857, gives no power to the court to give a lump sum of money absolutely. It can only make an order for an annual sum secured upon the property of the respondent or give a gross sum secured upon the property. The question of allowance for the child does not come in at all. That is conferred by section 35, which places the children of a marriage that has been dissolved on the same footing as children of a marriage the parties to which have been only judicially separated. Neither does section 45 give power, but deals only with the property of a guilty wife. The court should not do more than give security for the income of the £8,000 for the petitioner's life.

*Cannot,* in reply.—The respondent has no business and his capital is diminishing year by year. He has, moreover, threatened to leave the country. The court should therefore grant an injunction restraining him from parting with his property: *Newton* v. *Newton,* 34 W. R. 123, 11 P. D. 11.

JEUNE, P., in giving judgment, said: This case raises the question which I must now determine, whether the court has power to carry out the recommendation in the registrar's report, and I am sorry to have to come to the conclusion that the court has not that power. It was contended that the words in section 32, "such gross sum of money," are not governed by the subsequent words, "not exceeding her own life," and that these words apply only to the security. If that was so I should think it would be in the power of the court to impose on a petitioner the obligation of settling such gross sum as the respondent might be ordered to pay. But I cannot so read the section, and I am led to the view I now hold in spite of the steps, which of course it is not my business to regard, as to how those words came to be inserted, by the observation that that applies both to the gross and to the annual sum of money mentioned in the section. With regard to the annual sum of money it must be clearly a securing by settlement in the ordinary way; and when a gross sum is ordered, that must also be secured and not paid over to the petitioner, and it can only be secured for some period not exceeding the lifetime of the petitioner. I have now come to the clear conclusion, after hearing this point raised and argued for the first time, that the court has no power under section 32 to order a lump sum down by way of permanent maintenance.

This decision may seem a departure from those given in *Morris* v. *Morris, Kirk* v. *Kirk,* and also to a certain extent from *Stanley* v. *Stanley,* but in neither of those cases does the point seem to have been raised by the counsel for the respondent, and in one at least the order for a lump sum was made by consent. I say this because, from the report of *Morris* v. *Morris,* I observed there was an offer by X., the respondent, to pay a sum of £1,000, and I cannot help thinking that the Judge Ordinary was influenced by that. But however that may be, it certainly was not contended in *Morris* v. *Morris* that the gift of a lump sum could not be made absolutely to the petitioner, and so the point which I have been called upon to decide to-day was not

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

raised. In *Kirk* v. *Kirk* Barnes, J., had only the case of *Morris* v. *Morris* before him, and he ordered a lump sum of £6,000 to be paid by the respondent to the petitioner without any opposition on the part of the respondent or anybody. In *Stanley* v. *Stanley*, where the court was dealing with very small means, Barnes, J., also followed the case of *Morris* v. *Morris*, and ordered payment of a lump sum.

But notwithstanding those decisions, having regard to the plain words of the Act and to the fact that the point has now been definitely raised and argued for the first time, I cannot say that I have power to make the order asked, although I should have been glad if I could have seen my way to do so. Section 35, moreover, does not give me the requisite power, though but for a direct decision of Hannen, P.—viz., *Hunt* v. *Hunt*, 31 W. R. 724, 8 P. D. 161—I should have thought that the words were wide enough. With all respect to that decision, the words do not appear to me to be limited. The case appears, however, to be exactly in point, and is binding on me. There was in that case a sum of £1,400 available for purposes of settlement. The court was asked that some part of that sum should be set aside for the children, and the point was taken that the court had no jurisdiction to make such an order, that section 35 only gave a general power to make provision for children's maintenance after decree, and that if the Legislature had intended to give the court authority to order a sum to be secured for the children it would have used express language for the purpose, as in section 32. Hannen, P., thereupon said, "I am of opinion that I have no power to make the order asked for," and he rejected the motion accordingly. The order which I make in the present case is, that the sum of £8,000, which appears to be a proper sum under all the circumstances, should be realized and should be secured by the respondent for the petitioner for her life by a proper deed to be prepared by the conveyancing counsel of the court. Any allowance for the child must be the subject of a separate application. There remains only the question of an injunction. Although I do not wish to express any formal opinion against the respondent, I think that I should accede to the request of the petitioner in ordering that he be restrained from parting or dealing with his property in any way which might hinder the security for the £8,000 being completed in the way I have ordered. With regard to the petitioner's request that £100 should be paid to her out of the £8,000, I think that £100 should be paid to her at once on account of income.

Solicitors for petitioner, *Beardall & Co.*

Solicitors for respondent, *Stevenson & Couldwell.*

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## House of Lords.

From C. A. (England). July 24, 1902.

REEVE *v.* LISLE AND OTHERS. (*a*)

*Mortgage—Redemption—Independent agreement—Once a mortgage always a mortgage—Option to lender to enter into partnership—Sale or mortgage.*

*Where mortgagor and mortgagee entered into an arrangement dealing with the equity of redemption of certain property and making certain terms as to a possible partnership,*

*Held, that as the arrangement was subsequent and independent of the mortgage, and that as there was nothing unconscionable or unfair in the transaction, the agreement was binding.*

*Judgment of the* Court of Appeal, 50 *W. R.* 231, [1902] 1 *Ch.* 53, *affirmed.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ., 50 W. R. 231, [1902] 1 Ch. 53), where the facts are set out at length.

For the purposes of this report the following short statement will suffice:

In 1898 the respondents advanced to the appellant £5,000 upon the security of a ship and other property, under an agreement made between them on the 23rd of April, 1896, whereby the money was not to be called in or paid for two years, and the respondents might elect to enter the partnership within the two years, upon the terms of releasing the mortgage debt, and the ship and other property becoming partnership assets.

Later on, in July, 1898, another agreement was entered into between the parties. It recited the agreement of 1896, that the respondents had not entered into partnership; that the respondents had applied for, but appellant was unable to pay, the £5,000, and had requested the respondents to extend the term for a further period of five years; and it was thereby agreed (1) that the respondents might within five years elect to enter into partnership with the appellant; (2) that the respondents should in that event release the appellant from payment of the £5,000 and transfer the mortgage property for the purposes of the partnership; (3) that the capital of the partnership property should belong to appellant and respondents in equal shares.

In February, 1900, the respondents exercised their option, and communicated to the appellant their intention to enter into partnership with him, but he refused, alleging that the effect of the agreement was to render the property irredeemable and that it was an illegal clog on the equity of redemption.

The Court of Appeal held that the agreement of July, 1898, was binding, being an independent and subsequent arrangement to the original mortgage. This affirmed the decision of Buckley, J. (49 W. R. 188), but on different grounds.

*Warmington, K.C.*, and *Martelli*, for the appellant.

*Astbury, K.C.*, and *R. J. Parker*, for respondents, were not heard.

Earl of HALSBURY, L.C.—Notwithstanding the gallant effort that has been made by Mr. Warmington and his learned junior in this case, it appears to me that it does come back to that which the Court of Appeal suggested, and without quarrelling with or attempting to throw any doubt upon the propositions of law which have been advanced in this case, it seems to me that the Court of Appeal has taken the right view of the facts. When I say upon the facts, I am speaking now of the facts as elicited by the documents themselves, though in respect of one of them it is perfectly clear, by the limited admission that is now made, that there was a mistake in reference to the question of the policy.

Then the question which your lordships have to determine is whether or not this second transaction of 1898 was or was not the same transaction in the sense in which those words are used by the learned counsel for the appellant.

The view of the Court of Appeal, who had all the facts before them (and I do not propose to question the view which they have taken of these documents read together), is this, that the later transaction was

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

entirely separate—that it was, in truth, a matter applicable to the contemplated partnership, and that the real position of the parties was this, that all the securities were already in their possession; that this further transaction altered the rate of interest, but that the real substance of the second transaction was the contemplated partnership. Under these circumstances it was a mere question of what inference ought properly to be drawn from the nature of the instruments, and the object and purpose with which they had been entered into, as well as what the documents contained themselves. I come to the conclusion that what has been called here, and, I think, accurately called, the question of fact between the parties, was rightly arrived at by the Court of Appeal; and, if that is so, there is not and cannot be any question as to the law which ought to prevail in this case.

Under these circumstances, I move your lordships that this appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion, and I take the same view of the facts that the Court of Appeal did. Notwithstanding the very able argument addressed to us by Mr. Warmington to prove that the purpose of this document was the consolidation and rearrangement of the mortgages, in my opinion it was nothing of the kind. The respondents had the benefit of all these securities. There was merely a stipulation introduced at the request of the appellant, who was asking for time. Not being prepared to pay the money, he said, "If you will give me five years, you shall have the whole of that time in which to determine whether to enter into the partnership or not." When the respondents did make up their minds to enter into the partnership the appellant turned round and said: "Oh, but this transaction is entirely wrong; it strikes at the root of an equitable doctrine, and I am not bound by it." I think on the facts, as we have them before us, he is bound by it, and must pay damages for having broken his agreement.

Lord BRAMPTON.—I am of the same opinion.

Lord LINDLEY.—I also am of the same opinion. Mr. Warmington's argument is necessarily based upon the blunder in the recital in the deed of July, 1898, which is all wrong. In point of fact the real transaction was not taking a mortgage security for £5,000, or getting a better security than they had. It was not that at all. The real transaction was that the mortgagees were bargaining for a share in the partnership on certain terms. By a blunder in the recital they have given a foundation for a very ingenious argument to which I am happy to say we are not bound to accede. I have no doubt the decision is perfectly right, and the appeal ought to be dismissed with costs.

*Order of Court of Appeal affirmed, and appeal dismissed with costs.*

Solicitors, *Cattarns & Co.; Rowcliffes, Rawle, & Co.*, for *Alfred Appleby*, Newcastle-on-Tyne.

## Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew, L.J.) — May 18.

*In re* JAMES BRIGGS & SON. (*a*.)

*Solicitor—Costs—Taxation—Action in Mayor's Court—Certificate awarding costs on higher scale—Taxation of costs of unsuccessful party's solicitor—Mayor's Court Rules (Fees and Costs)*, 1890, *r.* 13.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*In an action in the Mayor's Court to recover a sum of £40 the plaintiff recovered judgment, and the judge who tried the action gave a certificate, under rule 13 of the Mayor's Court Rules (Fees and Costs), 1890, awarding the plaintiff costs on the scale applicable where £50 or over was recovered. The solicitor, who acted for the defendant in the action, delivered to the defendant a bill of costs, which included his costs of the action in the Mayor's Court and also costs in other matters, such as conveyancing, in which he had acted for the defendant. The defendant obtained a common order to tax the bill in the High Court, and the master taxed that part of the bill which related to the costs of the action in the Mayor's Court upon the scale where £50 or over was claimed.*

*Held, that the effect of the order of the judge of the Mayor's Court was to take the action for all purposes out of the lower scale and to place it in the higher scale, and that, therefore, the taxing-master was right.*

Appeal from an order of Phillimore, J., at chambers.

An action was brought in the Mayor's Court against Messrs. Tewson, Son, & Meeks to recover a sum of £40, and the plaintiff in that action recovered judgment for that amount. The judge who tried the action gave a certificate under rule 13 of the Mayor's Court Rules (Fees and Costs), 1890, awarding the plaintiff costs upon the scale applicable where the amount recovered was £50 or over.

In this action Messrs. Briggs & Son acted as solicitors for the defendants, Messrs. Tewson, Son, & Meeks, and they had also acted for them in other matters relating to conveyancing, &c. Messrs. Briggs & Son delivered to their clients, Messrs. Tewson, Son, & Meeks, a general bill of costs, which included their costs of the action in the Mayor's Court. The clients obtained a common order in the High Court to tax the bill under section 37 of the Solicitors Act, 1843. The master taxed that part of the bill which related to the costs of the action in the Mayor's Court on the scale applicable to cases where £50 or over was claimed. The clients carried in objections to the taxation, upon the ground that "the amount claimed was under £50, and that the costs should therefore be taxed upon the scale applicable to that amount, notwithstanding that the judge upon the trial made an order for costs as between party and party on the higher scale. By the express words of rule 13 of the Mayor's Court Rules, 1890, the power of the judge to give costs on the higher scale is limited to awarding such costs to the 'party recovering' (which is not this case) or the party 'successfully defending' (which is not this case), and there is no other power whatever enabling the taxing-master to allow the costs of the solicitor as against his client upon the higher scale except where the amount claimed or recovered in fact exceeds £50. Rule 10 of order 65 of the Supreme Court of Judicature Rules has no application except to the scales set out in the appendix to those rules, and cannot cover the Mayor's Court scales." The master in his answer to the objections stated that an order was made in the action for costs as between party and party to be taxed on the higher scale, and such an order must, in his opinion, also apply to the costs as between the parties and their own solicitors. He accordingly refused to review his taxation. Phillimore, J., refused to order the taxing-master to review the taxation.

Messrs. Tewson, Son, & Meeks appealed.

By rule 13 of the Mayor's Court Rules (Fees and Costs), 1890: "It shall be in the power of the judge of the court to award costs on a higher scale to the plaintiff on any amount recovered, however small, or to the defendant who successfully defends an action

brought for any amount, however small, provided the said judge certify that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest."

*J. B. Matthews*, for the appellants.—As between party and party the appellants were, in consequence of the order of the judge in the Mayor's Court, bound to pay costs upon the higher scale. But rule 13 of the Mayor's Court Rules (Fees and Costs), 1890, gave the judge no power to award costs on the higher scale as between the litigant and his own solicitor. The taxing-master was therefore bound to tax according to the scale applicable where the amount claimed was under £50. Rule 1 provides that in every action or matter in the Mayor's Court all costs shall be taxed by the registrar according to the scales. That applies to a taxation in the High Court of costs incurred in a Mayor's Court action. Rule 13 is similar in its terms to section 119 of the County Courts Act, 1888.

He referred to *In re Sudlow*, 11 Beav. 400, and *In re Langlois & Biden*, 39 W. R. 181, [1891] 1 Q. B. 349.

*G. F. Hohler*, for the solicitors, referred to *Hall* v. *Launspach*, [1898] 1 Q. B. 513, 46 W. R. Dig. 134.

*J. B. Matthews* replied.

COLLINS, M.R.—This is an appeal from a decision of Phillimore, J., refusing to direct the master to review the taxation of a bill of costs. The question arises between an unsuccessful defendant and his solicitor in respect of the costs of an action in the Mayor's Court. At the trial the judge of the Mayor's Court, under rule 13 of the Mayor's Court Rules (Fees and Costs), 1890, ordered that the plaintiff should recover costs upon the scale applicable where £50 or over was recovered. The defendants' solicitor sent in his bill of costs as against his own clients, and, as I understand, the costs of the action in the Mayor's Court constituted only a comparatively small part of the total bill of costs. The clients obtained a common order in the High Court to tax the bill, and the master taxed the costs of the Mayor's Court action upon the scale applicable where £50 or over was claimed. The learned judge at chambers affirmed the taxation.

It is contended on behalf of the clients that that decision is wrong upon the ground that the scale of costs applicable depends upon the amount claimed, and that they ought not to lose that advantage because the judge at the trial certified for costs to be paid to the plaintiff on the higher scale. The judge gave his certificate under rule 13 of the Mayor's Court Rules, and, in my opinion, the effect of the certificate is, so far as costs are concerned, to take the whole case out of the lower scale, and to justify anyone who has to deal with the case in treating it as one in which the costs are not to be measured by the amount claimed, but as one which, on account of its importance, is brought within the higher scale. The taxing-master was right, therefore, in dealing with the case as one in which the claim was for a sum of £50 or over, unless there is some limitation or prohibition in the rules which prevents his taxing the costs on that scale. It is admitted that there is no express limitation or prohibition. The only rule that can be pointed to is rule 1, which provides that "in every action or matter in the Mayor's Court all costs shall be taxed by the registrar of such court according to the scales of fees and costs set out in the schedules hereto annexed, subject to the review of such taxation by one of the judges of the court." But in that very system of rules comes rule 13, which gives power to the judge to lift the action out of one scale and to place it in another, and we shall be giving full effect to the rules by saying that the order of the judge raises the case for all purposes out of one scale into another, and makes the higher scale the standard of taxation applicable to the case in all its parts. The decision of the learned judge, affirming the taxation of the master, is right and must be affirmed.

MATHEW, L.J.—I am of the same opinion. As was pointed out early in the argument, the effect of the order of the judge who tried the case was to raise the case into the class of cases where £50 or over is claimed or recovered, as the case may be. That order, which was made as between party and party, ought reasonably to be extended to the taxation of costs as between solicitor and client, because it may be reasonably assumed that as, by reason of the difficulty or importance of the case, extra labour was entailed on the plaintiff, it is probable that extra trouble and skill were required on the part of the defendants' solicitor. The taxing-master seems to me to have acted entirely in the spirit of the judge's order at the trial by treating the action as one in which £50 or over was claimed.

*Appeal dismissed.*

Solicitor for the appellants, *Owen B. Thomas.*

Solicitors for the respondents, *Briggs & Son.*

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From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — April 23

STEVENS *v.* GENERAL STEAM NAVIGATION CO. (*a.*)

*Master and servant—Employers' liability—Accident—Compensation — "Factory" — Machinery used in unloading ship in river—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38, *sub-section* 1—*Factory and Workshop Act*, 1901 (1 *Ed.* 7, *c.* 22), *s.* 104—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

*By virtue of section* 38, *sub-section* 1, *of the Interpretation Act*, 1889—*which enacts that where any Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted—the reference to the Factory and Workshop Act*, 1895, *in the definition of "factory" in section* 7, *sub-section* 2, *of the Workmen's Compensation Act*, 1897, *is now to be construed as a reference to section* 104 *of the Factory and Workshop Act*, 1901, *which repeals section* 23 *of the Act of* 1895, *and extends the definition of "factory" so as to include machinery or plant used in the process of loading or unloading or coaling a ship in a dock, harbour, or canal.*

Appeal by the General Steam Navigation Co. from an award of the judge of the Southwark County Court under the Workmen's Compensation Act, 1897.

On the 24th of September, 1902, the applicant for compensation, who was in the employment of the appellants, was employed on board their steamship *Nautilus*. *The Nautilus* was lying in the River Thames, moored in the fairway. She was discharging a cargo of steel and iron plates into lighters alongside by means of her own cranes. Access to the ship for

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the workmen was by boat. The applicant was one of a gang of eight men engaged in the main hold unloading the ship. While they were so engaged some of the steel plates fell on the applicant's leg, with the result that his leg had to be amputated.

Upon proceedings being taken to assess compensation under the Workmen's Compensation Act, 1897, it was admitted on behalf of the applicant that before the Factory and Workship Act. 1901, which repealed the prior Factory and Workshop Acts, the applicant would not have been entitled to compensation; but it was contended that the definition of "factory" in section 7, sub-section 2, of the Workmen's Compensation Act, 1897, must now be taken, by reason of section 38, sub-section 1, of the Interpretation Act, 1889, as referring to section 104 of the Factory and Workshop Act, 1901.

By section 7, sub-section 1, of the Workmen's Compensation Act, 1897, "this Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a . . . factory . . ." By sub-section 2, "'factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. . . ." By section 23, sub-section 1, of the Factory and Workshop Act, 1895, certain provisions of the Factory and Workshop Acts were to have effect as if "(a) Every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . were included in the word factory. . . ."

Section 23 of that Act is now repealed by the Factory and Workshop Act, 1901, and section 104 of the Act of 1901, has replaced section 23, sub-section 1, of the Act of 1895. By section 104, sub-section 1, "The provisions of this Act with respect to (i.) power to make orders as to dangerous machines (section 17); (ii.) accidents; (iii.) regulations for dangerous trades; (iv.) powers of inspectors (section 119); (v.) fines in case of death or injury (section 136), shall have effect as if every dock, wharf, quay, and warehouse, and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal were included in the word 'factory,' and the purpose for which the machinery or plant is used were a manufacturing process. . . ." By sub-section 2, "For the purposes of this section . . . the expression 'ship' and 'harbour' have the same meaning as in the Merchant Shipping Act, 1894," which, by section 742, defines "harbour" as including navigable rivers.

By section 38, sub-section 1, of the Interpretation Act, 1889, "where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

The county court judge held that by force of the Interpretation Act, 1889, the word "factory" now includes machinery used in the process of unloading any ship in any "harbour," which includes a navigable river; and he accordingly made an award in favour of the applicant for 17s. 6d. a week during incapacity.

The employers appealed.

*Carver, K.C.*, and *Maurice Hill*, for the employers.—It is admitted on behalf of the applicant that if the Factory and Workshop Act, 1895, is still applicable no right to compensation is given, because the machinery referred to in section 23 of that Act is machinery used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse. The machinery in the present case was being used for unloading into lighters in the river, and would not therefore come within the Act of 1895: *Hennessey* v. *McCabe*, 48 W. R. 231, [1900] 1 Q. B. 491; *Raine* v. *Jobson*, 49 W. R. 705, [1901] A. C. 404. Section 23 of the Act of 1895 has, however, been repealed by the Factory and Workshop Act, 1901, and section 104, sub-section 1, of this latter Act enacts that certain provisions of that Act shall have effect as if all machinery used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal were included in the word "factory." It is admitted that if that section is to be read into the definition of "factory" in section 7 of the Workmen's Compensation Act, 1897, the county court judge is right; but it is submitted that it is not to be read in. The Workmen's Compensation Act, 1897, does not incorporate the Factory Acts. It only refers to them as defining the subject-matters covered by the Act of 1897. The effect is the same as if the words of the then existing Factory Acts had been written into the Act of 1897: *Reg* v. *Smith*, 21 W. R. 382, L. R. 8 Q. B. 146. The reference in the definition of "factory" in section 7, sub-section 2, of the Act of 1897 to section 23 of the Factory Act, 1895, only incorporates the particular words of that section. Section 38, sub-section 1, of the Interpretation Act, 1889, does not make that reference a reference to the subsequent Factory Act, 1901. Section 104 of the Act of 1901 is not a repeal "with modification" of section 23, sub-section 1, of the Act of 1895. The later Act has extended very considerably the scope of the former Factory Acts, and the word "modification" does not include an extension of an Act. Section 104 is entirely new and extended legislation and cannot be called a "modification" of the earlier Act.

*Thorn Drury* and *W. Valentine Ball*, for the applicant, were not called upon.

COLLINS, M.R.—I fail to see anything in the point taken on behalf of the appellants. The express words in section 38, sub-section 1, of the Interpretation Act, 1899, conclude the question. That section provides that "where this Act or any Act passed after the commencement of this Act repeals and re-enacts with or without modification any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted." We have a general Act—the Factory and Workshop Act, 1901—which repeals and re-enacts with modifications the former Factory and Workshop Acts. Unless it can be said that the provision in section 104 of the Act of 1901, which includes in the word "factory" "all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal," cannot be described as a "modification" of the repealed section 23 of the Factory and Workshop Act, 1895, then it is conceded that the effect of section 38 of the Interpretation Act, 1889, is to incorporate the provision so modified into the definition of "factory" in section 7, sub-section 2, of the Workmen's Compensation Act, 1897. That reduces the question to this: Is the introduction of the words "harbour, &c." into section 104 of the Act of 1901 such a radical alteration and extension of the former section as not to come within the word "modification" in section 38 of the Interpretation Act, 1889. I do not think that it is. It is a modification by the addition of certain words.

The ship here was being unloaded in the river, and not in a dock, and therefore it seems that before the Factory and Workshop Act, 1901, the employment of the applicant while unloading the ship in the river would not have come within the Workmen's Compensation Act, 1897. But the modification abovementioned was introduced into section 104 of the Factory and Workshop Act, 1901, and, having regard to the terms of that modification, I can have no doubt that the object of its introduction was to amend the Workmen's Compensation Act, 1897. The Legislature must be taken to have been fully aware of the provisions of the Workmen's Compensation Act, 1897, and of the decisions thereon, and in making this alteration in the Factory Act they must have intended to alter the Workmen's Compensation Act. I have no doubt that the alteration was introduced in view of the difficulties which had been discovered in the former legislation, and that the alteration was introduced with full knowledge of section 38, sub-section 1, of the Interpretation Act, 1889, which enabled the Legislature in this way to modify the Workmen's Compensation Act, 1897, though the Factory Acts to which express reference was made in the Act of 1897 were repealed. I can see no reason for limiting the word "modification" in the Act of 1889 to a narrowing of the repealed Act and for not applying it to an extension of the Act. The appeal therefore fails.

STIRLING, L.J.—I am of the same opinion. It is admitted that the machinery used in unloading this ship is not such machinery as is specified in section 23 of the Factory and Workshop Act, 1895, and would not therefore have come within the definition of "factory" in section 7, sub-section 2, of the Workmen's Compensation Act, 1897. But section 23 of the Act of 1895 has been repealed, and in lieu thereof a similar section has been re-enacted in the Factory and Workshop Act, 1901—section 104, which brings within the definition of "factory" all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal. It is admitted that the machinery in the present case falls within the class of machinery referred to in that section. What is the effect of that? By section 38, sub-section 1, of the Interpretation Act, 1889, where any Act passed after the commencement of that Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted. We have in the Workmen's Compensation Act, 1897, a reference to the provisions of the Act of 1895. That reference is to be construed as a reference to the provisions re-enacted, whether with or without modification. It is not suggested that any contrary intention appears. The re-enacted provisions need not be identical with the repealed provisions. The sole question is whether, when the modification takes the form of extending and not narrowing the limits of the Act, it is a "modification" within the meaning of section 38, sub-section 1, of the Interpretation Act, 1889. I can see no reason for holding otherwise. It seems to me that section 104 of the Act of 1901 is a re-enactment with a modification of section 23 of the Factory Act, 1895, within the meaning of section 38, sub-section 1, of the Act of 1889.

MATHEW, L.J., concurred.

*Appeal dismissed.*

Solicitors for the applicant, *H. Clifford Turner & Co.*

Solicitor for the employers, *William Batham.*

From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) — Feb. 13.

SCOBLE AND OTHERS v. SECRETARY OF STATE FOR INDIA IN COUNCIL. (a.)

*Inland revenue—Income tax—Annuity—Purchase of railway company—Payment by annual instalments—Annual sums consisting partly of capital and partly of interest—Income Tax Acts,* 1842 (5 & 6 *Vict. c.* 35), *s.* 102, *and* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedules C and D.*

*The purchase-money for a railway was paid off by what was called an annuity for a term of years, each instalment of the annuity being in part a payment on account of the capital sum due and the balance in respect of interest on the principal money unpaid.*

*Held, that income tax was only payable upon that part of the instalments which represented interest.*

*Decision of* Phillimore, J., [1902] 2 *K. B.* 413), *reversed.*

Foley *v.* Fletcher, 7 *W. R.* 141, *H. & N.* 769, 28 *L. J. Ex.* 100, *considered and approved.*

Appeal by the plaintiffs against a decision of Phillimore, J., in favour of the Crown on a case stated.

The case set out the following facts:

The plaintiffs were the annuity trustees under the Great Indian Peninsula Railway Purchase Act, 1900 (63 & 64 Vict. c. cxxxviii.), and they sought to recover from the defendant two sums of £8,122 10s. 8d. and £9,611 6s. 6d. respectively, which had been deducted by the defendants, as income tax payable by the plaintiffs in respect of two sums which the plaintiffs alleged were instalments of the purchase price of the Great Indian Peninsula Railway, and as such were not chargeable with income tax.

The East India Co. on the 17th of August, 1849, entered into a contract with the railway company whereby they acquired the option of purchasing the undertaking of the company without being compelled to pay the purchase price down in one capital sum, by means of annuities to be reckoned from the time when the gross amount would be payable.

By the Government of India Act (21 & 22 Vict. c. 106) the territories of the East India Co. were vested in the Crown, and the Secretary of State exercised the powers that were formerly exercised by the company or board of control.

In August, 1899, the Secretary of State, acting in pursuance of the provisions of the contract of the 17th of August, 1849, gave notice of his intention to purchase the railway and works at a price of £34,859,217, and further gave notice to pay by way of annuities instead of the gross sum. The rate of interest was fixed at £2 17s. per cent., payable half-yearly.

By section 12 of the Great Indian Annuities Railway Act, 1900, these annuities were payable to the plaintiffs, and they as the annuity trustees divided the holders of the annuities into two classes. Class A were those annuitants who had elected to receive their annuities in full; class B those who had elected to have their annuities paid with a sum deducted for a sinking fund, which at the end of forty-eight years would amount to the principal sum.

On the 1st of January, 1901, a payment of £634,254 became due to the annuity trustees in respect of the annuity. Part of that sum—viz., £162,450, was in fact a payment on account and as part of the capital sum of £34,859,217, the ascertained amount of the full purchase-money, and the residue thereof was a

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

payment in respect of interest on that capital sum for the six months immediately preceding; and the subsequent sums paid in respect of the annuity were composed partly of capital and the balance of interest on the amount of the purchase-money for the time being remaining unpaid.

The Secretary of State for India deducted income-tax on the whole sum of £634,254.

The income tax on £162,450, which represented a payment of capital, amounted to £8,122.

On the 1st of July, 1901, the next payment became due, and the Secretary of State for India again deducted income tax upon the whole amount.

The income tax on so much of the amount as represented capital was £9,611.

The plaintiffs claimed the two sums of £8,122 and £9,611, and a declaration that the Secretary of State was not entitled to make any deduction from future half-yearly payments in respect of such part of such payments as were payment on account of and as part of the capital sum of £34,859,217.

Phillimore, J., held that income tax was payable upon the whole amount of each half-yearly payment and not merely upon so much of it as represented interest. He accordingly gave judgment for the defendant.

The plaintiffs appealed.

*Cripps, K.C., Danckwerts, K.C.*, and *T. T. Paine*, for the plaintiffs.

*Sir R. B. Finlay, A.G.*, and *S. A. T. Rowlatt*, for the defendant.

VAUGHAN WILLIAMS, L.J.—In our judgment this appeal ought to succeed. I assent to a great deal that the Attorney-General has said about annuities, but it seemed to me that the outcome of his argument left him in this position: He could not say that every annual sum which was payable under a contract was necessarily an annuity within the income tax Acts. This had really to be admitted, in any case where it appeared upon the face of the contract that there was a debt existing independently of the contract which gave rise to the annual payment —if the annuity or annual payment was on the face of the contract of such a nature that you could say, on reading the contract, "This is not a contract for the purchase of an annuity, it is a contract under which a debt is made payable by instalments"—that the income tax would not apply in such a case to the whole sum payable by such annual instalments. It is not denied but that the income tax Acts would apply and income tax be payable in respect of so much of the annual payment as was not a repayment of an instalment of the antecedent debt. It was not denied, and is not denied in the present case, that income tax is payable upon so much of this annual sum, the annual instalment of purchase-money payable by the Indian Government, as consists of interest. The whole question in this case is: Is income tax payable upon that portion of the annual payment which you can discover from the very terms of the contract is a mere payment of an instalment necessary to complete the payment of an existing debt? In my judgment no income tax is payable in such a case.

Now when I come to look at the clauses in this contract—clauses 22, 23, and 26—it seems to me perfectly obvious that there having come into existence a debt payable by the Indian Government for the purchase of this railway, the Indian Government having the option, if they chose, to pay off this debt by annual payments—annual instalments—instead of paying down the gross sum, the Indian Government elected so to do; and that this annual payment (called in this contract an annuity) is really merely the payment of the purchase-money of the railway by annual instalments plus interest. In my opinion there is no tax payable in respect of this annual payment in so far as it is an instalment of a repayment of the principal of a present debt. I think under those circumstances the judgment of Phillimore, J., was wrong and that he ought to have given judgment in favour of Sir Andrew Scoble and the other persons.

STIRLING, L.J.—I am of the same opinion. The East India Co. gave notice to exercise the option of paying an annuity. The sum which was left to be paid was large, amounting to over £34,000,000, and obviously it was a very great advantage to a government, which does not generally possess capital but exists by income alone, to have the payment of that sum provided for by moderate annual payments of capital and of income, and accordingly that course has been adopted. The question which we have got to decide is whether in these circumstances the income tax is payable on the full amount of each instalment or only upon so much of it as represents income. Now the case of *Foley* v. *Fletcher*, 7 W. R. 141, 3 H. & N. 769, has been much referred to, and is relied on on both sides. It seems to me that the principle that is laid down in that case with reference to the construction of the word "annuity" has never been departed from. I think all the learned judges who gave judgment in that case say the same thing. For instance, Pollock, C.B., says this, "If we were at liberty to speculate on the matter and could come to the conclusion that a part of the annual payments is the price of the convenience of getting the payment postponed we could not say that the payments are within the Act because part of them consists of profits. These instalments are payments of money due as capital. The Act has made no provision for such case. It professes to charge profits only, and we cannot say that capital is liable to the income tax because found in company with profits." And Bramwell, B., says: "By an Act for granting to her Majesty duties on profits arising from property, professions, trade and offices it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it." And similar observations are made by Watson and Channell, BB. True it is that there are found observations in the judgments which seem to point in an opposite direction; for example, that which has been most relied on is what is said by the Lord Chief Baron in the close of his judgment: "If the plaintiff had sold the estate for an annuity, so calling it, the annuity would have been liable to income tax. But she sold it for a sum which is payable by instalments, which is therefore not chargeable." Now as to that portion of the judgment, it has not been followed. We have express authority in the case of *The Nizam's Guaranteed State Railway Co.* v. *Wyatt*, 24 Q. B. D. 548, 38 W. R. Dig. 88, of the Divisional Court, for saying that the mere fact that a sum is designated as an annuity is not conclusive, but that the real nature of the transaction must be looked at. Now if we look at the real nature of the transaction here, the so-called annuities are merely annual payments of equal amount, being instalments of a debt, and are made up partly of principal, partly of interest calculated at a particular rate. On the face of the contract, therefore, it appears that each annual instalment contains principal money and a portion of interest which can be readily ascertained by a competent actuary. Therefore in that state of things we are right in following the principle which I take to be laid down in *Foley* v. *Fletcher*, that the word "annuity" under those circumstances is not to be read in such a way as to make capital taxable.

Now the difficulty which I certainly felt in the present case arises from this: that it is said (and forcibly said) by the Attorney-General that that being so, then in the case of every terminable annuity which has been purchased for value, the same thing occurs, and you ought, if you logically follow out the principle, to say that each annual payment of that annuity ought to be split up between capital and interest and only the portion which represents interest ought to be taxed. I feel the full force of that remark, but it seems to me that the cases are not the same. There are cases of purchase of annuities where investment has been made in the form of property, and the Legislature in so many words has said that that is to be taxed, and it is recognized in this very case throughout that an annuity of that kind is taxable. And I in no way depart from that. The case to which I have referred seems to me to show that is a different matter where it appears on the face of the transaction that the so-called annuity is not a thing of that kind, but simply represents instalments of an existing debt. It matters not whether the debt be one which is a purchase arising from a sale, or whether it be the case of a repayment of a loan, in which latter case it is admitted by the Attorney-General that it is not the practice to tax anything except so much of the annual instalments as represent interest.

For these reasons I am unable to agree with Phillimore, J., and I think the appeal ought to be allowed.

MATHEW, L.J.—I am of the same opinion. It seems to me that the instalments stipulated for under this contract are not payments of an annuity within the meaning of the Act of Parliament. "Annuity" in the ordinary sense of the expression means the purchase of an income. It generally involves the conversion of capital into income, and reasonably enough, where the buyer places himself in that position, the Act of Parliament taxes him. He is taken at his word. He has got an income secured in the way I have mentioned. Now, has such a case any analogy whatever to the present? It appears to me none. Here was a sum of money, a lump sum, stipulated for in the first instance, which was to represent the capital outlay. If that money had been handed over to those who were entitled to it, it might have been invested, ought to have been invested, and probably would have been invested, and if invested the income would be taxable and not the principal sum. Now that sum representing the capital outlay is, by the terms of the contract, a sum that may be paid off by what is called (unfortunately) in the contract an annuity. It really means by annual instalments. Was it intended that under the contract those to whom the money was to be payable were to be in a worse position and to get less than if the other alternative were adopted by the Government? I cannot think there was any such intention. The option to pay in that way was one that was exercised independently of any consent of those to whom the money was payable. I think it was intended from the way that the sums were arrived at under the contract, whether they were paid by annual instalments or by a lump sum, that those who were entitled to it should not pay income tax. I quite agree that the case of *Foley* v. *Fletcher*, so far as it has not been encroached upon and impaired by the subsequent decision to which our attention has been called, is an ample authority for what I cannot help feeling is the perfectly reasonable conclusion to which we are invited to come in this case. I agree the appeal must be allowed.

Solicitors, *White, Borrett, & Co.; Solicitor of Inland Revenue.*

## High Court of Justice.

Chan. Div. } Farwell, J. } June 11, 12, 13, 20.

ATTORNEY-GENERAL v. TRUSTEES OF THE BRITISH MUSEUM. (*a.*)

*Treasure-trove—Crown—Prerogative—Charter—Franchise.*

*In* 1896, *in the course of ploughing a field near the shore of Lough Foyle, certain gold articles, all lying together in a space of about nine inches, were discovered at a depth of about eighteen inches beneath the surface of the field. The articles, which were probably made between* A.D. 200 *and* A.D. 400, *were of considerable value and of a miscellaneous description, including a model of a boat and a hollow collar, inside of which were concealed several plaited chains. The articles were purchased privately by the Trustees of the British Museum.*

*On a claim by the Crown for delivery up of the articles as being treasure-trove,*

*Held,* (1) *that the true inference to be drawn from the above circumstances was that the articles were originally intentionally concealed for the purpose of security, and, therefore, were,* primâ facie, *treasure-trove;* (2) *that the* onus *lay upon the defendants to adduce satisfactory evidence to displace this* primâ facie *inference, and that the defendants had failed to do so.*

*Held, further, that a grant by charter from the Crown of lands together with all "franchises" did not by the word "franchises" pass the right to treasure-trove.*

This was an information by the Attorney-General against the trustees of the British Museum, to establish the title of the Crown to certain gold articles as treasure-trove.

The articles were found in 1896, in the course of ploughing a field belonging to a Mr. Gibson near Limavady, on the shores of Lough Foyle.

The articles lay altogether in a space of about nine inches at a depth of about eighteen inches from the surface of the field. They were of considerable value, and of a miscellaneous description, including the model of a curragh, and a hollow collar, inside which were placed several plaited chain necklaces. The articles were sold by Mr. Gibson to a jeweller, and purchased from him by Mr. Robert Day, who sold them by private treaty to the British Museum for £600.

The land where the articles were discovered was included in a charter of 1662, whereby the Crown granted certain lands to the Irish Society, together with various rights, including "franchises."

*Sir R. Finlay, A.G. Sir E. Carson, S.G., Sutton,* and *R. J. Parker,* appeared for the Crown.—The fact that all the articles were found close together in a narrow space *primâ facie* shows that they had been placed there for concealment; they therefore come within the definition of treasure-trove (3 Coke's Inst., 132). The *onus* lies on the defendants to displace that *primâ facie* inference. The terms of the charters granted by the Crown to the Irish Society were not such that the right to treasure-trove thereby passed to the grantees. The right to treasure-trove is a prerogative of the Crown, and can only pass by words of express grant.

They referred to Chitty on Prerogative of the Crown, 391, 392; Plowden, 243, 336; *Bann Fishery case,* Davys' Irish Reports, 149, 156; Comyn's Digest, vol. 7, Prerogative, 74; *The Abbot of Strata*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

*Marcella's case*, 9 Coke 24*a* at 25*b*; *Duke of Northumberland* v. *Houghton*, 18 W. R. 495, L. R. 5 Ex. 127.

*Warmington, K.C., Haldane, K.C.*, and *E. Beaumont*, for the trustees of the British Museum. — These articles are not treasure-trove. There is evidence to show that they were a votive offering to some Irish sea god. The *locus in quo* is what is known to geologists as "raised beach," and in ancient times was covered by the sea. Stephen's Commentaries, 3rd ed., vol. 2, Book IV., Part I., p. 530, states the meaning of treasure-trove. Again, the grant by charters from the Crown to the Irish Society was intended to pass treasure-trove. The grant comprised the lands in which these articles were found, and the terms of the grant included all "franchises." The British Museum have acquired by assignment whatever rights the Irish Society or their mesne assignees were entitled to, so far as these articles are concerned.

They referred to *Dyke* v. *Walford*, 5, Moo. P. C. 434; *Attorney-General of Ontario* v. *Mercer*, 8 App. Cas. 767, 32 W. R. Dig. 33; *Attorney-General* v. *Moore*, 41 W. R. 294, [1893] 1 Ch. 676; Cruise's Dig. III., 244.

The nature of the evidence adduced at the hearing of the case on behalf of the defendants is summarized in the judgment.

*Cur. adv. vult.*

June 20.—FARWELL, J., in giving judgment, said: In the year 1896 two ploughmen were driving a furrow in a field near Lough Foyle, the leader with a 6in. plough, the second, Nichol, following down the same furrow with a 14in. American plough. Nichol's plough struck something hard at the bottom of the furrow, and he stopped and went back and found certain gold articles all lying together in a space about 9in. square. The articles found consisted of the following: (1) A hollow collar with repoussé ornaments; (2) a model boat with thwarts, and a number of oars, spars, &c.; (3) a bowl with four small rings at the edges; (4) a solid gold torque; (5) one half of a similar torque; (6) a necklace consisting of three plaited chains with fastening; (7) a single chain. The two last were found inside the hollow collar. The oars were much bent, and were inside the bowl, which was flattened. The boat was crumpled up. Nichol took the articles to his master, and they were sent to the factory of Messrs. Johnson in Grafton-street, Dublin, who restored them to the shape in which they have been shown to the court. They are articles of great interest and beauty, of Celtic origin. The dates suggested for their manufacture range from 300 B.C. to 600 or 700 A.D. I think that they may fairly be attributed to the second or third century after Christ. Ultimately they were purchased by the trustees of the British Museum, and they are now claimed by the Crown as treasure-trove.

The trustees set up two defences—first, they deny that the articles are treasure-trove; and, secondly, if they are, they allege that by a charter of Charles II. the right to treasure-trove is vested, not in the Crown or themselves, but in the Irish Society. Several definitions of treasure-trove have been cited to me, not substantially differing one from another. I will take that cited in Chitty on Prerogative, p. 152: "Treasure-trove is where any gold or silver in coin, plate, or bullion, is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the king or his grantee, having the franchise of treasure-trove; but if he that laid it be known or afterwards discovered, the owner and not the king is entitled to it; this prerogative right only applying in the absence of an owner to claim the property. If the owner, instead of hiding the treasure, casually lost it or purposely parted with it, in such a manner that it is evident he intended to abandon the property altogether and did not propose to resume it on another occasion, as if he threw it on the ground or other public place or in the sea, the first finder is entitled to the property, as against every one but the owner, and the king's prerogative does not in this respect obtain. So that it is the hiding, and not the abandonment, of the property that entitles the king to it." It is clear from the very terms of the definition that no direct evidence can be given of the intention to hide, or the intention to abandon, by a person who is *ex hypothesi* unknown. The direct evidence must necessarily be confined to the discovery of articles in fact concealed, and the court must presume the intention to hide or to abandon from the relevant surrounding circumstances, and the motives that usually influence persons acting under such circumstances, according to the ordinary dictates of human nature.

In the present case the articles were obviously of considerable value, but of a miscellaneous nature, such as might well represent the store of a native chief or the spoils gathered in the raid of some Norse pirate. The articles were all put close together, the chains being actually concealed within the hollow of the collar in the mode which a person hiding them for safety, with a view of returning to reclaim them, would be likely to adopt. Their value renders it improbable that they would be abandoned except under stress of imminent danger, and the care with which the chains were put inside the collar and all the articles were collected together point to the absence of any such imminent danger as would necessitate abandonment. The inference, therefore, is that they were intentionally concealed for the purpose of security. There is no evidence at all as to the date of concealment, but the state of Ulster from the beginning of its history down to comparatively modern times has been such as to render it highly probable that treasure would have been concealed on many occasions, and in this very district there is record of a great invasion of Norsemen, who overran the land comprising this spot about the year 850 A.D. The inference, therefore, appears irresistible that this was *vetus depositio*, unless the defendants can displace it. Mr. Warmington argued that it would be enough for him to show any other plausible theory. I do not agree with him. The Crown must first prove a *primâ facie* case, but when the Crown has done so, the defendants can only defeat that title by producing a better title. But, in my opinion, the defendants' theory is not even plausible. I desire to speak with all respect of the gentlemen who have been called as witnesses for the defence, but I must express my opinion that the court has been occupied for a considerable time in listening to fanciful suggestions more suited to the poem of a Celtic bard than the prose of an English law reporter. The defendants' suggestion is that the articles were thrown into the sea, which, they suggest, then covered the spot in question, as a votive offering by some Irish sea king or chief to some Irish sea god at some period between 300 B.C. and 700 A.D.; and for this purpose they ask the court to infer the existence of the sea on the spot in question, the existence of an Irish sea god, the existence of a custom to make votive offerings in Ireland—during the period suggested, and the existence of kings or chiefs who would be likely to make such votive offerings. The whole of their evidence on these points (if I may so describe it) is of the vaguest description.

I find as follows: (1) There is no evidence to show that the sea ever flowed over the spot in question within any period during which the articles could have been in existence; it is not disputed that the raised beach on which the spot is situate is of later origin by upheaval than the surrounding land, but there is nothing to show that it was raised at any time since the Iron Age began; and so far as I can see, it may have been at any time between 2000 or so B.C. and some time before the beginning of the Christian Era. (2) There is nothing to show that votive offerings of the sort suggested were ever made in Ireland. There is no such consensus of expert opinion as would enable me to find that such offerings have ever been made in Europe since the Bronze Age. There is no case known of a votive offering anywhere of a ship coupled with other miscellaneous articles, and there is no case on record of any votive offering having ever been made in Ireland at any time. (3) Notwithstanding the passage in Brash's work on Ogham inscriptions in Ireland which has been cited to me, it is by no means certain that there was any Irish sea god at all. (4) Or that there were any Irish sea kings or chiefs who made offerings to a sea god, if any such god there were. Further, the negative inferences against the defendants' theory are of considerable weight. Votive offerings to a pagan deity would be offered in such a way as to make the most display; no one seeking to propitiate an anthropomorphic deity, who like Baal might be engaged in hunting or sleeping, would be likely to conceal two of his gifts in the hollow of a third; nor (as pointed out by Mr. Coffey in his evidence on behalf of the Crown) would the donor mutilate some only of the objects as the defendants here allege to be the case. Mutilation would either be essential, or an insult, and one would expect, therefore, to find all or none mutilated. Again, by virtue of what process have all these articles of such different sizes, weights, and shapes been kept together during all these years under the whelming tide? What magic bag had the Irish sea king which would withstand the action of the waves until the ornaments confided to its care found a safe resting-place in the soil formed on the surface of the beach when the sea receded? It was perhaps natural that the defendants should grasp at theories which, in justice to them, I may say were not invented for the purpose of this defence; but it is really little short of extravagant to ask the court to assume the existence of a votive offering of a sort hitherto unknown in a land where such offerings were hitherto unknown, in a sea not known to have existed for 2,000, and possibly 4,000 years, to a sea god by a chieftain both equally unknown: and to prefer this to the commonplace but natural inference that these articles were a hoard hidden for safety in a land disturbed by frequent raids, and forgotten by reason of the death or slavery of the depositor. It is perhaps hardly necessary to mention that my observations as to votive offerings are confined to votive offerings of the character suggested by the defendants, and have nothing to do with votive offerings in Christian churches, or with offerings to wells and fountains, of which many instances are collected in Brand's Popular Antiquities, vol. 2, p. 259 and onwards. The view that I have expressed on the facts renders it unnecessary for me to express any opinion on the Attorney-General's further point that votive offerings may be treasure-trove.

The defendants' next point is this: They say that the right to treasure-trove was granted by a charter of King Charles II. to the Irish Society, and that the Crown has, therefore, no title. The first part of this defence depends on the construction of the charter. In 1613 King James I. granted a charter to the Irish Society for the purpose of effectuating the settlement of Ulster. In 1638 this charter was cancelled, and in 1662 the existing charter was granted for the purpose of restoring all the property and rights created by the charter of James I. Counsel agree that the two charters are practically identical, and it is necessary to refer, therefore, to the later charter only. The material parts of the charter, it is sufficient to say, contain a grant of lands and rights couched in a multiplicity of words, including waived chattels, estrays, and franchises, but not mentioning treasure-trove or royalties; the appointment of the society as vice-admirals of the coast, with all royalties, &c., to the office appertaining; and the grant of wreck, flotsam, and jetsam. It is argued that treasure-trove has passed under the word "franchises" either by the general meaning of the word or by its meaning as used in this particular document. In my opinion that contention fails. A franchise is a Royal privilege or branch of the King's prerogative subsisting in a subject by a grant from the King (Chitty on Prerogatives, p. 119). So long as it is attached to the Crown it is called prerogative, but when granted to a subject it is called franchise (Chitty on Prerogatives, p. 118). For the present purpose franchises may be divided into two classes—those which the King has in his own hands as parcel of the flowers of his Crown, and those which have no existence until created by the King. See the case of the *Abbot of Strata Marcella*, 9 Coke 25*b*: "It is to be known that when the King grants any privileges, liberties, or franchises, &c., which were privileges, liberties, or franchises in his own hands, as parcel of the flowers of his Crown, as *bona et catalla felonum, fugitivorum, utlagatorum, &c., bona et catalla waviata, extrahur', deodanda wreccum maris, &c.*, within such possessions, there if they come again to the King they are merged in the Crown and he has them again *in jure coronae*; and if the wreck or goods waifed, estrays, &c., were appendant before to possessions, now the appendancy is extinct and the King is seised of then *in jure coronae*. But when a privilege, liberty, franchise, or jurisdiction was at the beginning enacted and created by the King and was not any such flower before in the garland of the Crown, there by the accession of them again to the Crown they are not extinct nor the appendancy of them severed from the possessions; as if a fair, market, hundred, leet, park, warren, *et similia*, are appendants to manors, or in gross, and afterwards they come back to the King, they remain as they were before *in esse* not merged in the Crown, for they were at first created and newly enacted by the King and were not *in esse* before, and time and usage has made them appendant." This distinction is well settled and was recognized in the case of *The Duke of Northumberland* v. *Houghton*. Franchises which belong to the King by right of his prerogative cannot pass under the general word "franchise" in a grant from the Crown, because they do not exist as such; until created by grant they are part of the prerogative. If created and resumed they merge in the prerogative. But franchises which are no part of the flowers of the Crown have no existence until the Crown expressly creates them, and these, if resumed, do not merge—*e.g.*, the right to felons' goods is in the Crown, and can be exercised simply by virtue of the prerogative; the right to a fair or market has no existence until the Crown has created it, so that although the Crown could create a fair or market with tolls by charter, it could not enforce payment of tolls as for a fair or market by virtue of the prerogative without first creating the fair or market with tolls. It is of course clear that treasure-trove belongs

to the Crown by virtue of the prerogative. Indeed, it is one of the instances given by Mr. Ellis in his argument in *Dyke* v. *Walford*, adopted by Lord Selborne and the Privy Council in *Attorney-General of Ontario* v. *Mercer*, 8 App. Cas., at pp. 778 and 779. Nor is the word "franchises" superfluous in the charter of Charles II. It would refer, and may well have been intended to refer, to those franchises of the second class which if created would remain appendant to the property in respect of which they were created or in gross, as the case may be. Further, when the Crown desired to grant any of these flowers of the Crown they were expressly mentioned—*e.g.*, waived chattels and outlaws, and wreck, flotsam and jetsam. The true inference is that treasure-trove would have been also specified if it was intended to grant it. The same argument to some extent applies to the word "royalties." Mr. Warmington argued that the word "royalties" would be sufficient to pass these flowers of the Crown on the authority of *Dyke* v. *Walford* cited above. The Attorney-General does not admit this, and I express no opinion on the point; but if it would, the fact that the only royalties granted were those that belong to the office of vice-admiral raises a strong presumption that none other were intended to pass. I have arrived at the conclusion that treasure-trove does not pass by this charter by applying the ordinary rules of construction so far as is compatible with the subject-matter of the grant; and it is therefore unnecessary for me to express any opinion on the contention of the Attorney-General as to the rules by which the Crown is entitled to have its grants construed.

It is also unnecessary for me to express any opinion on the last point urged by the Attorney-General, which is of considerable general importance—viz., that in all claims to property the Crown is entitled to treat the defendant as if he were plaintiff, and to insist that he must succeed on the strength of his own title and cannot defeat the Crown merely by showing that the Crown's title is bad.

The result is that I will make a declaration that the articles in question are treasure-trove belonging to his Majesty by virtue of the prerogative royal, and I order the delivery up of the same accordingly.

*Judgment for the Crown.*

Solicitors, *The Solicitor to the Treasury; Warrens; L. Maton.*

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Chan. Div.
Farwell, J. } March 18.

STEVENS *v.* THEATRES (LIMITED) AND OTHERS. (*a.*)

*Mortgage — Foreclosure order* nisi *— Power of sale— Suspension of power.*

*A mortgagee obtained a foreclosure order* nisi *against the mortgagor. Before this order was made absolute the mortgagee sold under his power of sale.*

*Held, that the foreclosure order* nisi *did not extinguish the power of sale, but suspended the right to exercise it without the leave of the court.*

On the 20th of February, 1896, the defendants, Theatres (Limited), mortgaged the Royalty Theatre and adjoining premises to the plaintiff, George Stevens, to secure £3,000 and interest.

On the 26th of November, 1897, in an action by the plaintiff against Theatres (Limited), a foreclosure order *nisi* was made in the usual form, but the taking of the account was not proceeded with.

On the 3rd of December, 1897, the plaintiff gave notice to the defendants that he proposed to sell the properties comprised in his security, and on the 23rd of February, 1898, the plaintiff assigned the premises to A. Drucker.

On the 3rd of August, 1899, Drucker assigned the premises to the defendant, Miss Kate Santley.

On the 23rd of August, 1901, A. Drucker was adjudicated a bankrupt, and on the 11th of August, 1902, it was ordered that the names of Mr. Drucker's trustee in bankruptcy and of Miss Santley should be added as defendants in this action.

On the 20th of February, 1903, Miss Santley moved that all proceedings might be stayed as against her, and it was then arranged that the case should be argued on the following point of law:

Whether, assuming that, apart from the order of the 26th of November, 1897, the plaintiff Stevens had by virtue of the mortgage of the 20th of February, 1896, a power of sale exercisable on the 17th of December, 1897, he was prevented from exercising such power by reason of the existence of the order of the 26th of November, 1897."

The case now came before the court to be argued on this point of law.

*Upjohn, K.C.*, and *à Beckett Terrell*, for Miss Santley, referred to *Heath* v. *Pugh*, 29 W. R. 904, 30 W. R. 553, 6 Q. B. D. 345, 7 App. Cas. 235, and *Wrixon* v. *Vize*, 3 Dr. & War. 104.

*Stewart Smith, K.C.*, and *Coldridge*, for Stevens.

*Gore-Browne, K.C.*, and *George Wallace*, for Theatres (Limited).

*H. E. Wright*, for the trustee in bankruptcy.

FARWELL, J., said that, having regard to the fact that Miss Santley was a purchaser for value without notice, the answer to the point of law raised must be qualified. The question whether the decree for foreclosure *nisi* operated to prevent the exercise of the mortgagee's power of sale had to be decided on principle, in the absence of authority. Neither the mortgagee nor the mortgagor was entitled to dismiss the action of their own motion: *Taylor* v. *Mostyn*, 32 W. R. 256, 25 Ch. D. 48; *Exchange and Hop Warehouses (Limited)* v. *Association of Land Financiers*, 35 W. R. 120, 34 Ch. D. 195. So far as the judgment operated, the plaintiff could not get rid of it, nor could he vary the judgment in any way by putting it out of his power to obey the order of the court, without leave of the court.

The mortgagee had an absolute title at law, but the mortgagor had the right to redeem, and the court equally regarded the rights of both. The power of sale in a mortgage was a modern invention, and possibly for that reason no authority could be found on this point. The power of sale could not be exercised without the leave of the court after the foreclosure order *nisi* was made. Did the order of the court extinguish the power of sale? In his opinion it did not. The order foreclosure *nisi* did not destroy the power of sale, because the remedies of the mortgagee were only suspended for a particular purpose. It could not be said that the power of sale was gone. It was a question of some importance to purchasers, because the purchaser might find the power of sale extinguished. If in this case the mortgagee had come to court he might have had leave to exercise the power of sale. The result was that the mortgagee could not exercise his power of sale without the consent of the court, but that the power of sale was not extinguished.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Solicitor for the plaintiff, *W. H. Lendon.*

Solicitors for Miss Santley, *Fladgates.*

Solicitors for Theatres (Limited), *Wilkinson, Howlett, & Wilkinson.*

Solicitors for the trustee in bankruptcy, *King, Wigg, & Co.*

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Chan. Div. Joyce, J. } March 3, 4, 21.

*In re* FITZGERALD. (*a.*)
SURMAN *v.* FITZGERALD.

*Conflict of laws—Scotch law—Scotch marriage contract made in Scotland*—Lex loci—*Life interest by way of alimentary provision—Inalienable life interest in domiciled Englishman—Fraud upon creditors—Public policy*

*By a Scotch marriage contract a domiciled Scotchwoman settled property (including what by the law of Scotland is for certain purposes deemed to be Scotch real estate) upon trust (among other purposes) to pay the income to F., her intended husband, a domiciled Englishman, for his life, and the contract contained a declaration "that all payments to the said F. should be strictly alimentary, and should not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors." The trustees of the settlement were English, and the trusts had been administered in England. F. had purported to charge his life estate.*

*Held, that even if the construction and effect of the contract was to be determined by Scotch law, yet its validity and operation must be governed by the law of England, and that an inalienable life estate to a man being contrary and repugnant to the public policy of English law, F. was not entitled to payment of the income as against his incumbrancers.*

This was a summons by the trustees of settlements made in 1862, raising in effect the question whether under the circumstances mentioned below certain mortgagees had or had not a valid charge upon the life interest of Sir Gerald Fitzgerald under a settlement in Scotch form.

In 1862 a marriage was contemplated between Sir Gerald Fitzgerald, who was domiciled in England, and the lady who afterwards became Lady Fitzgerald, and who was domiciled in Scotland.

By an English settlement made in consideration of the intended marriage and dated the 20th of September, 1862, but executed in Scotland, certain property was assigned to trustees upon trust for Sir G. Fitzgerald for life, with remainder to Lady Fitzgerald for life, and after the death of the survivor upon the trusts therein declared for the children of the marriage.

By a Scotch marriage contract of even date with the English settlement, and made between the intending husband of the one part and the intending wife of the other part, and reciting the English settlement, Lady Fitzgerald assigned to the same trustees all her then present and future property upon trust (in effect) to pay the costs of the trust, and subject thereto to pay the income to Lady Fitzgerald for life, and subject thereto in case Sir G. Fitzgerald should survive his wife to pay the said income to him during the remainder of his life, and it was by the contract declared "that all payments to the said Sir Gerald should be strictly alimentary and should not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors"; and subject thereto upon the trusts therein declared for the children of the marriage.

The marriage was duly solemnized and there was issue one child and no more—viz., Miss Geraldine Fitzgerald, who was born in 1863.

Lady Fitzgerald died on the 16th of May, 1901.

Prior to this date Sir G. Fitzgerald and Miss Fitzgerald had executed numerous documents purporting to charge their respective interests under the English settlement and the Scotch contract, some of these having been executed prior to Miss Fitzgerald's attaining twenty-one on the 19th of June, 1884, and others subsequently to that event.

The trust had always been administered in England, and five of the six trustees were domiciled in England.

The question above indicated, which now came up for argument, depended in substance upon the question whether the Scotch contract was to be construed, with respect to its validity, according to Scotch or English law. If according to the former, then Sir Gerald's life interest was (except in favour of alimentary creditors and to the extent required by such creditors) restrained from anticipation, and the charges given as above mentioned were invalid.

The trust funds under the Scotch contract comprised (*inter alia*) Scotch heritable bonds, which, it was contended, were by the law of Scotland treated as real estate.

*E. Ford*, for the plaintiffs, the trustees.

*Hughes, K.C.*, and *Philpotts*, for Sir G. Fitzgerald.—As to the real property, if heritable bonds are to be deemed realty the Scotch law must govern, but whether the property is movable or immovable Scotch law is the proper criterion according to the obvious intention of the parties. If the question arises as to which of two systems of law is to govern a contract, and that contract contains provisions which are obnoxious to one system, the parties must be deemed to have intended to be governed by the other system; if not, their own acts would be stultified: *Barnard* v. *White*, 56 L. T. Rep. 9, 35 W. R. Dig. 177; *Chamberlain* v. *Napier*, 29 W. R. 194, 15 Ch. D. 614; and *In re Missouri Steamship Co.*, 37 W. R. 696, 42 Ch. D. 321. This was simply a bargain for value between husband and wife.

*Younger, K.C.*, and *Crossman*, for the daughter, adopted similar arguments.

*Badcock, K.C.*, and *Methold*, for the first mortgagee of the life interest.—No doubt persons may intend expressly or impliedly that the law of a particular country shall apply to their contract; but if the forum of jurisdiction becomes an English forum then only in so far as such law is not repugnant to English law, to that extent the English courts, by the comity of nations, will give effect to the intention; here the provision is void according to English law.

*Hamilton, K.C.*, and *Vernon C. James, Ashworth James, Blakesley, Withers, Northcote*, and *Pepys* appeared for other incumbrancers.

JOYCE, J., in a reserved judgment, stated the facts and the questions at issue, and continued: Now, it is contended that the words in question in the Scotch contract preclude Sir G. Fitzgerald from assigning so as to create a valid incumbrance. The domicil and residence of Sir G. Fitzgerald has throughout remained English, and the trustees are all subject to and have indeed invoked the jurisdiction of the English courts; in those circumstances it appears to me that even if the construction and effect of the contract in question is to be determined by Scotch law (*Barnard* v. *White*)

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

yet its validity and operation with respect to the matter now in question must be determined by the law of England: see Westlake on International Law, p. 76; Vaizey on Settlements, 1640, *et seq.* Moreover, if the question were one solely of contract between the parties, yet a contract inconsistent with the law and policy of this country, or which conflicts with what are treated in England as essential public interests could not be enforced in England: Westlake, 259. According to English law an inalienable trust in favour of a man, even for his maintenance, is not allowed, nor is a mere prohibition against alienation effectual except with regard to a married woman's separate estate: *Brandon* v. *Robinson*, 18 Ves. 429; *Graves* v. *Dolphin*, 1 Sim. 66; *Younghusband* v. *Gisborne*, 1 Coll. 400. It is contrary to English public policy, as being a fraud upon creditors, that property should be so settled as to continue in the enjoyment of a bankrupt notwithstanding bankruptcy. The words, therefore, in the Scotch contract in question are void and inoperative according to English law, being repugnant and contrary to public policy. It is clear that in so far as the property comprised in the contract is personalty, the law of England must govern, and upon reflection, having regard to the frame of the settlement, I think there is no difference even with regard to that part (if any) which ought by the law of Scotland to be treated as real and immovable property. Sir G. Fitzgerald had merely a personal claim against the trustees to be paid the income subject to the costs of the trust, and I think that the decision of the House of Lords in *Scott* v. *Allnutt*, 2 Dow & Clark, 404, at p. 409, applies (see also *Noell* v. *Robinson*, 2 Ventris 353). I therefore hold that the assignees and incumbrancers under the several documents of charge, and not Sir G. Fitzgerald, are the persons entitled to receive the income from the trustees of the Scotch contract.

*Declaration accordingly.*

Solicitors, *Keen, Rogers, & Co; Surman & Quekett; Redfern & Hunt; Stibbard, Gibson, & Co.; Currey & Hawkins; Rutter, Veitch & Bond; Trower, Still, & Co.*

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Chan. Div. Joyce, J. — Feb. 5; March 14.

*In re* WALPOLE'S SETTLEMENT.
THOMSON *v.* WALPOLE. (*a.*)

*Settlement — Power of appointment — Assignment by appointee of his share and all other, if any, his estate and interest in the trust funds—Subsequent acquisition of an interest by the trustees of the settlement.*

*By a marriage settlement, made in* 1845, *certain funds were settled on trust (after life interests therein to A., the husband, and B., the wife, respectively) for the children of the marriage as A. should appoint, and in default of appointment by him as B. should appoint. A. died in* 1876 *without appointing. In* 1879 *B. (the wife) appointed the trust funds, subject to her own life interest therein, among her six children (including W.) in equal shares. In* 1893 *W., by his marriage settlement, assigned to trustees his one-sixth share of the said trust funds "and all other (if any) his estate and interest of and in all other the trust funds for the time being subject to the trusts of the settlement of* 1845." *In February,* 1900, *C., an aunt of the said six children, died, having, by a codicil made in* 1878, *bequeathed certain property to the trustees of the settlement of* 1845, *to be held by them upon the trusts thereof. In July,* 1900, *B. (the wife) further appointed the property bequeathed by C.'s codicil among her said six children (including W.) equally.*

*Held,* (1) *that B.'s appointment in* 1879 *did not operate as an appointment of any property not then already subject to the trusts of the settlement of* 1845, *and therefore did not include the property comprised in C.'s codicil of* 1878; (2) *that the assignment in W.'s marriage settlement of* 1893 *passed only such estate and interest as W. then had in the trust funds of the settlement of* 1845, *and did not amount to a contract to assign any interest he might afterwards acquire by appointment or otherwise in property not then subject to the trusts of the settlement of* 1845; *and* (3) *that consequently W.'s share of the property bequeathed by C.'s codicil, which he did not acquire until* 1900, *was not covered by the words of the assignment contained in his marriage settlement of* 1893.

Summons.

By articles of settlement dated the 27th of January, 1845, upon the marriage of Sir Robert Walpole and Miss Gertrude Ford, certain railway shares and sums of Consols were settled upon trust for Sir Robert Walpole for life, with remainder for Lady Walpole for life, with remainder for the children of the marriage as Sir Robert should appoint, and in default of appointment by him, as Lady Walpole should appoint, and in default of any appointment for the children equally.

There were nine children—namely, R. E. Walpole (who died in 1867), George Walpole (who died in 1872), Geraldine Walpole, Spencer C. Walpole, Mary Walpole, Emma Walpole (who died in 1882), William H. Walpole, Catherine Walpole, and Margaret Walpole.

Sir Robert Walpole died on the 12th of July, 1876, having appointed certain specific sums of Consols to his daughter Geraldine, but not having further exercised his power of appointment.

On the 18th of November, 1879, Lady Walpole, by deed-poll, appointed that the trustees of the settled funds should, after her decease stand possessed of the trust funds (other than the Consols already appointed to Geraldine Walpole) for the other six then surviving children in equal shares absolutely.

On the 29th of September, 1893, a settlement was executed in contemplation of the marriage then intended and afterwards solemnized between one of the said children, William H. Walpole, and Miss Minnie Thompson, by which, after reciting that under or by virtue of the articles of 1845 and the deed-poll of 1879 W. H. Walpole was entitled in reversion expectant on the decease of Lady Walpole to one-sixth part or share of the trust funds then subject to the trusts of the articles of 1845, W. H. Walpole assigned to trustees on the usual trusts for himself and his wife and the children of the marriage this one-sixth part or share "and all other (if any) his estate and interest of and in all other the trust moneys, funds, stocks, shares, and securities for the time being subject to the trusts of" the articles of 1845.

By her will, dated the 22nd of January, 1875, Mrs. Sophia Frances Berens, a sister of Sir Robert Walpole, had bequeathed to Sir Robert Walpole certain leasehold premises in London and some specified chattels; and by a codicil dated the 23rd of December, 1878 (after his death), she directed that the amount of property left by her will to him should be paid to the trustees of Lady Walpole's marriage settlement and be held on the trusts thereof. Mrs. Berens died on the 8th of February, 1900, and her will and codicil were proved on the 13th of March, 1900; and on the 24th of March, 1900, her executor assigned the said leasehold premises to the trustees of the articles of 1845, by whom they had since been sold and the proceeds invested.

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(*a.*) Reported by C. B. CAMM, Esq., Barrister-at-Law.

By a deed of declaration and appointment dated the 23rd of July, 1900, to which Lady Walpole and her surviving children and the representatives of deceased children were parties, after reciting that doubts had arisen as to whether the leasehold premises and other property bequeathed by Mrs. Berens were comprised in the appointment contained in the deed-poll of the 18th of November, 1879, it was agreed and declared that they should be deemed not to be comprised therein or in any way affected by such deed-poll, and that Lady Walpole's power of appointment should as regarded them be deemed not to have been exercised, but to be then capable of being exercised; and Lady Walpole thereby irrevocably appointed that from and after her decease and subject to her life interest the leasehold premises and other property, bequeathed by Mrs. Berens, or the property for the time being representing the same, should be held in trust for Spencer C. Walpole, Mary Walpole, William H. Walpole, Catherine Walpole, and Margaret Walpole, their respective executors, administrators, and assigns, in equal shares.

In November, 1900, W. H. Walpole charged his one-fifth share and interest or other his share and interest under the deed of the 23rd of July, 1900, of and in the leasehold premises and other property bequeathed by Mrs. Berens, or the property for the time being representing the same, in favour of his sister, Mary Walpole, as security for a loan of £600 and interest at 4 per cent., and he subsequently gave her a further charge on the same property to secure a further advance of £100.

W. H. Walpole died on the 31st of January, 1902, leaving a will, of which he appointed Spencer C. Walpole executor.

On the 22nd of November, 1902, an originating summons was taken out by one of the trustees of W. H. Walpole's marriage settlement, to which Spencer C. Walpole (who was also the other trustee of the settlement) and Mary Walpole were made defendants, for the determination of the question whether upon the true construction of the settlement the trustees thereof were entitled (subject to Lady Walpole's life interest) to W. H. Walpole's share of and in leasehold premises and other property bequeathed by Mrs. Berens or the property for the time being representing the same, or whether such share, subject to Lady Walpole's life interest and to the incumbrances in favour of Mary Walpole, constituted part of W. H. Walpole's estate.

*H. B. Howard*, for the plaintiff.—The settled property, at the period of distribution is caught by the words in W. E. Walpole's marriage settlement, whatever be its character at that period. By that settlement there is an assignment of Mr. Walpole's share in any property that comes into the hands of the trustees of the articles of 1845. It may be said that the investments representing the leasehold house are not included because the property was in form of leaseholds at the date of the appointment of July, 1900; but this would give no effect to the words "for the time being." It was a wasting security, and the trustees were bound to sell it.

*Ashton Cross*, for the defendants.—To construe the words "all his estate and interest" as a covenant to settle is to strain their meaning. They are merely inserted to ensure that nothing in what is settled is omitted; and there is nothing in these words which can bring in after-acquired property. Present estates and interests only are referred to.

*Howard* replied.

*Cur. adv. vult.*

March 14.—JOYCE, J., delivered a written judgment in which, after stating the facts, he continued: Probably it is not necessary to decide whether the effect of Mrs. Berens' codicil was to make the property thereby bequeathed to the trustees of the marriage articles of 1845 a fund to be added and treated in all respects as an accretion to the funds originally settled, as in *Eustace* v. *Robinson*, 7 L. R. Ir. 83, 29 W. R. Dig. 239, or to create another settlement with referential trusts, as in *In re North*, 76 L. T. Rep. 186, where Stirling, L.J. (then Stirling, J.), held that by a bequest of property to the trustees of a settlement upon the same trusts there was not an accretion to the trust funds of the settlement, but a settlement with referential trusts of an independent fund. It appears to me, however, that, even if Lady Walpole could by the deed of 1879 have exercised with respect to the property which the trustees of the marriage articles took by the codicil of Mrs. Berens, in 1900, the limited and fiduciary power of appointment which she had under the marriage articles of 1845 before such power was created in reference to that property (see Farwell on Powers, 2nd ed., p. 226, and *In re Hayes, Turnbull* v. *Hayes*, 49 W. R. 659, [1901] 2 Ch. 529), this appointment by her in 1879, according to the true construction thereof, did not purport and was not intended to operate and did not operate as an appointment of any moneys, shares, stocks, funds, or securities not then already subject to the trust of the marriage articles. Mrs. Berens did not direct the property by her codicil bequeathed to the trustees of the marriage articles to be held upon the trusts thereof and of any appointment then already made in exercise of the power of appointment therein contained. Such codicil does not in any way refer to the appointment of 1879, or to the marriage settlement of W. H. Walpole. Now, what W. H. Walpole assigned to the trustees of his marriage settlement of 1893 was his one-sixth share under the appointment of 1879 in the stocks specified in the first schedule to such marriage settlement, and all other (if any) his estate and interest of and in all other the trust moneys, funds, stocks, and securities for the time being subject to the trusts of the marriage articles of 1845. If I am right, he did not by the appointment of 1879 acquire any share or interest in the property subsequently bequeathed by Mrs. Berens. Further, in my opinion, the assignment contained in his marriage settlement passed only such estate and interest as he then had. It neither was nor purported to be a contract to assign any interest he might afterwards acquire by appointment (*Sweetapple* v. *Horlock*, 27 W. R. 865, 11 Ch. D. 745; *Lovett* v. *Lovett*, 46 W. R. 105, [1898] 1 Ch. 82; and per Stirling, L.J., in *Attorney-General* v. *Selborne*, 50 W. R. 210, [1902] 1 K. B. 388, at p. 398); or, indeed, either by appointment or otherwise, in any property not then subject to the trust of the marriage articles, as, for instance, that afterwards bequeathed by Mrs Berens to the trustees of such articles upon the trusts thereof. And this bequest probably did not operate to make the property bequeathed an accretion to the funds originally settled by the marriage articles, but merely created a new referential settlement of such property upon similar trusts. At all events, I hold that the assignment by W. H. Walpole in his marriage settlement of all (if any) his estate and interest and in all other the trust moneys, funds, stocks, shares, and securities for the time being subject to the trusts of the marriage articles of 1845, did not comprise or affect any share or interest which subsequently came to him by the appointment of 1900 in the leasehold premises or other property bequeathed by the codicil to the will of Mrs. Berens.

Solicitors, *Payne, Shaw-Mackenzie & Lake.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) May 8.

MOURMAND AND ANOTHER v. LE CLAIR. PROVINCIAL UNION BANK, CLAIMANTS. (a.)

*Bill of sale—Sums repayable by instalments—Denomination of money in monthly payments omitted—Bills of Sale Act,* 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in schedule, Deviation from—Validity.*

*A bill of sale, given to secure the repayment of an advance of* £70 *and interest at the rate of* 1*s. per month, stated that the grantor agreed to pay to the grantee "the principal sum aforesaid, together with the interest then due, by monthly instalments of seven* (sic) *on the* 25*th day of every month succeeding the date of these presents."*

*The Court was of opinion that an irresistible inference arose from the language of the instrument that the missing word was "pounds."*

*Held, therefore, that the bill of sale was valid, as being substantially in accordance with the form in the schedule to the Act.*

Appeal by the claimants, the Provincial Union Bank, from a decision of the judge of the Greenwich County Court in an interpleader issue in which he held that a bill of sale granted by the defendant to the claimants was void as not complying with the form in the schedule to the Bills of Sale Act, 1882.

The material part of the bill of sale was as follows: "The grantor doth hereby assign unto the grantee and his assigns all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £70 and interest thereon at the rate of 1s. in the £ per month. And the grantor doth further agree and declare that he will pay to the grantee the principal sum aforesaid, together with the interest then due, by monthly payments of seven (*sic*) on the 25th day of every month succeeding the date of these presents, the first payment to be made on the 25th day of September next."

*Herbert Reed, K.C.* (*T. E. Haydon* with him), for the claimants.—The omission to specify in words the denomination of the money to which the word "seven" refers does not invalidate the bill of sale. It is perfectly clear that the word omitted could not be anything but "pounds," and that the parties intended the repayment to be by monthly payments of seven pounds each on a certain named day in every month. The instrument states that the interest was to be at the rate of 1s. in the £ per month, and therefore it is inconceivable that the agreement as to repayment was that the grantor should repay the principal sum and interest at the nominal rate only of 7s. per month. This is a business document, and the court is justified in construing it to give to the words used the obvious and ordinary meaning which business men would apply to them.

He cited *Grannell* v. *Monck*, 24 L. R. Ir. 241, 37 W. R. Dig. 24, and *Coles* v. *Hulme*, 8 B. & C. 568.

*F. O. Robinson*, for the execution creditor.—The county court judge rightly held that the bill of sale was void under section 9 of the Act of 1882 on the ground that it was not in accordance with the form in the schedule. The authorities show that that provision must be construed strictly, and that it is not complied with if some material part of the form is omitted, although the omission may be of such a nature that at common law it would not make the instrument invalid. The object of the Legislature was that the borrower should understand the nature of the security, and that a creditor on merely searching the register should be able to ascertain the borrower's position: *Thomas* v. *Kelly*, 37 W. R. 353, 13 App. Cas 506; *Davis* v. *Burton*, 32 W. R. 423 11 Q. B. D. 537. This bill of sale does not fulfil either object, because it is impossible to ascertain from its language the amount of the monthly instalments. The omission cannot be supplied by extrinsic evidence, though the defect could be cured if it could be inferred beyond all doubt from the language of the bill of sale what the amount of the instalments was intended to be: *Parsons* v. *Brand*, 38 W. R. 388, 25 Q. B. D. 110; *Bird* v. *Davey*, 39 W. R. 40, [1891] 1 Q. B. 29. No such inference can be drawn here. It may be admitted that the missing word is not shillings or guineas, but it does not necessarily follow that it must be pounds. The language of the instrument is consistent with an intention that the instalments should be at the rate of seven "shillings in the pound per month." Such a method of repayment, though possibly unusual, would be valid, because it would only require a simple arithmetical calculation to ascertain the amount of each monthly instalment and the date by which the principal sum would be paid off: *Linfoot* v. *Pockett*, 44 W. R. 66, [1895] 2 Ch. 835. The cases cited for the appellant are not in point. *Coles* v. *Hulme* was not a decision under the Bill of Sales Act. *Grannell* v. *Monck* was decided on very different facts from the present, and, further, being an Irish case, is not binding on this court.

Lord ALVERSTONE, L.C.J.—In this case it seems to me that the learned county court judge has been misled by the rules laid down in the cases as to the effect of section 9 of the Bill of Sales Act, 1882, which provides that a bill of sale shall be void unless made in accordance with the form in the schedule. The question which we have to decide is whether this bill of sale is in accordance with the form to the Act. I agree that in order to decide the question the bill of sale only, ought to be looked at, and that external circumstances ought not to be taken into consideration. Mr. Robinson for the execution creditor argued that the bill of sale was void as not complying with the form in the schedule, and he cited a passage from *Thomas* v. *Kelly*, 13 App. Cas., at p. 520, per Lord Macnaghten, who said that in order to be in accordance with the form, a bill of sale must not "depart from the statutory form in anything which is a characteristic of that form." It was suggested by him that the language of the sentence in the bill of sale which dealt with the amount to be paid by the grantor was capable of meaning a sum other than pounds; and he argued that the true grammatical reading of the words was "7s. in the pound per month." If I thought that there was any reasonable doubt as to the amount denoted by the word "seven," I should agree with Mr. Robinson's contention; but when it is observed that the amount of interest was £3 10s., it seems to me unreasonable to suggest that any sum of money could have been intended to be paid other than a sum which would be expressed in pounds. With regard to the contention that the words might mean 7s. in the pound per month, looking at the amount of the principal sum and the fact that interest was being charged, I think that meaning could not reasonably be given to the words.

Therefore in my opinion the learned judge was wrong in holding that this bill of sale was not substantially in accordance with the schedule of the Act and this appeal must be allowed.

WILLS and CHANNELL, JJ., gave judgment to the same effect.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*Appeal allowed.*

Solicitor for the claimants, *J. G. Lincoln.*

Solicitor for the execution creditor, *W. Hood.*

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K. B. Div. (Wright, J.) — Feb. 20.

*In re* AN ARBITRATION BETWEEN GOUGH AND THE ASPATRIA, SILLOTH, AND DISTRICT JOINT WATER BOARD. (*a.*)

*Waterworks—Lands compulsorily taken—Special adaptability of site.*

*An arbitrator, in assessing the value of lands taken for the purposes of a reservoir, may award an extra value in respect of the special adaptability of the site for the purposes of a reservoir even though it cannot be proved that there are other competitors for the site.*

Special case stated by the umpire.

By the Aspatria, Silloth, and District Water Act, 1901, the Aspatria, Silloth, and District Water Board was constituted for the purpose of constructing the works and taking the waters by the said Act authorized and for supplying water within the districts and parishes therein mentioned, and exercising the powers in the said Act contained.

On the 14th of October, 1901, Miss Gough was served with a notice to treat for certain lands and water therein referred to, of which she was owner, for the purpose of making a reservoir.

Arbitrators and an umpire were appointed for the purpose of assessing the amount due to her, and at the request of the parties the umpire stated his award in the form of a special case. One of the findings in the special case was that "owing to the natural configuration of such last-mentioned lands such lands are peculiarly adaptable for the construction of a reservoir."

One of the questions for the opinion of the court was whether in estimating the value of the land to be acquired by the water board for the Overwater and Chapel House reservoirs, respectively, the natural and peculiar adaptability for the construction of a reservoir of the land in question is a fit and proper matter for consideration in the value thereof in the assessment of compensation. If the court should be of opinion that the natural and peculiar adaptability for the construction of a reservoir of the lands in question is not a fit and proper matter for consideration as an element in the value thereof in the assessment of compensation, then the umpire reduced the amount of his award by the sum of £1,686 *

*Balfour Browne* and *Roskill*, for the water board.—The arbitrator was wrong in taking the special adaptability of the lands into consideration. There must be some commercial value in order to get compensation for special adaptability. There must either be some other town who would be likely to purchase the land for the purpose of constructing a reservoir, or there must at least be evidence to show that it is adaptable for other places, and here it is only shown that the land had special adaptability for the purpose of supplying the board.

They cited *Countess Ossalinsky* v. *Manchester Local Board*, reported in appendix to Browne and Allan's Law of Compensation, 1896, p. 718.

*Sir Ralph Littler, K.C.*, and *W. Gorst Clay*, for the claimant, were not called upon upon this point.

WRIGHT, J., after dealing with the other parts of the case, said: As regards the question as to the £1,636 awarded in respect of the special value of this site, I do not see my way to interfere with the award on this point. It seems to me that if there is a site which has peculiar natural advantages for the supply of water to a particular valley or to a particular area of any other kind, or to all valleys and areas within a certain distance if those valleys are what might be called natural customers for water by reason of their populousness and of their situation, if the site has peculiar natural advantages for the supply of water in that sense, apart from value created or enhanced by any Act of Parliament or scheme for appropriating the water to a particular local authority, I think it ought to be taken that there is a natural value in the site for the purposes of water supply, and that it should be taken into consideration. It would be otherwise, of course, if there was no natural value in the place as a water site apart from the particular Act or scheme of the promoters; or, in other words, there is no value for which compensation ought to be given under this head if the value is created by the Act or scheme of the promoters. But I cannot think I am bound to hold that there is no special adaptability value merely because it is impossible to put one's hand upon people who can compete for the site. I think the existence of an area which would naturally require the use of water ought to be sufficient, and I do not think that any decision to which I have been referred precludes me from taking that view. The answer to the question will be in the affirmative.

Solicitors for the claimant, *Metcalfe, Birkett, & Rowlett*, for *Mounsey, Bowman, & Graham*. Carlisle.

Solicitors for the water board, *F. A. Hargreaves*, for *F. Richardson*, Aspatria.

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Prob. Div. & Adm. Div. Admiralty. — Jan. 23, 28; Feb. 12.

"THE VILLE DE ST. NAZAIRE." (*a.*)

*Ship—Wharf—Negligence—Damage to vessel lying in berth—Liability of wharf owners.*

*The plaintiffs' vessel, which was found to be in a fit condition to take the ground for the purpose of unloading a cargo of iron ore, was damaged through straining, by reason of her lying on an uneven bottom in the defendants' wharf.*

*The Court held the defendants to blame in not keeping the berth in a fit and proper condition to receive the vessel, and held the plaintiffs entitled to recover such damages as were assessed by the registrar and merchants.*

Action.

The plaintiffs were the owners of the French steamship *Ville de St. Nazaire*, a vessel of 1,556 tons gross, and built in 1883, and claimed to recover for the damage alleged to have been sustained by their vessel through straining while lying at the defendants' wharf at the Briton Ferry Works (Limited) in the Neath River, South Wales.

In November, 1901, *The Ville de St. Nazaire* was chartered to load a cargo of iron ore at Bilbao, and proceed thence to the defendants' wharf at Briton Ferry and there discharge.

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* Note the other questions in the case turn on the construction of a private Act of Parliament, and are therefore not reported here.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

On the 25th of January, 1902, the vessel arrived off Briton Ferry, and was moored alongside the defendants' wharf under the direction of the defendants' foreman.

The plaintiffs alleged that while the vessel was lying at the wharf she sustained very severe injuries through straining, which they attributed to the rough and uneven bottom of the berth, which they alleged was not in a fit state for the vessel to lie upon.

The defendants denied that allegation, and alleged that all reasonable means had been taken by them to insure that the berth was in a fit and proper condition, and that *The Ville de Nazaire* herself was not in a fit state of repair to take the ground, her plates being worn and thin, and she herself an old boat. They further alleged that after she had been put into position by their servant she was, on the night of the 27th of January, improperly shifted by her master some forty feet astern.

*Pickford, K.C., Laing, K.C.*, and *Stubbs*, for the plaintiffs.

*Aspinall, K.C.*, and *Newson*, for the defendants.

*Cur. adv. vult.*

BUCKNILL, J., in delivering judgment, said: This is an action brought by the owners of the steamship *Ville de St. Nazaire* against the owners or lessees and occupiers of the Briton Ferry Iron Works Wharf to recover damages alleged to have been sustained by the ship whilst lying and discharging at the defendants' wharf, and said to have been caused by the default of the defendants in omitting to take proper steps to make the berth reasonably safe for its occupation by the plaintiffs' ship. *The Ville de St. Nazaire* had been chartered by her owners to Messrs. Wedlake, and by them again to Cory & Co. to load a cargo of iron ore at Bilbao and proceed therewith to Briton Ferry Wharf and there deliver it according to charter-party and bills of lading. Cory & Co. indorsed the bills of lading to the defendants, who became the owners of the cargo in due course, and who knew that *The St. Nazaire* would arrive at their wharf about the 25th of January, 1902, and there discharge as customary—that is, that at certain times of the tide she would be aground. There was therefore an obligation on the part of the defendants to use reasonable care to have the berth or "layer" in a condition fit to receive the ship and to make it reasonably level. It was their custom and regular mode of business to do this, and it was admitted that it was to their own interest to see that it was properly done. They did not warrant that the berth should be in a fit and proper condition, but they impliedly undertook the duty and obligation which I have mentioned, and if they omitted to perform it and knew that the berth was not fit for the ship to occupy it, it was their duty to give notice to the owners' representatives before the ship arrived, so that they might exercise their discretion whether they would or would not berth the ship there and incur the risk of her being injured. Several questions arise for my decision: (1) Was *The St. Nazaire* in a fit and proper condition on her arrival at the berth to take the ground and discharge there at all times of tide? (2) Was the berth, as such, a fit and proper place for discharging cargo of this nature? Was it in a fit and proper condition when *The Ville de St. Nazaire* arrived there? (4) If not, was it in consequence of a failure of duty on the part of the defendants in that behalf? (5) If the ship was damaged whilst lying on the berth, was that damage caused wholly or in part in consequence of a failure of duty on behalf of the defendants, or was it caused by some independant act of the owners' representative?

*The Ville de St. Nazaire* is an iron screw steamship and was built in 1883 or 1884 to Lloyd's highest class, and in the Bureau Veritas under special survey, being also in their highest class, and at the time of the matters complained of she was, and had always been, kept up to her class both in Lloyd's and the Bureau Veritas. She is what is called a flat-bottomed ship, although, of course, not quite so. She has two more cross bulk-heads than required by Lloyd's, having six in all. She was built with 'tween decks, but in 1899, being intended for use in heavy cargo trades, some of her transverse beams had been removed to facilitate the loading of coal or mineral cargoes, and to compensate for that removal, web frames were introduced and strong angle irons were put in longitudinally on the inner edge of the stringer plate on both sides. All that was done under the inspection of the surveyor of the Bureau Veritas at Bordeaux. The surveyor of that society at Cardiff gave evidence that many vessels of her description take the ground and are fit to do so provided the berth is kept in a proper condition. Since 1899 she had discharged coal cargoes and one cargo of iron ore aground, but when waterborne to a certain extent, that is to say, that she was not left high and dry as she was at Briton Ferry when the tide was out. On the other side, Mr. Lewis, a marine surveyor of experience, gave it as his opinion that the ship being old and with somewhat worn shellplates was not fit to take the ground when loaded, and especially with a cargo of iron ore, which, he said, was a most trying one, and he thought it dangerous to have done so, and imputed her damage to what he called her own inherent weakness. The length of the ship was 260ft. over all, and 245ft. between perpendiculars. She was 34ft. in beam, and had 19ft. depth of hold. At Bilbao she loaded a cargo of 1,739 tons of iron ore, which was stowed as follows: 290 tons in hold No. 1, 676 tons in hold No. 2, 401 tons in hold No. 3, and 372 tons in hold No. 4. On the 22nd of January she began her voyage toward Briton Ferry, and, as might be expected at that time of the year, she encountered bad weather. The ship's and engineer's logs do not describe it as extraordinarily bad, and the engineer's log shows that no harm came to the engines and that nothing special happened in that department except that the ship had to be put head to sea twice to pump the water out of the bilges, there being some difficulty in doing it on account of the roses of the bilge pumps having become choked. It is not suggested that the ship sprang a leak on the voyage or that anything happened to injure the hull. But a great deal was made at the trial of a consular report made by the master on the 26th of January, the day after the ship's arrival at Briton Ferry, and after she had been aground there, and after she had, as alleged, been seriously injured in the way of her engine-room and boiler spaces. In that document the master stated that after a stormy passage, the ship, boilers, engines, &c., had suffered much by her violent rolling and pitching. He also stated that the ship and cargo arrived at their destination without apparent damage. In the same report he described the injuries the ship sustained on the night of the 25th and early morning of the 26th, "during the grounding alongside the quay."

I am convinced that the ship was not damaged during her voyage, and I attach no importance to what I may call the too usual language of her master in his consular report, made, perhaps, for another purpose, and unsupported by the facts. Nor can I accept the theory of Mr. Lewis that this ship was damaged by her own inherent weakness. I think she was a very strong ship, as I shall hereafter more particularly demonstrate, and it is a very important fact that, of several shellplates in her bottom that had to be

removed when she was put in dry dock after leaving Briton Ferry Wharf, all of them, except one, were, after being faired, put back in their places and with the same rivet holes. The underwriters' representative would not have allowed this if the plates had been as thin and worn as suggested by the defendants. If it had been intended to rely on this point of inherent weakness and worn and thin plates, I should have expected to have received evidence of experts who had inspected the plates and the ship generally when she was in dry dock, about which there could have been no difficulty, for, if necessary, the court would have made an order giving leave for such inspection, but no such evidence was forthcoming A point was also made by the defendants that before the vessel was fixed for this cargo the owners stipulated that she should discharge always afloat, and it was suggested that the reason for doing so was that they were afraid to let her take the ground. But the answer is that the owners gave way on being assured by the charterers' agents that the berth at Briton Ferry was a safe one to discharge aground at, and that Messrs Moul's steamers did so regularly. It is natural that the owners of a large and valuable ship laden with a cargo of this description should prefer that the cargo should be discharged, the ship being always afloat, but in this case I attach no importance to the point, and one reason for the conclusion to which I have come is that not a word of evidence has been given to establish the fact that in the previous record of this ship she had been found to be weak or injured. In the case of a ship it is comparatively easy to ascertain when she has been repaired and the reason why.

The first question I answer by finding that *The Ville de St. Nazaire* was in a fit and proper condition on her arrival at Briton Ferry Wharf to take the ground and discharge there. I have now to determine when she was damaged, and on this part of the case I think there can be no sort of doubt. At 8 p.m. on the 25th of January, about high water, she arrived alongside the wharf and was safely and properly made fast. Her draught of water was 18ft. 2in. mean, but she was down about one foot by the stern. When the tide had ebbed one foot, the ship began to take the ground. It was high water that evening at 7.30. About 10 p.m. loud cracking noises were heard under the engine-room and boiler spaces by the master, the chief engineer, and the chief officer, and they continued more or less loudly until 5 a.m. of the next day. The chief engineer reported the matter at once to the chief officer, who went down to the engine-room and saw that the ship had been injured, and he described what he saw. At 10 p.m. there can be no doubt that the ship was waterborne, and probably had nine or ten feet of water round her. These cracking noises continued until the vessel became waterborne again on the following morning, when they ceased. This is an important fact in the case, because, when she had discharged coal cargoes at Nantes and Bordeaux and took no harm when aground, the suggested explanation was that she was always waterborne; but if waterborne then and no hurt was done to her, why was she damaged when at Briton Ferry and waterborne? There must be some reason for it, and I have already decided that she had not been injured on her voyage and that she was a strong and staunch ship when she arrived at Briton Ferry. On the Sunday morning, the 26th, the master and engineer examined the ship and detailed in evidence what they saw, and I accept their statements as true. The engines and the boilers were displaced. The bunker bulkheads were bulged, the boiler cradles were broken, and many strong stanchions were bent. All that damage was indicative of an upward pressure at the bottom of the ship from below and outside of it. On the Sunday the master and others on the ship inspected her at low water, and found that for about 60ft. or more from the stem going aft she was quite unsupported on the berth, and daylight for that distance could be seen under her, in some places there being as much as eighteen inches between the ship's bottom and the ground below. No doubt the master attributed the damage that he then saw to that cause, and on the Monday he drew the matter to the attention of a person whom he believed was the wharf manager, and he complained that it was caused by the bad condition of the berth. Having given a most careful consideration to the evidence of the experts, I conclude that the damage done was not caused by this overhang forwards. If the ship had been damaged by it, the location of the damage would have been in her upperworks, at the point of breaking strain and not under the engine-room where, in point of fact, it was. But not having been injured by this considerable overhang, I find that it indicated a great strength of the ship, for if she had been weak she could never have remained unhurt in her upper works. It must not be forgotten that in No. 1 hold, the furthest forward one, there was 290 tons of iron ore. I have no doubt that the injury done to the ship under the engine-room and boiler spaces was done on the night of the 25th and morning of the 26th of January. The master, thinking that the ship would break in two if left in her original berth, moved her on the Monday evening after the workmen had left off discharging cargo for the day, and he moved her back about forty feet from the position she first had. In a few hours, when the tide had somewhat ebbed, the same cracking noises were heard on board, but not in the same part of the ship as before. This time the noises were heard under No. 2 hold or further forward than before, No. 2 hold being that part of the ship next forward of the boiler space. There is no doubt that the damage in No. 2 hold and to the bottom of the ship under it was done on that Monday night and Tuesday early morning—as the tide fell and until it rose again sufficiently to float the ship.

The ship having been damaged in the way and at the times which I have found, I proceed to answer the next question, which is, Was the berth as such a fit and proper place for discharging cargoes of this nature? The answer is unhesitatingly, yes, provided it was properly looked after. Since 1890 no less than 459 ore cargoes were discharged there, and with very few exceptions without any complaint as to its condition. It is said that three such complaints were made with reference to three vessels, but they were never insisted on, and I pass them by, as, in my judgment, there is not enough evidence to prove that they could have been successfully established. I prefer to decide this case on the evidence relating to it, and to it only. Ample proof was produced at the trial that if the "layer" was properly looked after, it was a proper place at which vessels could lie in safety to themselves and discharge their cargo whilst aground. The next question is, was the berth in a fit and proper condition when *The Ville de St. Nazaire* arrived there? This is the difficult part of the case, and I have had to give it my most attentive and serious consideration. On cross-examination of the defendants' witnesses who spoke on the subject, it was established that although the berth was a good berth it would be unsafe for ships whilst unloading unless it was properly watched and looked after, and that it was necessary to level the ground after each ship had left it, and

before another ship took its place. [His lordship then dealt in detail with the evidence as to what steps had been taken to prepare the berth for the reception of *The Ville de St. Nazaire*, and continued :] I have very carefully considered all the evidence that bears directly or indirectly on this question of the condition of the berth and I cannot accept the evidence of the defendants' servants, to whose carelessness I attribute the condition of the berth on the ship's arrival. I find myself obliged to come to the conclusion that this berth or layer was not in a fit and proper condition for *The Ville de St. Nazaire* on her arrival there, and I find that the ground was improperly and, for that ship with that cargo, dangerously uneven, and that that was the direct cause of the damage done to her on the first berthing, or in other words on the night of the 25th of January and the early morning of the 26th, and up to the time of her being removed on the evening of the 27th. That the uneven condition of the berth in the neighbourhood of the damage caused her to be unsupported forward and damaged aft I have no doubt, and it may also have been partly caused by her stern taking the ground on a hollow in the berth. The deputy harbour-master, one of the defendants' witnesses, stated that he had never seen a ship lying on that berth with so great an overhang as she had, and he also admitted that if he had found a ship set up amidships as this vessel was, he should conclude she had sat upon something hard, by which, of course, he meant something abnormal. The fact that so many ships have been at that berth with safety, coupled with my finding of fact that *The Ville de St. Nazaire* was a very strong ship and fit to discharge aground, is evidence that the berth could not have been on this occasion in a fit and proper condition to receive her.

There is yet another question to be answered. It has been pleaded by the defendants that after *The Ville de St. Nazaire* had been berthed on her arrival the master improperly shifted her to another place, and improperly omitted to attend to her mooring ropes from time to time as the tide rose and fell, and it is suggested that after she was removed by the master her bow was not hauled in against the wharf wall, and consequently moved or ranged about. It was also suggested that the effect of this shifting of the ship and berthing her at an angle and partly over her first berth caused her to lie in such a position that whatever inequalities she made or might have made on the first berth by her own weight became a danger to her, and that lying on them or on some part of them caused the injuries which she sustained or some of them. Mr. Bray, when addressing the court, said that this was clear to demonstration. Assuming the truth of the allegation as to her being improperly berthed after being shifted there would be a great deal in it, but I do not accept those allegations. What happened in fact was this: The master, believing that the damage which his ship had already sustained was due to the overhang forward, asked the leave of Mr. Roberts, one of the defendants' officials, to move her some forty feet astern, and whether he got such leave or not I find that he understood and thought that he had it. He could not speak English and Mr. Roberts could not speak French. So on the Monday evening, at high-water, the ship was shifted some forty feet astern, and was, as I find, properly made fast again and hauled in alongside the wharf as much as its somewhat curved shape (convex towards the ship) would allow. I find as a fact that the ship was properly shifted and that her master did it for the best and in the belief that it would save his ship from further damage. The veracity of the master has been severely attacked on more points than one, but I consider him a witness of truth, and any mistake which he may have made as to conversations I attribute to his want of knowledge of the English language. I decide this issue therefore in favour the plaintiffs, and find that the second damage to the ship was not caused by the act of her master, but in consequence of the improper condition of the berth. The result is that my judgment on all points must be, and is, in favour of the plaintiffs for such damages as may be assessed by the registrar and merchants, and costs.

Solicitors for plaintiff, *Stokes & Stokes.*

Solicitors for defendants, *Everett & Hodgkinson.*

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## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.) — May 13, 29.

*In re* IBO INVESTMENT TRUST (LIMITED). (*a.*)

*Practice— Costs— Company— Winding up— Appeal— More than one set of contributories supporting respondent in court below—One set of costs.*

*An appellant from an order on a winding-up petition, when the respondent has been supported in the court below by more than one set of contributories, if he does not wish to disturb that part of the order which gives one set of costs among those persons, should give notice by letters to the creditors or shareholders in question that an appeal is pending which, however, does not affect the order made in the court below, so far as their costs are concerned. If creditors or shareholders, after receiving such a letter, appear on, and successfully oppose, the appeal, they will only be entitled to one set of costs among them, the rule in the court below applying in such a case in the Court of Appeal.*

In this case a petition to wind up the above company had been presented by a creditor and had been dismissed by Byrne, J., with costs.

There were two sets of contributories opposing the petition in the court below and one set of costs was allowed between them.

The petitioner appealed and his appeal was dismissed with costs.

The notice of appeal had been served on both sets of contributories, and they had appeared on the appeal.

The order, as drawn up, allowed only one set of costs of the appeal between the contributories.

The question was now raised whether the practice in the court below, of allowing one set of costs among the various successful contributories, applied to the case of contributories supporting the successful side on an appeal.

*Gatey* and *R. J. Parker*, for the contributories.

*Kirby*, for the petitioner.

*Cur. adv. vult.*

May 29.—VAUGHAN WILLIAMS, L.J.—In this case we took time to consider, because we wanted to ascertain from the learned registrars whether there was any settled practice as to how the costs ought to be dealt with in a case in which there was an appeal, and those persons, whether shareholders or creditors, who in the court below had supported the successful party were affected in this sense, that the order below was

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

appealed, but there was nothing to deprive those persons who had in the court below supported the successful side, of the one set of costs which they get amongst them all, according to the fixed practice in the court in which the petition was presented.

Now we have made inquiries, and we have had a most careful report made to us by the registrars, and the result is that it cannot be truly said that there is any fixed practice whatsoever in this matter.

Before I say what our conclusion is as to what the order ought to be under these circumstances, I propose to say a word about a case that was cited in the course of the discussion, *In re New Gas Co.*, 25 W. R. 643, 5 Ch. D. 703. It was supposed that there was something said by Sir George Jessel in that case which disposed of this question, but if the decision is carefully looked at it does not dispose of this question at all. That was a case in which there was a petition for winding up the New Gas Co. which came before Vice-Chancellor Bacon. The Vice-Chancellor was of opinion that the petitioner had failed to establish his case and dismissed the petition, but ordered the creditors who opposed to pay their own costs. Now that was clearly wrong, because it was plain that the creditors who opposed, either collectively or individually, or in fact according to the established practice collectively, were entitled to one set of costs amongst them, and the Vice-Chancellor by his decision had refused them that set of costs. There was a suggestion there that there was a difference between a shareholder's petition and a creditor's petition. Sir George Jessel says: "I never heard of any distinction in this respect between a shareholder's petition and a creditor's petition. The advertisement which the company was bound to issue under the General Rules of 1862 says, 'Any creditor or contributory of the said company desiring to oppose the making of an order for the winding up of the said company under the above Act, should appear at the time of hearing by himself or his counsel for that purpose.' You have, therefore, invited the creditors to appear and oppose. I think they had a right to appear, and being successful they are entitled to one set of costs." That was really merely a reversal of the decision of Bacon, V.C., in the court of first instance, and that is all, in my opinion, that those words mean.

There being neither express authority nor practice in dealing with this matter, it rests with us, sitting as a Court of Appeal, to lay down a rule ourselves as to how the costs should be dealt with in cases where there is an appeal from the learned judge before whom the petition for winding up was heard; and we think that the proper rule to lay down is this: that the appellant, who presumably has been ordered to pay one set of costs amongst those shareholders or creditors who supported the respondent in the court below, must make up his mind whether it is worth his while to disturb that part of the order which gave to those shareholders or creditors who supported the successful party one set of costs. If, either, having paid that one set of costs he wishes to be recouped that amount, or, if he has not actually paid and is still under the original order, he wishes to get rid of that liability, in either of those cases he is asking for an order which obviously will affect personally those individual shareholders and creditors. He may think that it is not worth his while to run the risk of additional costs by asking for a discharge or modification of that part of the order, and under those circumstances he should really limit his appeal in that way; he should make it plain that by his appeal he does not seek to affect that part of the order which gave the one set of costs amongst those who supported the respondent. But then it is said, undoubtedly the shareholders and creditors who appeared below, at all events, had the right to appear on the appeal in the same way that they did in the court below, and they must not be excluded from that right; and somehow or other they must have that notice which they would have had in the court below under the advertisement to which Sir George Jessel refers in his judgment.

We think that that difficulty can be got over. The appellant who wishes to avoid the risk of costs in respect of these costs which those supporting the respondent below have either had paid to them or have the right to have paid to them, must write a letter to those creditors—he must know who they are—or to their solicitors, simply to tell them, if it be the fact, that he does not propose to ask either for recoupment or to disturb that part of the order—a letter which, if properly framed, must, of course, announce the fact of the pending appeal; and any creditors or shareholders who think fit to appear upon the appeal may do so, but they will do so under the rule we propose to lay down with full knowledge that the one set of costs amongst them all, a rule which is applied in the court of first instance, will continue to apply in the Court of Appeal. I hope that I have made my meaning plain, but it is shortly this, that inasmuch as there is an order here appealed against, which if appealed against in its entirety might be wholly reversed so as to take away from those creditors or shareholders the costs which they got in the court below, the appellant must take care to give due notice to those persons entitled to that right that he does not propose to ask to have the order modified or discharged in such a way as to effect at all the right to costs which has been given by the judgment in the court below to those creditors or shareholders supporting. But having regard to the fact that the shareholders and creditors will have the right to appear in the Court of Appeal if they like, notwithstanding that they personally are not proposed to be affected by the order that is asked for by the appellant, a letter such as that which I have suggested ought to be written to them saying that it is not proposed to affect that part of the order; and then if those creditors or shareholders like to appear, they will appear with the knowledge that they will only get one set of costs amongst them. In the present case both sets of contributories will get their costs, and the words of the order limiting them to one set will be struck out.

ROMER and COZENS-HARDY, L.JJ., concurred.

Solicitors, *Ingle, Holmes, Sons, & Pott; Pritchard & Sons; Ashurst, Morris, Crisp, & Co.*

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From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — May 26, 28.

LAMBOURN v. MCLELLAN. (a.)

*Landlord and tenant—Lease—Covenant to yield up fixtures—Construction—Trade fixtures—General words—* Ejusdem generis—*Right of tenant to remove trade fixtures.*

*In a covenant by a tenant to deliver up fixtures at the end of his lease, if there is a series of words which point to additions to the premises which ordinarily would not as between landlord and tenant be removable by the tenant, general words which follow those particular words ought to be confined to things not included in tenant's fixtures.*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*unless there is something which clearly shows an express intention that they are not to be so confined.*

*In order to show that the covenant for delivery up has taken away the tenant's rights, the onus is on the landlord to show that that was the object and intention of the covenant, and if the language of the covenant leaves the matter doubtful, the ordinary rights of the tenant will not be interfered with.*

Bishop *v.* Elliott, 3 *W. R.* 454, 11 *Exch.* 113, *approved.*

*Decision of* Kekewich, J., [1903] 1 *Ch.* 806, *reversed.*

This was an appeal from a decision of Kekewich, J. (reported [1903] 1 Ch. 806).

By an underlease dated the 16th of February, 1899, and made between the plaintiff Thomas Nixon of the one part and Louis Solomons of the other part, Nixon demised a messuage and premises known as No. 6, Crispin-street, Spitalfields, in the county of London, to Solomons for the term of twenty-one years from the 29th of September, 1898, at the rent therein mentioned. By the said indenture Solomons covenanted with Nixon that (among other things) Solomons would keep the demised premises in repair as therein mentioned, and the same and every part thereof so repaired would at the end and expiration or other sooner determination of the said term peaceably and quietly leave, surrender, and yield up unto Nixon "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stones, marble and other chimney-pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures, and things which then were or which at any time during the said term should be fixed, fastened, or belong to the said demised messuage and premises or any part thereof." Solomons also covenanted that he would not use, exercise, or carry on, or permit to be used, exercised, or carried on, in any part of the demised premises, any trade or business whatsoever except that of a boot and shoe manufacturer, without the license and consent of the lessor Nixon or his superior landlord in writing first had and obtained; and that he Solomons would not erect on the premises any machinery other than that propelled by hand or foot without the consent in writing of Nixon.

By an indenture of the 30th of May, 1902, the premises comprised in the said underlease of the 16th of February, 1899, were sub-demised by the plaintiff Nixon to the plaintiff Lambourn by way of mortgage for securing the payment of £600 and interest.

In November, 1902, Solomons was adjudicated bankrupt and the defendant Henry McLellan was appointed trustee of his property in the bankruptcy.

The defendant as trustee in bankruptcy advertised for sale by auction on the premises demised by the underlease of the 16th of February, 1899, certain stock-in-trade and machinery which comprised the following articles—namely: (*a*) On the second floor of the messuage three wooden stands reaching from floor to roof; (*b*) on the first floor of the messuage four heel-building machines, one heel-attaching machine, and one channelling machine; (*c*) on the ground floor of the messuage one heel finisher machine or heel trimmer, one sole-edge trimming machine or edge setter, one scouring machine, four wooden stands reaching from floor to roof, and certain fitted shafting and other machinery (including a conveyor and piping); and (*d*) in the basement an electric motor machine.

The plaintiffs requested the defendant to withdraw the above-mentioned articles from the sale on the ground that they were the property of the plaintiffs by virtue of the covenants in the underlease which was still subsisting and was vested in the defendant as trustee in bankruptcy. The defendant declined to withdraw the articles from the sale, and contended that he was entitled to sell them separately and so as to involve their removal from the premises. The plaintiffs thereupon brought the present action to obtain a declaration that the defendant was not entitled to remove or cause the removal from the demised premises of the articles or any other erections, buildings, improvements, fixtures, or things which then or at any time during the term created by the underlease of the 16th of February, 1899, had been or should be fixed, fastened, or belonging to the demised premises or any part thereof, and an injunction to restrain such removal.

It was not disputed at the trial in the court below that the articles in question were articles used in the bankrupt's trade, and the only question argued was whether the articles being trade fixtures were subject to the covenant contained in the underlease for the yielding up of fixtures and other articles as above mentioned.

Kekewich, J., following *Bidder* v. *Trinidad Petroleum Co.*, 17 W. R. 153, held that the covenant by reason of the general words therein contained extended to the trade fixtures, and made the declaration asked for.

The defendant appealed.

*Stewart Smith, K.C.*, and *E. Ford*, for the appellant.—The concluding words of the covenant ought to be construed according to the *ejusdem generis* doctrine. *Bishop* v. *Elliott*, 3 W. R. 454, 11 Exch. 113, and *Dumergue* v. *Rumsey*, 12 W. R. 205, 2 H. & C. 777, govern the present case; *Bidder* v. *Trinidad Petroleum Co.*, and *Wilson* v. *Whateley*, 9 W. R. 331, 1 Joh. & H. 436, are distinguishable.

*Rolt* (*Warrington, K.C.*, with him), for the respondents.—The words of the covenant are wide enough to include everything which becomes attached to the building, and should be construed according to their natural meaning: *Anderson* v. *Anderson*, 43 W. R. 322, [1895] 1 Q. B. 749.

[ROMER, L.J., referred to *Burt* v. *Haslett*, 4 W. R. 485, 18 C. B. 162, 893.]

*Stewart Smith, K.C.*, replied.

VAUGHAN WILLIAMS, L.J.—I agree with the observation of Kekewich, J., that the authorities which have been cited in this case do not leave the question of the construction of the covenant in this case very clear. We have come to the conclusion that this covenant does not throw upon the tenant the obligation of yielding up on the determination of the term trade fixtures of the class described in an affidavit which has been accepted on both sides as fairly describing the trade fixtures in question. I will not go through the affidavit in detail, but speaking generally of the trade machinery here, it is not machinery which, when put up, becomes an integral part of or an addition to the building. On the contrary, it seems to me plain that the only connection of the trade machinery with the building was for the more convenient user of the machinery for the purposes of the business. Some part of the machinery, no doubt, could be used in connection with other machinery if put there, but I do not think that any part of it was placed on the premises for the improvement of them, but only for the more convenient user of the machinery. Having said that as to the subject-matter, I come to the lease. The tenant is described as a boot and shoe manufacturer, and it is plain that it was contemplated that he should carry on that business upon the premises. The

being the intention of both parties to the lease as to the user of the premises, then comes the covenant for delivery up of the premises at the end of the term, which contains the words that we have to construe. Now, *primâ facie*, apart from express agreement, trade fixtures would be removable by the tenant under such a lease as this at the end of his term. We have, therefore, to see whether, on the true construction of this covenant, the right of removal is taken away from the tenant. If one looks at the particular words of the covenant, as regards those words which end with the word "shelves," it is not easy to say of any one of them that it is not of such a character that under the ordinary law it would be irremovable by the tenant. These fixtures are such as are sometimes described as landlord's fixtures, meaning thereby, to my mind, fixtures which a tenant cannot under the ordinary law remove as against his landlord by reason of their attachment to the premises. Of all these articles of which I am speaking, although some of them might be in the nature of removable fixtures, still there is not one that might not be just as well an irremovable fixture. However that might be, it is plain that the particular enumeration here does not include this machinery. The word machinery is not used from beginning to end of the covenant, and when there is a lease of premises for the express purpose of their being used for a boot and shoe manufactory it is, as a matter of business, very difficult to believe that if the landlord really meant that the machinery was not to be removed by the tenant he should not have said so in plain words. It is a most important thing and yet it is not mentioned from beginning to end of the covenant. It is not contended that there is anything in these particular words which would cover machinery; and if the tenant is to be restricted from removing this machinery, the restriction must be found in the general words of the covenant. Curiously enough, this case seems to be the exact converse of *Burt* v. *Haslett*. In that case there was a particular enumeration of the articles to be yielded up by the tenant at the end of the term, and general words not very unlike the general words here, and the Court of Common Pleas held that the particular plate-glass front which had been put into the shop there came within the enumeration as being a window. But when the case came on a writ of error before the Court of Exchequer Chamber, that court was not satisfied whether the plate-glass front was a window, or whether it came within the general words as an improvement, but they held that in one way or the other it was clearly within the covenant, and therefore not removable by the tenant. As to the covenant in the present case, in my judgment, it does not much matter in which way one looks at it. This machinery does not come within the enumeration of the particular words, nor within the general words, even though one leaves out the application of the *ejusdem generis* doctrine. I think the present case could be decided on the basis of *Bishop* v. *Elliott* and *Dumergue* v. *Rumsey*. Both those cases show that the *ejusdem generis* rule is to be applied in this way—namely, that if you can find in the things described by the particular words some characteristic constituting them a genus, then you should limit the general words which follow them to things of that genus. In the present case all the articles enumerated by the particular words according to their natural meaning have the common characteristic of irremovability, and in these circumstances I think we ought only to apply the general words to articles of that genus. But, even apart from that, construing the general words here without any such limitation, I should come to the same conclusion from a consideration of the general words themselves. The general words are "erections, buildings, improvements, fixtures." Taking them separately, I think with regard to "erections," subject to what I shall have to say presently, that word cannot properly be applied to machinery fastened to the floor of the premises for more convenient user. To use the words of Lord Macnaghten in *London and South African Exploration Co.* v. *De Beers Consolidated Mines*, [1895] A. C. 451, 43 W. R. Dig. 28—speaking of the word "improvements"—"that is not the natural or proper meaning of the expression, which seems to be more applicable to something attached to and forming an integral part of the thing improved than to something which is merely added to it or placed upon it without annexation or union." In the same way I think that what I have indicated is not the natural meaning of the word "erections," and for that reason I think that the word, especially when used in immediate collocation with "buildings," has no application to things placed on the floor of the the house without any idea of adding to it in any sense. I read the word "improvements" in a similar way. With regard to the provision that the lessee shall not erect on the premises any machinery other than that of a specified kind without the consent of the landlord, I do not think that binds us as to the meaning to be put upon the word "erections" in the general words of the other covenant in the collocation in which we there find it. Then when we come to the word "fixtures," I think that if we look at the covenant as a whole, and bear in mind the proper application of the *ejusdem generis* doctrine, we are not entitled to hold that these articles of machinery, which are clearly removable, come within it. It is desirable that we should lay down such a rule that landlords and tenants may know once and for all, that if a man is letting a house which is to be fitted with machinery to a tenant who intends to use the house for the purpose of a trade, and the landlord means to restrict the natural right of the tenant to remove trade machinery or fixtures placed so as to be more conveniently used, and not to be added to the premises, he must say so plainly. It seems to me that if the language used leaves the matter doubtful, the ordinary right of the tenant to remove trade fixtures must not be interfered with.

ROMER, L.J.—I have felt extreme doubt about this case, but on careful consideration I have come to the conclusion that the appellant is right. What has to a great extent induced me to come to this conclusion is the knowledge that we must all have, how extremely hard it would be to a tenant under an ordinary lease to hold that he had lost his ordinary right to remove trade fixtures put up by him merely by the use of ordinary general words in the covenant in the lease as to delivering up the demised premises at the end of his term, unless it can be clearly gathered that the words were meant to cover the fixtures and prevent the tenant from removing them. In order to show that the covenant for delivery up has taken away the tenant's rights, the onus is strongly on the landlord to make it clear that that was the object and intention of the covenant. That is borne out by *Bishop* v. *Elliott*. That case proceeds on that principle, and the decision has stood unimpugned for many years, and we ought not lightly to depart from it It is very important that on such a subject as we have to deal with here the law should be settled as much as possible, and it would, I think, be very unfortunate if we should be compelled to differentiate this case from *Bishop* v. *Elliott* and to hold that the tenant in the present case had lost his right to remove trade fixtures. *Bishop* v. *Elliott* proceeded upon the broad view, that

if you find in such a covenant as we have here a series of words which point to and can only be satisfied by referring them to additions to premises which ordinarily would not as between landlord and tenant be removable by the tenant, then, if general words follow those words, the general words ought to be confined to things not included in tenant's fixtures unless there is something which clearly shows an express intention that they were not to be so confined. In the present case I think every one of the words used in the particular enumeration might fairly be held to refer to additions to the premises which as between the landlord and tenant would not be ordinarily removable by the tenant if put up by him. In my opinion, on principle, the present case cannot be distinguished from *Bishop* v. *Elliott*, and in the circumstances it is far better to treat that case as intended to lay down an intelligible rule to be followed in all cases rather than to attempt to draw nice distinctions which will make it difficult for people to know what has to be delivered up and what has not when premises have to be given up at the end of a term. I think, therefore, that this appeal should be allowed.

COZENS-HARDY, L.J.—I am not prepared to depart from the view taken by Vaughan Williams and Romer, L.JJ., though I am not free from doubt. I think that the rule laid down in *Bishop* v. *Elliott* is binding on us, and I am not disposed to draw too narrow distinctions as regards the application of it to this lease. The wording of leases is peculiar, and I doubt whether in any document other than a lease it would be proper to apply the doctrine of *Bishop* v. *Elliott*. But on the whole I am not prepared to differ from or to narrow the rule laid down in that case so as to include under the general words of the covenant trade fixtures brought on to the premises by the tenant.

*Appeal allowed.*

Solicitors, *Stanley Evans & Co.; Morgan, Upjohn, & Leach.*

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From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) May 16.

*In re* TOLLEMACHE. (*a.*)

*Trust—Investment—Unauthorized change of—Sanction of court.*

*The Court will not sanction an unauthorized change of investment of trust funds merely on the ground that the beneficiaries will be benefited thereby.*

In re New, 50 *W. R.* 17, [1901] 2 *Ch.* 534, *discussed.*

*Decision of* Kekewich, J. (*reported as* In re T——, ante, *p.* 568, [1903] 1 *Ch.* 457), *affirmed.*

Appeal from a decision of Kekewich, J. (reported as *In re T*——, *ante*, p. 568, [1903] 1 Ch. 457).

The following statement of the facts is taken from the judgment of the court below:

The applicant was tenant for life under certain wills of a large amount of personal estate. Subject to that life interest, the property went to the applicant's children other than her eldest son, she having a power of appointment in the usual form. That power had been extensively exercised, and the appointees had settled their shares so that their children born or unborn had become interested. In order to raise money for purposes not necessary to be specified, the applicant had insured her life for large amounts in first-class offices, and had mortgaged her life estate to secure interest and premiums. It was proposed that the trustees of the wills should take over this security. Accordingly, an originating summons was taken out by the applicant asking the sanction of the court to this proposal. The policies afforded an ample margin as regards capital, and the income of the trust estate was largely in excess of the interest and premiums, so that the transaction was perfectly safe. In order to take over the security it would be necessary for the trustees to realize trust investments yielding 3 per cent. per annum, whereas the mortgage interest was calculated on a rate of 3½ per cent. per annum, and the amount of the mortgage debt was such that the difference of ½ per cent. would make a large addition to the applicant's income. The application, however, was in no wise based on her personal benefit. She had been in the habit of making an allowance to her husband, who was without means, and she wished to make some provision for her eldest son, who was also without means. All the children were more or less dependent on the applicant, who had by settlements made on the marriages of some of them covenanted to make annual payments to them, and had been in the habit of making voluntary allowances to those entitled under the covenants and the other children. She found it difficult to maintain these payments and allowances and also to keep up the house in which she resided, and which she naturally wished to keep up as a family home. She foresaw increasing demands on her purse, and she was at a loss to know how to meet them without an increase of income. The proposed transaction would give that increase to so substantial an extent as to enable her to do what she desired, and it was not open to doubt that this would be for the benefit of the children.

Kekewich, J., refused the application, on the ground that there was no emergency in the administration of the trust.

The applicant appealed.

*Warrington, K.C.*, and *J. R. Northcote*, for the applicant.—The court has jurisdiction to authorize the change of investment, it being in the interest of all the beneficiaries: *Brooke* v. *Lord Mostyn*, 13 W. R. 115, 2 De G. J. & S. 373; *In re New*, 50 W. R. 17, [1901] 2 Ch. 534. The investment is perfectly safe. The question is one of administration and management, and the court, therefore, has jurisdiction. Further, this is a case where the trustees, if they had committed this breach of trust, would have been relieved by the court under section 3 of the Judicial Trustees Act, 1896.

*Hornell*, for the respondents, the children of the applicant, was not called upon.

*Brabant*, for the trustees.

VAUGHAN WILLIAMS, L.J.—It is admitted that the applicant cannot succeed unless she can bring herself within *In re New*. The effect of that case shortly is this, that in the course of the administration of an estate, such an emergency may occur that the court may authorize a departure from the strict terms of the trust. It cannot be said that there is any such emergency here. The appeal must, therefore, be dismissed, and with costs.

ROMER, L.J.—I agree.

COZENS-HARDY, L.J.—I agree. I will only add that in my opinion *In re New* constitutes the high-water mark of the exercise by the court of its extraordinary jurisdiction in relation to trusts.

*Appeal dismissed.*

Solicitor, *J. Bertram.*

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) April 7.

SILLES v. FULHAM BOROUGH COUNCIL. (a.)

*Metropolis—Management Acts—Drain—Sewer—Drain carrying sewage from one house and rain-water from another house—Metropolis Management Act,* 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

*A drain used for the drainage of two houses, and not made under an order of any vestry or district board, comes within the definition of "sewer" in section* 250 *of the Metropolis Management Act,* 1855, *although so far as one of the houses is concerned it is a drain for rain-water only.*

Holland *v.* Lazarus, 66 *L. J. Q. B.* 285, 45 *W. R. Dig.* 99, *approved.*

Appeal from the judgment of Wright, J., on the trial of an action without a jury.

The action was brought by the owner of two houses in the metropolitan borough of Fulham to recover a sum of money expended by him in abating a nuisance which had arisen from a certain pipe or drain under a threat of proceedings on the part of the defendant borough council, acting under section 85 of the Metropolis Management Act, 1855. The plaintiff alleged that the pipe or drain in question was a "sewer," and that therefore the defendants ought themselves to have done the work necessary to abate the nuisance.

The two houses were built in one block. The pipe or drain in question carried sewage from one of the houses, but not from the other, into the main sewer. A gutter running along under the eaves at the backs of both houses carried a portion of the rain-water from the roofs of both houses into a down pipe. The down pipe discharged into a gully and from thence into the pipe or drain in question.

By section 250 of the Metropolis Management Act, 1855, "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies."

It was not suggested that the pipe or drain in question had been made for draining a group or block of houses by a combined operation under the order of a vestry or district board.

Wright, J., following the case of *Holland* v. *Lazarus*, 66 L. J. Q. B. 285, 45 W. R. Dig. 99, held that the pipe or drain in question was a sewer, and he therefore gave judgment for the plaintiff.

The defendants appealed.

*Macaskie, K.C.*, and *Sylvain Mayer*, for the defendants.—The case of *Holland* v. *Lazarus* was wrongly decided. The words "drain" and "sewer" in section 250 of the Metropolis Management Act, 1855, apply only to drains and sewers in the ordinary sense of pipes used for the carriage of fœcal and refuse matter. The pipe in question is "used for the drainage of one building only" within the meaning of the section, and is therefore a drain. It is not converted into a sewer by the fact that rain-water from the roof of another house flows into it.

They cited *Geen* v. *Newington Vestry*, 46 W. R. 624, [1898] 2 Q. B. 1; and *Reg.* v. *Vestry of St. Matthew's, Bethnal Green*, 44 W. R. 697, [1896] 2 Q. B. 319.

*Mattinson, K.C.*, and *J. C. Earle*, for the plaintiff.

VAUGHAN WILLIAMS, L.J.—It is admitted that this case is substantially governed by the decision in *Holland* v. *Lazarus*, if that decision is correct. The effect of that case and of *Geen* v. *Vestry of St. Mary, Newington*, is this—that where there are two drains carrying sewage from two buildings respectively and running together into one drain, which carries the sewage of both buildings, but which is not a drain made for draining a group or block of houses by a combined operation under the order of a vestry or district board, that drain is a sewer within the meaning of the definition of "sewer" in section 250 of the Metropolis Management Act, 1855; and further, that if one of the two drains happens to be a drain which only carries rain-water, that makes no difference, but the drain which ultimately carries off the rain-water from the one building and the sewage from the other equally comes within the definition of "sewer" as if it carried sewage from both. Section 250 provides as follows: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies." The decision in *Holland* v. *Lazarus* is that a drain comes within the definition of "sewer" where it is used for the drainage of two buildings, even although, so far as one of the buildings is concerned, it only carries off rain-water. I think that that decision is correct, and that Wright, J., properly applied the two cases to the facts of the present case.

STIRLING and MATHEW, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the plaintiff, *W. W. Young, Son, & Ward.*

Solicitor for the defendants, *T. Blanco White.*

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

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From K. B. Div. (Vaughan Williams, Stirling, and Mathew, L.JJ.) March 23.

DAVIS v. HYMAN & CO. (a.)

*Practice—Partners—Judgment against firm—Execution—Liability as member of firm—Holding out—Issue—Ord.* 48A, *r.* 8.

*A writ was issued against H. & Co., and served under ord.* 48A, *r.* 3, *at the principal place of business of the defendant firm on the person having the control or management of the business there. An appearance was entered in the name of H. H., sued as H. & Co. The plaintiff, having obtained judgment, took out a summons under ord.* 48A, *r.* 8, *asking that an issue might be ordered*

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

*to be tried to determine whether S. M. H. was liable to have execution levied against him on the judgment.*

*Held, that one of the questions to be tried in the issue ought to be whether S. M. H. had held himself out as a partner in the defendant firm.*

Appeal from an order of Phillimore, J., at chambers.

The action was brought on a bill of exchange for the price of goods sold and delivered by the plaintiff to the defendant firm.

The writ was issued against "Hyman & Co.," and was served under ord. 48A, r. 3, at the principal place of business of the defendant firm on the person having the control and management of the business there. An appearance to the writ was entered in the name of "Herbert Hyman, sued as Hyman & Co." On an application under order 14 the plaintiff recovered final judgment in the action.

The plaintiff being unable to satisfy his judgment against Herbert Hyman, and having reason to believe that the firm consisted of two partners, Herbert Hyman and Sydney Maurice Hyman, took out a summons in the action under rule 8 of order 48A, asking that an issue might be ordered to be tried to determine whether Sydney Maurice Hyman was liable to have execution issued against him on the judgment.

The master made an order that an issue should be tried between the plaintiff and S. M. Hyman, and that the question to be tried in the issue should be whether S. M. Hyman was, or had held himself out as, a partner in the defendant firm.

On appeal Phillimore, J., varied the order of the master, directing that the question to be tried should be whether S. M. Hyman was at the date when the bill of exchange was given or at the date when the goods were supplied a member of the defendant firm of Hyman & Co.

The plaintiff appealed.

Ord. 48A, r. 8, provides as follows: "Where a judgment or order is against a firm, execution may issue: (*a*) Against any property of the partnership within the jurisdiction; (*b*) against any person who has appeared in his own name under rule 5 or 6, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner; (*c*) against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear. If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the court or a judge for leave so to do; and the court or judge may give such leave if the liability be not disputed, or if such liability be disputed may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."

*Edward Clayton*, for the plaintiff.—The order of the judge, tying down the inquiry to the question whether the Hymans were actually partners *inter se*, is erroneous. The question whether Sydney Maurice Hyman is liable as a co-partner by estoppel ought not to be excluded from the inquiry. The order of the master ought to be restored.

*Carrington*, for S. M. Hyman.—The issue to be tried under rule 8 of order 48A is whether any particular person is liable "as being a member of the firm," not whether he is liable as a partner under section 14 of the Partnership Act, 1890. If the issue included an inquiry as to holding out, the result would be that a person might be made liable who had never been served in the original proceedings, and had therefore never had an opportunity of setting up a defence.

He cited *Wigram* v. *Cox, Sons, Buckley, & Co.*, [1894] 1 Q. B. 792.

VAUGHAN WILLIAMS, L.J.—The question which we have to consider is whether one of the questions to be determined in the issue ought to be whether S. M. Hyman has held himself out as a partner in the defendant firm. If he has not done so, no execution will issue against him or his goods. If he has done so, he ought to be altogether estopped from denying his membership in the firm. And in such circumstances there seems to be no hardship in his having execution issued against him in a case where a writ has been issued against the partnership firm and served under order 48A, r. 3. I do not think it is necessary to determine the exact form of words in which under rule 8 an order for an issue in such a case should be drawn. I desire only to decide this particular case. In my opinion the order of the master is one which carries out the rule, and it does not impose any hardship on the person against whom it is made. The appeal will therefore be allowed, and the order of the master restored.

STIRLING, L.J.—I am of the same opinion. I see no likelihood of hardship being inflicted by the rule being followed. [The Lord Justice read rule 8 of order 48A.] Here a person is alleged to be liable as a member of the defendant firm, and there is a a question whether the liability arises from his being really a member of the firm or by reason of his holding himself out to be a member of the firm. It is suggested that, if such questions were allowed to be tried, a person might be held liable who had never been served with the writ, and who would thus be deprived of the opportunity of raising any defence. But the issue is a general one, whether the person is liable as a member of a firm, and it seems to me that any proper defence might be raised in the issue. I think the order of the master was right.

MATHEW, L.J., concurred.

*Appeal allowed.*

Solicitors for the plaintiff, *H. H. Wells & Sons.*

Solicitor for S. M. Hyman, *Edward Le Voi.*

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From K. B. Div.
(Earl of Halsbury, L.C., Lord Alverstone, L.C.J., and Sir F. Jeune, P.) } Feb. 13.

TAGART, BEATON, & CO. *v.* JAMES FISHER & SONS. WEST HARTLEPOOL STEAM NAVIGATION CO. (LIMITED), THIRD PARTIES. (*a.*)

*Ship—Charter-party—Freight—Lien of shipowner on sub-freight.*

*A lien on sub-freight given by a charter-party to a shipowner as security for the payment to him of the hire of the ship can only be exercised before such sub-freight has been paid to the charterer or his agent, and, therefore, when once the sub-freight has been so paid the shipowner has no right, by virtue of his lien, to follow the sub-freight.*

Appeal by the defendants from the judgment of Bigham, J., who tried the action without a jury in the Commercial Court.

The plaintiffs, Tagart, Beaton, & Co., were timber brokers in London, and they acted as agents for the sale of timber shipped to England from Pensacola by a firm named Baars, Dunwody, & Co.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The action was brought by the plaintiffs against Messrs. Fisher & Sons, of Barrow-in-Furness, who brought in the West Hartlepool Steam Navigation Co. (Limited) as third parties, and during the proceedings these third parties were ordered to be joined as defendants.

The facts were stated in the judgment of Bigham, J., as follows:

By a charter-party dated the 6th of October, 1900, the West Hartlepool Steam Navigation Co. (Limited), who were the owners of the steamship *The Askehall*, chartered *The Askehall* to Messrs. Baars, Dunwody, & Co. for three years (thirty-six calendar months).

The only material terms of this charter-party were that the captain was to be under the orders and directions of the charterers as regards employment, agency, or other arrangement, the charterers indemnifying the owners from all consequences or liabilities that might arise from the captain signing bills of lading or otherwise complying with the same, and that the owners should have a lien upon all cargoes and sub-freights for any amount due under the charter.

The hire under the charter-party was to be £1,750 per month, payable monthly in advance; also by the terms of the charter-party the vessel was while in dry dock to be "off hire."

By the course of business between the plaintiffs and Baars, Dunwody, & Co., when Baars, Dunwody, & Co. made shipments of timber from Pensacola to the plaintiffs in London, they drew upon the plaintiffs for a part of the values of the shipments, and when the goods were sold the proceeds were placed by the plaintiffs to the credit of Messrs. Baars, Dunwody, & Co.'s account with them.

In June, 1901, Messrs. Baars, Dunwody, & Co.'s account with the plaintiffs was in debit to about £7,000.

The ship being at Pensacola, Baars, Dunwody, & Co. desired to load her with a cargo of their own, and they therefore, by a charter-party dated the 15th of May, 1901, purported to charter the vessel for some nominees of their own for a voyage to Barrow to carry timber at a fixed freight at so much per standard. Having entered into this charter-party, they shipped the goods and then drew out the bill of lading, in which they appeared as shippers, and by which the goods were to be delivered to their assignees, he or they paying freight as per this charter-party of the 15th of May, 1901.

The captain, then, at Baars, Dunwody, & Co.'s request, signed bills of lading indorsing upon them a statement that he had received £3,750 on account of the freight. The captain also gave a freight note by which he acknowledged that he had received a further sum of £1,000 on account of freight.

The freight note for £1,000, which was signed by the captain, was, so far as is material, in the following terms:

"27th of May, 1901.—Five days after arrival at port of destination of *The Askehall*, of which I am master, I promise to pay to the order of myself one thousand pounds, value received, for account of freight on cargo now on board my said vessel, payable under terms of charter-party, dated the 15th of May, 1901, and for the payment of this note I pledge my said freight, and the consignees of my cargo and (or) my agents are hereby directed to pay the amount of this obligation from the first amount due for freight."

This note was indorsed by the captain as follows: "Pay Tagart, Beaton, & Co. or order.—A. Tritton."

On the 29th of May, 1901, Baars, Dunwody, & Co. sent to the plaintiffs the shipping documents—namely, the bills of lading for the quantity of timber shipped on *The Askehall;* the shipping value of the timber was represented as £3,867. These bills of lading, which were signed by the captain in the ordinary way, showed that the goods were shipped by Baars, Dunwody, & Co. to order, and that the freight was payable by the consignees as per the charter-party dated the 15th of May, 1901. The bills of lading contained an acknowledgment on their face that £3,750 had been advanced against the freight at the port of shipment, so that the value of the goods with the paid freight amounted to £7,617.

Against this Baars, Dunwody, & Co. drew on the plaintiffs for £6,000; and instructed the plaintiffs to sell the goods on Baars, Dunwody, & Co.'s account in the ordinary way and place the proceeds to Baars, Dunwody, & Co.'s credit. In the same letter of the 29th of May, 1901, there was enclosed to the plaintiffs the above freight note for £1,000, and it was referred to in the letter in the following way: "We enclose freight note per *The Askehall* for £1,000 to credit of our account." As a matter of fact the captain had received nothing on account of freight, nothing for the indorsement of the receipt of the £3,750 on the bills of lading, and nothing for the £1,000 freight note.

The receipt of the bills of lading and freight note was acknowledged by the plaintiffs in a letter of the 18th of June, 1901, the reference to the freight note being as follows: "We are very much obliged to you for freight note £1,000, which we will pass to the credit of your account after collection." On the 9th of July 1901, the plaintiffs sold the timber to arrive to a firm of Crosfield & Co., the vessel being ordered to Barrow.

The defendants, Messrs. James Fisher & Sons, were shipping agents at Barrow, and they wished to secure the ship's business at that port. Accordingly on the 10th of July they telegraphed to the plaintiffs asking if they might have the business. To this telegram the plaintiffs answered directing the defendants, Messrs. Fisher & Sons, to address their request to a Captain Dyason, of Poole, who was the agent in England of Baars, Dunwody, & Co., to attend to their shipping business. On the same day the defendants wrote to Captain Dyason asking for the consignment to them of the ship, and the business was given to them. It thus became the defendants' duty to superintend the delivery of the cargo and to collect from the buyers of the cargo so much of the freight as remained payable in England.

On the 13th of July Captain Dyason wrote to the defendants giving the particulars of the freight to be collected: "Freight.—The freight is to be taken up as follows: Total per bills of lading £6,385; advances £3,750—£1,635. Captain's note on freight £1,000; balances £635." So that the defendants knew that they had to collect £1,635, of which £1,000 was to be used in redeeming the captain's freight note, and the balance was to be accounted for to Captain Dyason.

On the 15th of July the plaintiffs sent a note to the defendants that they were the holders of the note for £1,000, adding: "We will forward same for collection to your address in due time." This notice was acknowledged by the defendants on the 16th of July: "We note you have the captain's promissory note for £1,000. Bills of lading show £3,750 advanced freight, so it will be several days before we can get freight to meet your promissory note." This meant that as so much freight had apparently been paid in advance, a great part of the cargo would have to be delivered before more freight could be asked for.

On the 19th of July *The Askehall* arrived at Barrow, and on the 20th of July the discharge began.

On the 25th of July the plaintiffs sent the promissory note through their bankers for presentation to the defendants.

The note was duly presented on the 26th of July, but, the defendants not having collected any freight from Messrs. Crosfield & Co., it was refused payment and was marked by the banker: "Answer: Cannot pay at present, not having been provided with funds for it."

On the 29th of July Messrs. Crosfield & Co. paid the defendants £1,000 on account of freight, and the discharge of the vessel was completed.

On the 3rd of August the cargo having been measured, Crosfield & Co. paid a further £400 to the defendants, so that by that time the defendants had ample funds in hand to pay the note. But in the meantime—namely, on the 1st of August, the owners of the vessel, the West Hartlepool Steam Navigation Co., intervened by sending to the defendants the following telegram: "Don't pay either captain or time charterers' drafts out of freight. Hold same our account and risk; we hold you free all liability in consequence thereof."

Before this telegram was received the defendants had sent word to the bankers that if the note was presented again it might be met in three or four days, and they wrote to the West Hartlepool Co. telling them so, and adding: "We look upon the note as a first charge upon the freight."

On the same day, the 1st of August, the West Hartlepool company wrote a letter to the defendants which explained the reason of their intervention. It was as follows: "West Hartlepool, 1st August, 1901. Messrs. James Fisher & Sons, Barrow-in-Furness. Dear Sirs,—Steamship *Askehall*,—We telegraphed you this morning as per copy inclosed, which we beg to confirm. The time charterers' representative, Captain Dyason, intimated to Captain Tritton to-day that time charterers did not intend continuing the charter although *The Askehall* is fixed for three years, and has so far only been six months under charter, and as the hire is also due to-day and has not been paid, we intend exercising our lien on the freight in accordance with the terms of the charter for the hire unpaid and consequential damages. We therefore asked you not to make any remittance of any part of the freight due on present cargo to time charterers, not to pay either their drafts or captain's drafts drawn at the loading port against the freight and payable at this side, we, of course, holding you harmless in regard to any consequences resulting out of such action. For the present we wish you simply to hold the freight as trustees until we have been able to come to some agreement with time charterers, and will keep you informed. In reference to bankers we may communicate with you again."

It appeared that it was inaccurate to say that on the 1st of August any chartered freight was due under the original charter-party of October, 1900, a month's hire in advance falling due on the 2nd of August at noon. It would have fallen due on the 1st of August but for the fact that the ship had gone into dry dock on completing her discharge, and did not come out until noon on the 2nd of August, and while in dry dock she was, by the terms of the charter-party, "off hire."

On the 1st of August a formal notice of the alleged lien for chartered hire was served on the defendants on behalf of the West Hartlepool company.

On the 6th of August the note was again presented to the defendants for payment and was marked "Still unable to pay."

The present action was then brought for £1,000, the amount of the freight note, by the plaintiffs, Tagart, Beaton, & Co., against the defendants, James Fisher & Sons, who were defending the action under the direction and with the indemnity of the West Hartlepool Steam Navigation Co.

The question was whether the defendants, who had on the 6th of August sufficient funds in hand from the freight to meet the freight note, were bound to pay the plaintiffs.

Bigham, J., held that, in order for the lien of the West Hartlepool Steam Navigation Co. to become operative, notice of it ought to have been served on the persons who had to pay the freight, and not upon the persons who were receiving it for the time charterers, and he therefore gave judgment for the plaintiffs for £1,000.

From this judgment the defendants now appealed.

*Bankes, K.C.* (*Noad* with him), for the defendants, who were now appellants.—In this case the defendants stand in the shoes of the shipowners, and therefore have, as against the plaintiffs, the same rights as the shipowners would have had. According to the terms of the charter-party of the 6th of October, 1900, the shipowners were to have a lien upon all sub-freights for the amount of the hire due under the charter-party as against the plaintiffs, and therefore the defendants have now a right under such lien to seize the freight at any time so long as it can be identified as freight, even after it has come into the hands of the charterer's agents. The plaintiffs, at their best, can be in no better position than as agents for collecting and handing over to Messrs. Baars, Dunwody, & Co. the moneys received by them, and therefore they can be in no better position than their principals. It follows, therefore, that the plaintiffs are in no better a position than Messrs. Baars, Dunwody, & Co., and therefore they are not *bonâ fide* holders for value. Consequently the plaintiffs are not entitled to recover in this action. There is no authority on the point.

*Hamilton, K.C.* (*Loehnis* with him), for the respondents.—In this case the judgment below was right, and the defendants are not entitled to succeed on their appeal. A lien on sub-freight can only be exercised so long as there is a freight to be paid; once the freight has come into possession of the time charterer or his agents the lien is gone, and the freight can no longer be traced as freight. Therefore, as soon as the freight was paid by Crosfield & Co. to James Fisher & Sons, the agents for Baars, Dunwodie, & Co., the lien of the West Hartlepool Steam Navigation Co. ceased to exist. The question as to lien on sub-freights has been considered an open one: see Carver on Carriage by Sea (3rd ed.), s. 655.

*Noad* replied.

Earl of HALSBURY, L.C.—I am of opinion that the judgment in this case was perfectly right. Confining myself to the only question with which I think it is necessary to deal here, I am of opinion that it is quite clear that the right—which is an important right, whether it is called a lien, or whatever it is called—must be exercised at the time when there is freight to be paid. That, really, is the short point. If the freight has been paid the lien is gone, and the moment it is paid into the hands of the agents for Baars, Dunwody, & Co., who are the persons entitled to receive it, the shipowners' right to stop it on its way to them is gone. If it has been paid as freight, then it has been paid, and the thing has ceased to exist as freight. It is not necessary to descend into any subtleties to consider what is the freight in the sense of in what particular form it has been paid, whether it has been paid by a cheque or in what way as a matter of business it has been disposed of. The right to stop the payment of it to the person to whom

it is due must be exercised while that right for payment exists. If that payment has been already made, the opportunity of exercising the lien is gone, and I am of opinion that, as the freight had been handed by the consignees to the defendants, Fisher & Sons, who were the agents of Baars, Dunwody, & Co., it was as much paid in this case as if it had been handed over to Baars, Dunwody, & Co., and they had been physically there present and put it into their own pocket. Under those circumstances could it be contended that there was some right of stoppage of the money in their pockets? Of course, if that is not so, I am of opinion it is exactly the same thing if their agents received it in the character in which it was paid, and that when it was so paid there was no longer any lien upon it. Therefore I am of opinion that the judgment of Bigham, J., was right, and must be affirmed.

Lord ALVERSTONE, L.C.J.—I only wish to add a word or two, because the ground on which I concur is entirely that which has been stated by the Lord Chancellor, but I think as there are certain other matters referred to in the judgment of Bigham, J., I should indicate one or two on which I am not quite clear. If we had had to decide that its being freight, and received by Fisher as freight, and still in his hands as freight, the shipowner could not claim it, because Fisher was trustee for Tagart, I should have had very great doubt, and, therefore, I do not want to endorse that part of the judgment at all. It is, however, very curious to note that long before I delivered judgment in a case recently before me, Bigham, J., had expressed what seems to me the right view about these freight notes, because he says "The captain has no right to make any arrangement between himself and the time charterers which would have the effect of varying the terms of the charter-party by excluding the owner's lien." I only mention that because it bears on the judgment which I gave the other day. The ground on which I desire to concur with what the Lord Chancellor said and with Bigham, J., is this, as stated by the latter in his judgment: "In the present case these considerations appear to me to be immaterial, for before the lien could be exercised, there being no chartered freight payable"—I will leave that out of the question—"£1,000 of the bill of lading freight had been paid to the defendants, who for the purpose of the receipt of the money stood in the position of the time charterers themselves, and no lien afterwards could be exercised on that sum." Then with regard to some arrears of freight said to be due amounting to the £159 he finds in the same way that it got into the pockets of the agents of Dunwody before any lien could be exercised. Putting the matter in my own way, as I understand it, a lien for sub-freight in these time charters means a right to stop freight and receive freight as such, and does not mean the right to follow the proceeds into the pockets of somebody else because the money which had been so received was paid in respect of a debt due for freight. Upon the grounds which the Lord Chancellor has put, I think this judgment clearly ought to be supported; but I express no opinion on the other parts of the case, to which it is not necessary to any further refer.

Earl of HALSBURY, L.C.—I may add for myself that I designedly avoided dealing with the question to which the Lord Chief Justice referred, and I desire to confine my judgment entirely to the point which has been mentioned.

Sir FRANCIS JEUNE, P.—I agree with the judgments which have been delivered, and have nothing to add.

*Appeal dismissed with costs.*

Solicitors for appellants, *Downing, Bolam & Co.*, for *Bolam & Co.*, Sunderland.

Solicitors for respondents, *Druces & Atlee.*

## High Court of Justice.

Chan. Div. } March 27.
Farwell, J. }

*In re* CORNWALLIS - WEST AND MUNRO'S CONTRACT. (*a.*)

*Settled land—Compound settlement—Resettlement—New life estate "in restoration and continuance of" former life estate—Appointment of trustees for the purposes of the Settled Land Acts—Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 20, 22, 40—*Settled Land Act,* 1890 (53 & 54 *Vict. c.* 69), *s.* 4.

*In* 1850, *under a will, lands were settled to the use of A. for life, with remainder to B. in tail, and A. was thereby empowered to create a jointure rent-charge for his wife. In* 1872 *A. by deed charged the lands with a jointure for his wife. In* 1895 *A. and B. by a disentailing assurance conveyed the lands to such uses as A. and B. should jointly appoint, and by a deed of resettlement of even date they appointed the lands to the use of A. for life "in restoration and continuance of his former life estate under the will," with remainder to B. in fee; and by this deed of resettlement persons were appointed to be trustees of the deed of resettlement, and were also thereby expressed to be appointed trustees thereof "for all the purposes of the Settled Land Acts." A. contracted to sell the lands as tenant for life under the Settled Land Acts. Upon objection taken by the purchaser:*

*Held, that the only settlement under which A. could exercise the statutory power of sale under the Settled Land Acts was the "compound settlement," consisting of the will, the jointure deed, the disentailing deed, and the deed of resettlement; that no trustees of such compound settlement for the purposes of the Settled Land Acts in fact existed; and that unless and until such trustees were appointed or a consent given to have the purchase-money paid into court, the vendor could not make a good title to the purchaser.*

This was a summons under the Vendor and Purchaser Act, and raised the question whether it was necessary to appoint trustees for the purposes of the Settled Land Acts.

By the will, dated the 26th of August, 1841, of Mrs. Whitby, certain estates known as the Newlands Manor Estate, were limited to the use of the vendor by his then name of William Cornwallis West for life, with remainder to the use of his first and every son successively in tail male, with remainders over. The vendor was empowered by deed or will to appoint unto any woman whom he might marry a jointure charged on the lands thereby devised in strict settlement.

Mrs. Whitby died on the 5th of August, 1850.

By a settlement dated on the 2nd of October, 1872, made on the marriage of the vendor, he appointed to his wife, if she should survive him, an annual rent-charge, which was charged on the said lands.

On the 15th of November, 1895, the vendor and his eldest son executed a disentailing deed by which the land was conveyed to such uses as the vendor and his son should by deed jointly appoint.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

By a deed of resettlement of even date (the 15th of November, 1895) the vendor and his son appointed the land devised by the said will to such uses as the vendor and his son should by deed appoint, and subject to such appointment to the use that the vendor's son should receive a yearly rent-charge, and subject thereto to the use of the vendor for his life, in restoration and by way of continuation of the former life estate of the vendor under or by virtue of or with reference to the said will, and from and after the decease of the vendor to the use of the vendor's son, his heirs and assigns, for ever. And the persons who were by this deed of resettlement appointed the trustees of the deed of resettlement were also thereby expressed to be appointed the trustees thereof "for all the purposes of the Settled Land Acts, 1882 to 1890."

By an agreement in writing dated the 5th of November, 1902, made between the vendor of the one part and E. L. W. Munro, the purchaser, of the other part, the vendor agreed to sell and the purchaser agreed to purchase certain freehold lands situate at Milford-on-Sea, in the county of Southampton, forming part of the settled estate. The vendor purported to be selling as tenant for life under the provisions of the Settled Land Acts.

The purchaser objected to the title on the ground that there were no trustees for the purposes of the Settled Land Acts of the settlement created by the said will, or of the compound settlement created by the said will and the deeds above mentioned, and required that such trustees should be appointed, and that they should join in the conveyance and give a discharge for the purchase-money.

*Upjohn, K.C.*, and *Popham*, for the purchaser, contended that the vendor was tenant for life either under the will of the 26th of August, 1841, or all the instruments taken together which formed one compound settlement, and that there were no trustees for the purposes of the Settled Land Acts who could give a discharge for the purchase-money.

They referred to the Settled Land Act, 1882, ss. 2, 20, 22, 40; Settled Land Act, 1890, s. 4; *In re Marquis of Ailesbury and Lord Iveagh*, 41 W. R. 644, [1893] 2 Ch. 345; *In re Du Cane and Nettlefold's Contract*, 46 W. R. 523, [1898] 2 Ch. 96; *In re Munday and Roper's Contract*, 47 W. R. 226, [1899] 1 Ch. 275; *In re Spencer's Settled Estates*, 51 W. R. 262, [1903] 1 Ch. 75.

*Butcher, K.C.*, and *Austen Cartmell*, for the vendor, contended that the appointment of trustees was not necessary because there were in fact trustees for the purposes of the Settled Land Acts of the indenture of the 15th of November, 1895 (the deed of re-settlement), who were competent to give a discharge for the purchase-money. The vendor's wife was willing to join in the conveyance and release her jointure, but the parties did not desire that the purchase-money should be paid into court.

They referred to 3 Davidson's Precedents (3rd ed.), p. 594; *Hill* v. *Pritchard*, 2 W. R. 297, Kay 394, *In re Wright's Trustees and Marshall*, 33 W. R. 804, 28 Ch. D. 93.

FARWELL, J., in giving judgment, said; I think it is sufficient for me to say that in my opinion the life estate is restored—that is to say, the old life estate created by the will of Mrs. Whitby, is still the life estate in existence. That is in accordance with the decision of Pearson, J., in the case of *In re Wright's Trustees*, approved by Stirling, L.J., in the case of *In re Du Cane and Nettlefold's Contract*, and it also accords, in my opinion, with the view expressed by Chitty, L.J., in *In re Mundy and Roper's Contract*, [1899] 1 Ch., at p. 294, where he says, "the life estate was not in terms limited to him (the life tenant) in restoration of his old life estate. The object of this restoration is well known; it was to keep alive the old powers annexed to the life estate." Having once arrived at that, it seems to me to be clear that in the present case "the settlement" within the meaning of the Settled Land Acts must be the compound settlement consisting of that created by the will, the jointure deed, the disentailing assurance, and the deed of resettlement; and that the tenant for life under this compound settlement is the person to exercise the statutory power given by the Acts. Trustees, however, will have to be appointed of this compound settlement for the purposes of the Settled Land Acts, unless the parties are willing that the purchase-money should be paid into court.

Solicitors, *Woodcock, Ryland, & Parker*, for *Preston & Francis*, Bournemouth; *Patersons, Snow, & Co.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — Jan. 30.

REEVE v. SADLER. (a.)

*Local government—Nuisance—Notice to abate served on adjoining owners—Intercommunication of drainage system for the two houses—Work to that part of the drain that served both houses done by plaintiff—Claim against defendant for half of the expenses of this work—Rights of parties* inter se—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 104.

*The plaintiff and the defendant were the owners of adjoining houses which were drained by a system that met under the plaintiff's premises, and from that point the sewage of both houses passed along a single pipe into the main sewer.*

*Separate notices were served by the local authority on the owners to abate a nuisance on their respective premises. The plaintiff had the necessary work done, including the connecting of the defendant's drain to the common connection with the sewer. This operation benefited the defendant, and the plaintiff claimed to be repaid half the expense of this part of the work.*

*The county court judge decided that the defendant was not liable.*

*Held (dismissing the plaintiff's appeal), that there was no legal responsibility on the defendant, either by statute or at common law, to indemnify the plaintiff, and that the plaintiff could not recover.*

Appeal by the plaintiff from a decision of his Honour Judge Edge, sitting at the Clerkenwell County Court, in favour of the defendant.

The plaintiff and the defendant were the respective owners of two adjoining houses, Nos. 37 and 39, Gurney-street, Stratford.

On the 24th of April, 1902, the plaintiff received notice from the urban authority under the provisions of the Public Health Act, 1875, ss. 91, 94, and 95, and the West Ham Corporation Acts, 1893, s. 41, and 1898, s. 42, that they were satisfied of the existence of a nuisance at his premises, 37, Gurney-road, and requiring him within seven days to abate the same, and for that purpose to do certain specified work. This work included making a connection between the drainage of the plaintiff's house and the sewer in the street.

On the 10th of May following a similar notice was

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

served upon the defendant in respect of his premises, No. 39, Gurney-street.

The system by which the plaintiff joined his house drainage with the main sewer lay entirely under his own premises, but the sewage from the defendant's house was carried off by a pipe which was connected with the plaintiff's drain, and from that point the sewage of the two houses was carried off by a single pipe into the main sewer in the street. The plaintiff did the work required to be done by him under the notice from the local authority, including the connecting of the defendant's pipe to that part of the drain that was common to both houses. As these operations benefited the defendant the plaintiff directed his builder to keep separate accounts of the expenses of the work done on the joint sewer and his own separate drain, and claimed from the defendant half of the former costs, which amounted to £12 4s. 3d. The defendant having refused to pay this amount, the plaintiff brought his action in the county court.

At the trial the learned judge held that the defendant was not liable, and the plaintiff appealed.

*E. J. Naldrett*, for the plaintiff.—The defendant was equally liable to abate the nuisance on his premises as the plaintiff was to do the necessary work in respect of his property, and must have done the very work to the part of the drain used by both which the plaintiff had done. The defendant having therefore benefited by the plaintiff's work, he is liable for half the cost. By the notice to abate having been served on both parties, and the plaintiff having done the work required, the plaintiff is therefore in an analogous position to the sanitary authority under the Public Health Acts, where if work ordered to be done by an owner is not done, they come in and do the work at the owner's expense. The plaintiff is entitled to recover half the expense by virtue of section 104 of the Public Health Act, 1875, because the claim comes within the words "all reasonable costs and expenses incurred in relation to a nuisance under this Act shall be deemed to be money paid for the use and at the request of the person on whom the order is made." The defendant is moreover liable at common law because the structural work done by the plaintiff benefited the defendant and was work which the defendant was under a legal liability to do or have done.

*Gebhardt* v. *Saunders*, 40 W. R. 571, [1892] 2 Q. B. 452; *North* v. *Walthamstow Urban Council*, [1898] 67 L. J. Q. B. 972; *Lancaster* v. *Barnes District Council*, 46 W. R. 623, [1898] 1 Q B. 855, were also cited.

*W. M. Hunt*, for defendant, was not heard.

Lord ALVERSTONE, L.C.J., after stating the facts, said: It seems that the drainage of the defendant's house passing through this common drain was carried into the sewer in the street by means of the connection which the plaintiff, in compliance with a notice of the sanitary authority, had made between his house and the sewer. The plaintiff claimed in his action the right to recover from the defendant half the cost of this connection by which the drainage of the defendant's house, as well as that of his own, passed into the sewer in the street. In order to make good such a claim the plaintiff must show that the defendant was under a legal responsibility to do the work cast upon the plaintiff by the order, and to share the burden of a part of the expense. No doubt there are sections in the Public Health Acts authorizing the sanitary authority to enter upon premises and do the necessary work and recover the apportioned expenses from the various occupiers, but so far as we have been told to-day by Mr. Naldrett there is not any section in the public Acts or in the local Acts, nor was he able to cite a case as an authority for his contention that where a person who has incurred expense in the performance of work under a sanitary notice can sue another person for a proportion of such expenses, because and by reason of the fact merely that the sewage from the house of the latter passes through the connecting drain or sewer which the plaintiff had been called upon to make. Whatever the rights of the sanitary authorities may be, they need not be considered by us now, because they have no relation to such a case as the present, where an owner does work for himself, and in doing so benefits his neighbour. There is no statute or rule of common law that can be relied on by the plaintiff here as entitling him to maintain an action to recover expenses so incurred, nor can I see anything to create any legal responsibility on the part of the present defendant. It avails the plaintiff nothing to say that because in other proceedings the defendant might have been compelled to do certain work, therefore he is liable to contribute his proportion of expenses when the work has been done by someone else. That appears to me to decide the present case.

WILLS and CHANNELL, JJ., concurred.

*Appeal dismissed.*

Solicitors, *King & Macmillin; Beulton, Sons, & Sandeman.*

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C. C. R.
(Lord Alverstone, L.C.J., and Wills, Wright, Bruce, and Ridley, JJ.) — Feb. 7.

REX v. ALBERT DEAVILLE.
REX v. JOHN DEAVILLE.
REX v. SIMPSON. (*a.*)

*Criminal law—Gaming—Place used for betting—Bar of public-house—Permission of landlord—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1 *and* 3.

*Where a person is indicted for carrying on betting transactions in the bar or taproom of a public-house, it is necessary, in order to convict him of an offence under the Betting Act*, 1853, *to produce evidence showing that the landlord permitted him to carry on his betting transactions there. It must be shown that the defendant had something in the nature of a right or license to use the place for the purpose of his betting business over and above the right of an ordinary member of the public to resort thereto.*

These three cases were tried before the recorder sitting at the quarter sessions for the borough of Hanley, Staffordshire, and raised the question whether a bookmaker's attendance in the bar or vaults or other public room of a licensed public-house for the purpose of carrying on his business of ready-money betting is a breach of sections 1 and 3 of the Betting Act, 1853.

REX v. ALBERT DEAVILLE.

In this case the indictment charged that the defendant on the 24th of May, 1902, being a person then using a certain licensed beerhouse known by the name of Park Inn, at Hanley, unlawfully did use the said house for the purpose of betting with persons resorting thereto.

Seven following counts charged a similar offence on seven subsequent days.

At the hearing it was proved that the defendant was a bookmaker, and that on each of the days

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

mentioned in the indictment he was in fact for a considerable time in the vaults or an adjacent public room of the Park Inn; and that he there received on each occasion money from persons by way of bets on horses, and that, on several of these occasions, he paid money to persons in respect of winnings on bets made, some or all, in the same place.

No evidence was given that the occupier or his servants saw or knew what was going on.

At the close of the case for the prosecution counsel for the defendant submitted that there was no case for the jury. He contended that the user prohibited by the Betting Act, 1853, was the user of a person having something in the nature of dominion or control over the place, having some right of user peculiar to himself as against others, or at least having the permission or license of the occupier, and he cited *Whitehurst* v. *Fincher*, 17 Cox. 70, 38 W. R. Dig. 82; *Powell* v. *Kempton Park Racecourse Co.*, 47 W. R. 585, [1899] A. C. 143, and *Belton* v. *Busby*, 47 W. R. 636, [1899] 2 Q. B. 380. In reply *Belton* v. *Busby* was relied on as distinguishing *Powell* v. *Kempton Park Racecourse Co.* from the present case.

The learned recorder refused to withdraw the case from the jury. He directed them in accordance with the case of *Reg.* v. *Worton*, [1895] 1 Q. B. 227, 43 W. R. Dig. 69, to consider whether the defendant did in fact use the respective rooms on the days mentioned and, if so, whether he used them for the purpose of betting with persons resorting thereto. He further directed them that a mere casual use of the rooms would not be sufficient, but that if the defendant attended there with the expectation that persons would come to bet with him, and for the purpose of inviting them to do so, and so of carrying on his business as a bookmaker, that would be a breach of the statute; and that no evidence of permission by the occupier was necessary, nor was it necessary that the defendant should have any control, dominion, or right peculiar to himself as against others over the place.

The jury found the defendant guilty on all the counts.

The learned recorder respited judgment until the next sessions in order that the decision of the Court for Crown Cases Reserved might be obtained on the points raised on behalf of the defendant.

*Danckwerts, K.C.* (*G. D. Keogh* with him), for the defendant.—In this case the conviction was wrong. There was really no case to go to the jury, and the recorder should have withdrawn it from them. Here the evidence was perfectly neutral. It is not sufficient that there is a mere *scintilla* of evidence in order that a case may be left to a jury; there must be substantial evidence of guilt; there must be evidence showing that the defendant here did something in the nature of a user of the public-house for the purpose of carrying on his business of a bookmaker. It is not enough to show that he merely went to the house as an ordinary member of the public for the purpose of obtaining refreshment, and that during the time he was there other members of the public made bets with him: see *Powell* v. *Kempton Park Racecourse Co.* The user referred to in the Betting Act, 1853, involves more than the mere use of a place in common with other persons; it involves the use of such place by a person having some sort of dominion or control over it and possessing some right greater than that possessed by the other persons making use of the place, and unless it be shown that such user is by the license or permission of the occupier no offence is committed contrary to the statute: *Downes* v. *Johnson*, 43 W. R. 556, [1895] 2 Q. B. 203; *Whitehurst* v. *Fincher*; *Hornsby* v. *Raggett*, 40 W. R. 111, [1892] 1 Q. B. 20; *Belton* v. *Busby*; *Tromans* v. *Hodkinson*, *ante*, p. 286, [1903] 1 K. B. 30; and *Reg.* v. *Worton*.

*B. C. Brough*, for the prosecution.—The conviction was right and should be upheld. It is not necessary to show that the occupier of the house knew that the defendant was carrying on the betting transactions. In *Brown* v. *Patch*, 47 W. R. 623, [1899] 1 Q. B. 892, where the respondent was convicted of using a "place for the purpose of betting with persons resorting thereto" within the meaning of section 1 of the Act, there was no evidence that he had any license from the owner of the grounds where the horse-racing was taking place. In the present case there is a sufficiently definite localization of the betting although there was no authority from the occupier.

REX *v.* JOHN DEAVILLE.

In this, the second case, the indictment charged that the defendant, on the 24th of May, 1902, and on six several subsequent days in the same year, being the occupier of the Park Inn beerhouse, unlawfully, knowingly, and wilfully did permit the said house to be used for the purpose of Albert Deaville (the person mentioned in the first of these three cases), a person then using the said house, betting with persons resorting thereto. At the hearing it was proved that on each of the said days the said Albert Deaville used the house, of which his father, the defendant in this case, was the occupier, in the manner stated in the previous case, and that on each of these occasions the defendant in this case was present and could see what was going on.

Counsel for the defendant submitted that there was no case for the jury, and contended that no unlawful use by the said Albert Deaville had been proved. He further contended that if no unlawful user were proved against the said Albert Deaville, the defendant John Deaville could not be guilty of permitting such user.

The learned recorder refused to withdraw the case from the jury, and directed them in the same terms as in the previous case, and told them that if they were satisfied that the said Albert Deaville in fact used the house for the purpose of betting with persons resorting thereto, and that the defendant John Deaville knew of what was going on, and permitted or wilfully suffered it to continue without interference, that would be a breach of the statute.

The jury found the defendant guilty on all the counts.

The learned recorder respited judgment for the same purposes as he did so in the previous case.

*G. D. Keogh*, for the defendant.—The conviction was wrong. The learned recorder in directing the jury did not point out to them that in order to enable them to convict it must be shown that the user was such as is indicated by the House of Lords in *Powell* v. *Kempton Park Racecourse Co.* Betting is in itself no offence, and betting with persons resorting to a public-house is no offence. In order to sustain a conviction here, it is necessary for the prosecution to show that the public-house was being used as a betting establishment and being so used with the permission of the defendant. There is, however, no evidence that he gave such permission. In *Powell* v. *Kempton Park Racecourse Co.*, Lord Halsbury, L.C., [1899] A. C., at pp. 161 and 162, held that it is not an offence under the Act "to allow persons to assemble for the purpose of betting with each other"; and at p. 195 Lord James of Hereford says: "Doubtless it is proved that betting as alleged systematically took place within the inclosure to the knowledge of the defendants. Is that evidence sufficient to establish an infringe-

ment of the Act? In my opinion it is not." In *Haigh* v. *Town Council of Sheffield*, 23 W. R. 547, L. R. 10 Q. B. 102, where it was shown that the appellant knew of what was going on and took no steps to prevent it, he was convicted, but that case was expressly overruled in *Powell* v. *Kempton Park Racecourse Co.* [Lord ALVERSTONE, L.C.J.—That case does not, however, overrule *Shaw* v. *Morley*, 16 W. R. 763, L. R. 3 Ex. 137.] That case is distinguishable from the present one. Assuming there is a "place," there must be something more than a user of and a resorting to that place. There must be evidence of some dedication of the place with the assent of the occupier or licensee. There is no such evidence here.

*B. C. Brough*, for the prosecution, was not called upon.

REX *v.* SIMPSON.

In this case the indictment charged that the defendant on the 9th of May, 1902, and on ten subsequent several days in the same year, being a person then using a certain licensed public-house known as the Travellers' Rest, did use the said house for the purpose of betting with persons resorting thereto.

At the hearing the evidence as to the acts and conduct of the defendant was similar in all material points to that produced against the defendant in the previous case of *Rex* v. *Albert Deaville*, except that evidence was given that the occupier of the house in this case was present on several of the occasions and could see what was going on, but that no relationship existed between the defendant and the occupier.

On behalf of the defendant it was submitted that there was no case to go to the jury—*vide Whitehurst* v. *Fincher* and *Powell* v. *Kempton Park Racecourse Co.*

The learned recorder, however, decided to leave the case to the jury.

It was then submitted on behalf of the defendant that if there were any questions at all for the jury they should be as follows:

(1) Was the house used as a betting establishment?

(2) Had the defendant dominion and control over the place for that purpose?

(3) Had he such dominion and control in the character of owner, keeper, occupier, or in some character analogous thereto? And further, counsel requested the learned recorder to direct the jury, in reference to the nature and character of the use, in accordance with the terms of the judgment of Lord Halsbury, L.C., in the aforesaid case of *Powell* v. *Kempton Park Racecouse Co.*

The defendant then gave evidence to the effect that he never went to the Travellers' Rest for the purpose of his business of commission agent or bookmaker, but solely for the purpose of obtaining refreshment in the ordinary course, but that he did sometimes make casual bets there.

The learned recorder thereupon directed the jury in the same terms as he used in the previous case of *Rex* v. *Albert Deaville*, and he asked them, in case they found the defendant guilty, to say whether the defendant used the place with the knowledge and consent of the landlord.

The jury found the defendant guilty on all the counts, but said that the user was without the full knowledge and consent of the occupier, and that the occupier did not know exactly what was being done.

Counsel for the defendant thereupon submitted that such finding was a verdict of "not guilty," but the learned recorder directed that a verdict of "guilty" should be entered. He however ordered that judgment should be respited until the following sessions for the same reasons as in the two previous cases.

The questions for the opinion of the court now were whether the learned recorder's directions to the jury in the above cases, respectively, were right, and whether he ought to have withdrawn any of them from the jury and have returned a verdict of acquittal.

*G. D. Keogh*, for the defendant.—[Read the stated case.]

*B. C. Brough*, for the prosecution, was not called upon.

Lord ALVERSTONE, L.C.J.—The point raised in the first and third of these cases is substantially the same, but that in the second case is different. I will first of all deal with the first and third cases. I regret that I feel I am obliged to come to the conclusion that the convictions in these two cases cannot be sustained; but I am glad to be able to say that I think that in coming to this conclusion no harm will be done, because the only reason why I have come to that conclusion is that in the first case no evidence was given of a state of facts of which in any case where an offence is committed evidence could undoubtedly be supplied. All that has been found in the first case is that Albert Deaville was a bookmaker, and that on certain days he was for a considerable time in the vaults or an adjacent public room of the inn, and that he there received and paid money in respect of bets. No evidence was given as to whether the occupier of the public-house knew or did not know what was taking place. It seems to me that if evidence is produced showing that there is a practice of betting transactions being carried on continuously for a considerable number of days, and that such practice has been brought to the knowledge of the occupier of the house, it would be a perfectly right thing to direct the jury to find that what was being done was being done by the license and with the permission of the occupier. Mr. Danckwerts has satisfied me that the view I was disposed to take of the case of *Powell* v. *Kempton Park Racecourse Co.* is too narrow. I had thought that, if it be established that a person was carrying on a betting business in a place, that would be sufficient evidence of an offence within the meaning of the Act, and that it was not necessary to show that the proprietor of the place had given any license or authority. I now think that that view goes too far.

Since the decision in *Powell* v. *Kempton Park Racecourse Co* there have been three cases which have a material bearing on this matter.

I agree with counsel for the prosecution that if you get a sufficient localization and, therefore, possession of a spot of ground or anything of that kind, the question of the license of the owner or occupier becomes immaterial, because you can regard the person charged as being himself in occupation of the place. That is pointed out in *Brown* v. *Patch*. In *Belton* v. *Busby* the facts were much like those in the present case, but there in addition it was proved that the bookmaker received slips of paper bearing the name of the horse backed, and that bets were settled over the counter in the saloon, but there was no evidence that the proprietor of the house had any interest in any of the bets. But it was decided in that case that the bookmaker had something in the nature of a right or license to the user of the bar over and above the right of an ordinary customer to resort to the place there in question. That shows that the true inference is that the bookmaker was not using the bar for the purpose of obtaining refreshment, but, with the permission and license of the proprietor, for the purpose of betting. Then when the matter came before us in *Tromans* v. *Hodkinson*, I pointed out that where you find a man habitually frequenting the same room or place for

the purpose of carrying on there a regular betting business with persons resorting thereto he commits an offence against the Act. In that case the carrying on of the business in the bar or tap-room was pursued under some understanding with the proprietor.

It does seem to me that, assuming that there is a place which is not in law or in fact in the possession for the time being of the person charged, but which is a common place to which persons in general have access for other purposes than betting, it is necessary to have evidence from which the jury can conclude that the proprietor of the place has authorized that to be done which he need not have permitted in view of his own rights over the place. I therefore think that the conviction in the first case cannot be sustained. I do not think this decision will do any harm because in most of these sort of cases the necessary evidence can be supplied.

In the second case—that of John Deaville—it was proved that the defendant allowed Albert Deaville to use the bar, and carry on a betting business, as he was present on each of the occasions and could see what was going on. I therefore come to the conclusion that in this case there was exactly what was pointed out by Grantham, J., in *Belton* v. *Busby*, namely, "something in the nature of a right or license to use the bar of the beerhouse for the purpose of his betting business over and above the right of an ordinary member of the public to resort thereto." Simpson's case is practically the same as Albert Deaville's case, because the jury found the defendant guilty, but said that the user was without the full knowledge and consent of the landlord, and that the landlord did not know what was going on.

I am therefore of opinion that the convictions in the first and third cases must be quashed, and the conviction in the second case be sustained.

WILLS, WRIGHT, BRUCE, and RIDLEY, JJ., concurred.

Solicitors for the prosecution, *H. G. Church*, for *A. Challinor*, Hanley.

Solicitors for the defendants A. and J. Deaville, *Chester, Broome, & Griffithes*, for *Paddock & Sons*, Hanley.

Solicitors for the defendant Simpson, *Chester, Broome, & Griffithes*, for *E. A. Paine*, Hanley.

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Prob. Div. & Adm. Div. } Feb. 13, 14.
Admiralty. }

"THE DALLINGTON." (*a*.)

*Ship—Collision—Compulsory pilotage—Belgian law.*

*Article 228 of the Code de Commerce, Livre II., Titre VIII., De L'Abordage, enacts that "if the collision be caused by the default of any person, all the damages are borne by the ship on board of which the default has been committed. The presence of a pilot on board is no defence to this liability." The Court construed that to mean that, whether the pilot is on board or not, it makes no difference as to the responsibility of the owners if damage is caused in consequence of the negligence of those in charge of the ship.*

Action. Damage by collision.

The plaintiffs were the Peninsula and Oriental Steam Navigation Co., and were the owners of the steamship *Socotra*.

The defendants were the Southdown Steamship Co., the owners of *The Dallington*.

(*a*.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

About 7 a.m. on the 1st of February, 1903, *The Socotra*, a twin screw steamship of 6,009 tons gross register, was proceeding down the River Scheldt bound from the port of Antwerp for London. *The Dallington*, a screw steamship of 2,534 tons gross register, was lying at anchor in Austruweel Roads. *The Socotra* was in charge of a compulsory pilot and had a tug ahead, when she collided with *The Dallington*. The owners of *The Socotra* brought an action against the owners of *The Dallington*, but judgment was given for the defendants, *The Socotra* being held alone to blame, the fault being that of the pilot.

The question therefore arose as to the liability of the shipowner for damage resulting from the negligent navigation of his vessel whilst in charge of a compulsory pilot in Belgian territorial waters. It was proved by Belgian law that it was obligatory on a vessel such as *The Socotra* when in the waters in question to take a Government pilot on board, or at least to pay one. The plaintiffs' evidence on the Belgian law was that there was no express provision in the Belgian code by which the pilot was declared not to be in charge, or, in other words, that his duty was restricted to acting as the adviser of the master, but admitted that the shipowner in Belgium could not rely upon pilotage as a defence. The defendants cited article 228 of the Belgian Commercial Code in support of the proposition that though it was obligatory to pay for a pilot, nevertheless the pilot did not supersede the master, but acted only as his adviser, so that the presence of a pilot on board was no defence to the liability of the shipowner for a collision caused by the negligence of those in charge.

*Rowlatt* and *Finlay*, for the plaintiffs.—The pilot's presence on board *The Socotra* was compulsory, at least in the sense that the fees had to be paid, but as a matter of fact the pilot was actually in charge and navigating the vessel. The test of compulsory pilotage was the obligation to pay the pilotage dues. The provision of section 633 of the Merchant Shipping Act, 1894, which enacted that "an owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within a district where the employment of a qualified pilot was compulsory by law," was merely declaratory of the common law, by which liability cannot be entailed for the negligence of a person who was not the servant or agent of the ship.

They cited *The Halley*, L. R. 2 P. C. 193; *The General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, 17 W. R. 615, L. R. 3 Ex. 330.

*Aspinall, K.C., Dawson Miller*, and *Dunlop*, for the defendants.—A distinction is drawn between a pilot being compulsorily in charge so as to supersede the master, as in English law, and being compulsorily on board. By Belgian law the pilot only acts as the adviser of the master, who remains in charge.

They cited *The Guy Mannering*, 30 W. R. 525, 835, 7 P. D. 52, 132; *The Prinz Hendrik*, 47 W. R. 183, [1899] P. 177; *The Agnes Otto*, 35 W. R. 550, 12 P. D. 56; *The Augusta*, 6 Asp. M. L. C. 161, 35 W. R. Dig. 186.

BUCKNILL, J., in delivering judgment, said the plaintiff's argument shortly comes to saying that because there is an omission, so to speak, or rather no positive declaration in terms by the Belgian law that pilotage is not compulsory in the sense that the pilot is not in charge, I am to assume that it is compulsory in the sense in which they argued. Evidence has been given by two Belgian lawyers, and they both agree that according to their law, to the extent to which it is to be found in terms, the pilot is only an adviser, and the owners of the vessel are responsible

for damage done. In this case it may be that the master did hand over the navigation of his ship entirely to the pilot. He stated that in fact he had done so, and that all the orders were given by the pilot and that all those orders were carried out by the crew. So in point of fact the pilot was solely in charge; but, as was said in *The Augusta* by Esher, M.R., "We are concerned with the law of England, and in an English action. We are bound by the law of France because the law of France establishes what are the circumstances of the appointment of and employment of the pilot." So far as the law of Belgium is in writing it is to be found in article 228 of the code, which is as follows: "If the collision be caused by the default of any person all the damages are borne by the ship on board of which the default has been committed. The presence of a pilot on board is no defence to this liability." It seems to me that it would be difficult in the face of that article, to do other than find that whether the pilot is on board or not makes no difference as to the responsibility of the owners where damage is caused in consequence of the negligence of those in charge of the ship. At any rate, the opinion of the Belgian lawyers is that the owners are responsible because the pilot, although compulsorily in one sense, is not by law compulsorily in charge. According to Belgian law ships must take a pilot, and if they do not take him they must pay his fee, so that when a pilot comes on board the master may say, "You may go away or you may come on board and I will pay your fee, but I do not want you." But pilotage is compulsory in the sense that if the master does not choose to take the pilot he cannot get out of the responsibility of paying the pilot's fee. With regard to the authorities cited during the argument, *The Halley* is not in point for the reasons given by Esher, M.R., in his judgment in *The Augusta*, which case, together with *The Guy Mannering* and *The Prinz Hendrik*, establish the view I am taking—namely, that according to Belgian law, though a pilotmay be compulsory in the sense that if he is not accepted he must still be paid for, yet he is not a person legally in charge, the result being that, although in point of fact the pilot is navigating and solely in charge, yet if the ship does damage in consequence of negligent navigation, the owners are, according to Belgian law, responsible.

Solicitors for plaintiffs, *Freshfields*.

Solicitors for defendant, *Thomas Cooper & Co.*

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## House of Lords.

From C. A. (England). Feb. 24.

PELHAM-CLINTON *v.* DUKE OF NEWCASTLE. (*a.*)

*Will — Construction — Estate in special tail — Issue — Gift to A. if he marries a gentlewoman and has issue male, to such issue male and their descendants.*

*A testator willed and bequeathed certain estates to his son Charles, and after providing that his eldest son might redeem those estates, continued: "The proceeds to go with the limitations of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and has issue male, and their male descendants, in failure of which" then over.*

*Held, that Charles took an estate in special tail male.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

*Decision of the* Court of Appeal (50 *W. R.* 83, [1902] 1 *Ch.* 34) *affirmed.*

Appeal from an order of the Court of Appeal (Lord Alverstone, L.C.J., and Vaughan Williams and Romer, L.JJ.) (50 W. R. 83, [1902] 1 Ch. 34), affirming the decision of Buckley, J. (49 W. R. 12).

Henry Pelham, fourth Duke of Newcastle, by the fifth codicil, dated the 14th of August, 1846, to his will, dated the 31st of January, 1814, willed and bequeathed to his son Lord Charles Pelham-Clinton certain estates; and after providing that his eldest son, the Earl of Lincoln, might purchase and redeem those estates for certain sums of money, the testator continued: "The proceeds to go with the limitation of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants, in failure of which" then over.

In 1848 Lord Charles Pelham-Clinton married Elizabeth Grant, a fit and worthy gentlewoman, within the meaning of the above limitation.

The fourth duke died on the 12th of January, 1851, and his said will and five codicils thereto were duly proved on the 14th of February, 1852.

In April, 1851, Lord Charles disentailed all the hereditaments by the fifth codicil given to him for any estate in tail male or in tail.

Lord Charles Pelham-Clinton died on the 14th of December, 1894, and the appellant was the eldest son of Lord Charles' marriage with Elizabeth Grant.

The appellant issued the writ in the present action against the respondent, claiming a declaration that upon the true construction of the said fifth codicil to the will of Henry Pelham, fourth Duke of Newcastle, Lord Charles Pelham-Clinton (the plaintiff's father) was only entitled as tenant for life to the estates in such codicil mentioned, and that the plaintiff is now entitled to such estates as tenant in tail male in possession.

Buckley, J., held that the codicil gave Lord Charles an estate in special tail male and dismissed the action, which was affirmed by the Court of Appeal.

*Warrington, K.C.*, and *A. F. Peterson*, for the appellant.

*Haldane, K.C.*, *Vaughan Hawkins*, and *Benn*, for the respondent, were not heard.

Earl of HALSBURY, L.C.—It appears to me that this case is entirely free from difficulty, and that the language we have to construe is perfectly clear. If you look at the construction of the will, to suggest any difficulty is to my mind almost an absurdity. It is admitted that almost the same words in another part of the same codicil are intended to point to an estate in special tail male, and we are asked to single out this particular gift as being something different from the others.

I have nothing to add to what Buckley, J., originally said; I am quite satisfied with his judgment, and I move that this appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. I think everything that can be said on this codicil has been said, and very well said, by the learned judges who have given their judgments in the court below. I am quite content to adopt in particular the reasoning of Buckley, J., and Romer, L.J., and I do not share at all in the difficulties that presented themselves to Vaughan Williams, L.J. I think Buckley, J., summed it up very well when he said that it was exactly the same as if the testator had said "to my son Charles and such issue male as he may have by marriage with a fit and worthy gentle-

woman." I do not think anyone could suggest that that was not an estate in special tail male.

Lord SHAND.—I am of the same opinion.

Lord DAVEY.—I also am of the same opinion, and, like my noble and learned friends, I really cannot understand the difficulties in the case. It seems to me to be one of the plainest cases for an estate tail that I ever saw or heard. Mr. Warrington endeavoured to say that there was enough in the words to imply an estate for life to Charles; but, as I pointed out to him, supposing it had been expressly given to Charles for life, in my opinion the decision would have been exactly the same as the decision at which we now arrive. Speaking for myself, I am entirely satisfied with the reasons which have been given in the court below.

Lord ROBERTSON.—I concur.

Lord LINDLEY.—I am of the same opinion, and I cannot usefully add anything.

*Appeal dismissed.*

Solicitors for the appellant, *Blair & W. B. Girling.*

Solicitors for respondent, *Richard F. & C. L. Smith*, for *Marshalls & Bate*, East Retford.

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## Court of Appeal.

From Chan. Div.
(Vaughan Williams, Romer, and Stirling, L.JJ.) June 15, 16.

*In re* WILMER.
MOORE *v.* WINGFIELD. (*a.*)

*Perpetuity—Remoteness—Devise to son of M. for life with remainders to such son's issue—Son* en ventre sa mère—*Relation back.*

*For the purpose of the rule against perpetuities an infant* en ventre sa mère *is to be treated as a living person, whether such assumption is to the advantage of the infant or not.*

*A. devised her real estate to trustees upon trust to pay the income to her daughter M. for life, and, after her death, by way of equitable contingent remainders (in the events which happened) to the third son of M., born or to be born, for life, and after his death for his first and other sons successively in order of seniority in tail male. A. died in* 1880. *S. T., the third son of M., was then* en ventre sa mère. *He was born in* 1881. *In* 1902 *S. T., acting on the assumption that the limitations subsequent to his own life estate were void for remoteness, took out a summons against the trustees of the will for a declaration that, on the true construction of the will, and in the events which had happened, he had, on attaining the age of twenty-one years, become entitled as tenant in tail male in possession to the real estate so devised.*

*Held, affirming the decision of* Buckley, J. (ante, *p.* 395, [1903] 1 *Ch.* 874), *that the limitations did not transgress the rule against perpetuities, and that the sons of S. T. took valid estates in tail male in remainder.*

Appeal by the plaintiff from the decision of Buckley, J. (reported *ante*, p. 395, [1903] 1 Ch. 874).

The facts are fully set forth in the report of the case in the court below.

*Buckmaster, K.C.*, and *Sargant*, for the plaintiff, used the same arguments and cited the same cases as in the court below.

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

*Austen Cartmell*, for the defendant, the heir-at-law of the testatrix Mrs. Moore, and

*Warrington, K.C.*, and *S. Dickinson*, for the surviving trustees of the will, were not called upon.

VAUGHAN WILLIAMS, L.J., after stating the facts, continued: In this case the question is whether for the purpose of the rule against perpetuities a child *en ventre sa mère* is to be treated as a life in being. The case has been put in two distinct ways. Mr. Buckmaster's argument was based on the suggestion that for the purpose of the rule against perpetuities one ought not to treat a child *en ventre sa mère* as a living person. Buckley, J., has come to another conclusion. Mr. Sargant does not dispute the conclusion of Buckley, J., as to how one ought to treat a child *en ventre sa mère*, or the statement of Buckley, J., that, when such a child has been born and proves of the proper sex, there is a relation back. He says that if one takes the will and looks at the devise, then one has got, besides the description of the sons who have been born, a description which has no application to any living person, but a description which might be answered by the birth of a child at a time which had no relation to the death of the testatrix. He says that the rule against perpetuities is infringed because one has no right to turn to the actual facts of the case, but has to consider the possibilities. Buckley, J., begins his judgment with a statement of the law which Mr. Sargant does not quarrel with, and having stated the law in a way which expressly regards a child *en ventre sa mère* as a living person, he proceeds, *ante*, p. 396, as follows: "But if it be a correct rule of law that on the child being born on the 7th of February, 1881, and turning out to be a boy, you must refer back that state of facts to the earlier date, that of the death of the testatrix, and say retrospectively that at that earlier date events had so turned out that the rule against perpetuities could not be infringed because there was a child in existence, although *en ventre sa mère*, who was a male and who was born alive, then of course it cannot be contested but that the limitation is perfectly good." Mr. Buckmaster does not accept that last passage, but I think it is perfectly right. Buckley, J., then takes all the cases and deals with them. The first he takes is *Doe* v. *Lancashire*, 5 T. R. 49, where the question was whether marriage and pregnancy which resulted in birth amounted to the revocation of a will. He goes on to deal with the other cases, and, amongst them, with *Long* v. *Blackall*, 7 T. R. 100, which, Mr. Sargant says, is not an authority against him. But, in my opinion, it is an authority against him. The fact that the child in that case was referred to as such is quite immaterial. What the court held was that a child *en ventre sa mère* was for the purpose of the rule against perpetuities to be treated as a living child from the moment of gestation.

Under the circumstances it is not necessary for me to do more than to say that I agree with the judgment of Buckley, J., and his summing up on p. 399. I do not say, and I do not think the learned judge meant to say, that for every purpose of law a child *en ventre sa mère* is to be treated as a living person. For example, a child in its mother's womb cannot be murdered. Blackstone, in his Commentaries (*Kerr*, 4th ed.), vol. 1, p. 101, says: "An infant *en ventre sa mère*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees

with ours." And later on, in vol. 2, p. 143, he states the rule in this very case. Most of Mr. Buckmaster's argument went on the assumption that Buckley, J., had said that the rule that a child *en ventre sa mère* was to be treated as a living person, was applicable to all cases. But on the authorities the rule is manifestly applicable when one has to deal with the rule against perpetuities. As soon as the child is born and its sex satisfies the description, one must retrospectively treat it as being in existence just prior to the death of the testatrix.

ROMER, L.J.—I am of the same opinion, and will only add a few words. Where a question as to the rule against perpetuities arises on gifts under a will of the kind in this case, I think there is a rule that a child *en ventre sa mère* subsequently born alive is to be regarded as living at the time of the death of the testator. This rule cannot be disputed where it is for the interest of the child. That being so, it disposes of the present case. The plaintiff is clearly tenant for life, and the question whether or not the subsequent limitations are to be deemed void depends on whether or not the plaintiff was living at the death of the testatrix.

STIRLING, L.J.—I am of the same opinion. The question is whether the limitation to the first and other sons of the plaintiff is valid or no. As regards the rule against perpetuities, it has been stated with perfect accuracy by Buckley, J. The first proposition he lays down is that in applying the rule the court must look at events which might happen. The second proposition he lays down is that absolute ownership may be suspended for a life or lives in being and twenty-one years afterwards, and that for the purposes of this rule a child *en ventre sa mère* is treated as a life in being. That statement of the law is in accordance with all the modern text-books. I may cite, for example, Jarman on Wills (4th ed.), pp. 252, 253.

The period to look at is the death of the testatrix. What were the facts at that time? One son had died, there was a second son entitled to the Barne estate, and the mother was pregnant of a third son, the present plaintiff, who was afterwards born alive. How is the rule as to perpetuities to be applied? We have to inquire whether the plaintiff, who under the limitations takes for life, was in existence at the testatrix's death. If he was in existence the subsequent limitations are valid. The answer is that he was in existence, for a child *en ventre sa mère* is for the purpose of the rule against perpetuities to be treated as a life in being.

*Appeal dismissed.*

Solicitors, *Evans, Foster, & Wadham; Tylee & Co.*

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From K. B. Div.
(Earl of Halsbury, L.C., Collins, M.R., and Romer and Mathew, L.JJ.)
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.)
Oct. 24, 1902; June 10.

GERSON *v.* SIMPSON. (*a*.)

*Company—Directors—Promoter—Action for fraudulent misrepresentations in prospectus—Contribution from co-director—Directors' Liability Act,* 1890 (53 & 54 *Vict. c.* 54), *s.* 5.

*By section 5 of the Directors' Liability Act,* 1890, "*every person who by reason of his being a director, or named as a director, or as having agreed to become a director, or of his having authorized the issue of the prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment.*"

*Held, that this section gives a right of contribution in respect of a claim to recover damages for fraudulent misrepresentations in a prospectus of a company inviting persons to subscribe for shares, as well as in respect of a claim to recover damages for an untrue statement in the prospectus apart from fraud.*

Action to recover damages for fraudulent misrepresentation in the prospectus of a company, called the Gem of Murchison Gold Mines (Limited), whereby the plaintiff was induced to apply for and take 10,000 £1 shares in the company. The defendant, who was a promoter and director of the company, denied that any of the representations in the prospectus were false or fraudulent; and further that, if any of them were untrue, he had reasonable ground for believing them to be true. The defendant obtained leave to issue and serve third party notices upon two persons named Reitlinger and Oppenheim, from whom he claimed to be entitled to contribution under section 5 of the Directors' Liability Act, 1890, the claim against Reitlinger being as a co-promoter with the plaintiff of the company, and as having with the defendant authorized the issue of the prospectus to the plaintiff, and that against Oppenheim being as a co-director. Oppenheim thereupon applied to Jelf, J., at chambers, to set aside the third party notice and the service thereof upon him upon the ground that section 5 did not give a director, against whom a common law action of deceit was brought, a right of contribution from a co-director. Jelf, J., refused the application, but gave leave to appeal. Oppenheim appealed.

By section 5 of the Directors' Liability Act, 1890, "every person who by reason of his being a director, or named as a director, or as having agreed to become a director, or of his having authorized the issue of the prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment."

Oct. 24.—*H. H. Haldinstein*, for Oppenheim.—Section 5 of the Directors' Liability Act, 1890, has not altered the old common law rule laid down in *Merryweather* v. *Nixan*, 8 T. R. 186, that there is no contribution between tortfeasors. *Betts* v. *Gibbins*, 2 A. & E. 57, and *Moxham* v. *Grant*, 48 W. R. 130, [1900] 1 Q. B. 88, showed that there is an exception to that rule where the act is not clearly illegal in itself. In the present case the plaintiff is suing the defendant in a common action of deceit to recover damages for fraudulent misrepresentations. There is clearly no right to contribution at common law in such a case, and section 5 of the Act of 1890 has not altered the law in that respect. Section 3 of that Act creates for the first time a liability in a director of a company and other persons for any untrue statement in a prospectus of the company inviting subscriptions for shares unless (*inter alia*) the director or other person can prove that he had reasonable ground to believe, and did believe, the statement to be true. That section creates a liability for an untrue statement apart from fraud, and section 5 only gives a right of contribution to a person who has become liable to make a payment "under the provisions of this Act." That limits the right of contribution to cases where the liability is

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

created by section 3 of the Act: Lindley on Company Law (6th ed.), p. 123. If that were not so, a fraudulent director might recover contribution over against an innocent co-director. The order of the learned judge was therefore wrong.

*Muir Mackenzie*, for the defendant.—Section 3 of the Directors' Liability Act, 1890, gives a right of action against a director or promoter of a company and against any person who has authorized the issue of the prospectus in respect of any untrue statement in the prospectus, with certain exceptions. That includes a statement that is known to be untrue as well as a statement not known to be untrue. In respect of that cause of action section 5 gives a director or any person who has authorized the issue of the prospectus so becoming liable a right of contribution, as in a case of contract, from any other person who, if sued separately, would have been liable to make the same payment. The order was therefore right.

Earl of HALSBURY, L.C.—I have no doubt that the order was perfectly right. The question which we have to decide is whether there can be a right of contribution in this case. To my mind the statute has stated, with what I may, without disrespect, call unusual clearness, that with reference to this particular class of tort, and with reference to this class of persons, the ordinary rule that there shall be no contribution between tortfeasors shall not apply, and that the rights of the parties shall be treated as though it was a question of contract and not of tort at all. The result is that a right of contribution exists, and the appeal must be dismissed.

COLLINS, M.R., and ROMER and MATHEW, L.JJ., concurred.

The action came on for trial before Wills, J., and a special jury, the action as between the plaintiff and the defendant being heard first.

The jury were asked, so far as material to the present report, the following questions: (1) Were any of the statements in the prospectus false to the knowledge of the defendant? and (2) Had such false statements a material effect in inducing the plaintiff to take the shares? The jury answered both these questions in the affirmative, and they assessed the damages at £4,750, and judgment was accordingly entered for the plaintiff for that amount with costs.

The third party proceedings were then heard. With regard to the defendant's claim against Oppenheim, the jury returned a verdict for Oppenheim, and judgment was entered for him as against the defendant. With regard to the defendant's claim against Reitlinger, the jury returned a verdict against Reitlinger on one representation, stating that it was a fraudulent mis-statement and that Reitlinger must have known it. Judgment was accordingly entered for the defendant as against Reitlinger for £2,375, and half the costs of the original action, which the defendant had to pay to the plaintiff and to his own solicitor, together with the costs of the third party proceedings against Reitlinger.

The defendant applied for judgment or a new trial of the action as against him, and Reitlinger made a similar application as to the third party proceedings against him.

June 10.—*C. A. Russell, K.C., Muir Mackenzie*, and *J. A. Simon*, for the defendant.

*Gore-Browne, K.C.*, and *Clavell Salter*, for the plaintiff, were not called upon.

THE COURT (COLLINS, M.R., and MATHEW and COZENS-HARDY, L.JJ.) dismissed the defendant's application, holding that there was evidence to justify the verdict of the jury.

Reitlinger's application then came on for hearing.

*Stewart Smith, K.C.*, and *Arthur Sims*, for Reitlinger.—Section 5 of the Directors' Liability Act, 1890, does not create any right to recover contribution where the action is a common law action of deceit. It only applies where there is a claim under section 3 of the Act founded upon an innocent misrepresentation apart from fraud. If the section does create a liability to contribute in the case of an action of deceit, a fraudulent director may recover contribution from an innocent director. [COZENS-HARDY, L.J.—May not the innocent director show that he had reasonable ground for believing, and did believe, that the representation was true?] The decision of this court on the 24th of October last on the appeal from Jelf, J., at chambers is not a decision that a right of contribution between tortfeasors is given by section 5. That decision applied solely to a claim under section 3 of the Act.

*C. A. Russell, K.C., Muir Mackenzie*, and *J. A. Simon*, for the defendant, were not called upon.

COLLINS, M.R.—The same question which has been raised now has been decided by this court when the Lord Chancellor was presiding over it. We held in an application in this very action that a liability to contribute would arise. According to the verdict of the jury the defendant and Reitlinger were joint tortfeasors, and the latter became liable under the terms of the Act to contribute.

MATHEW and COZENS-HARDY, L.JJ., concurred.

*Applications dismissed.*

Solicitors for the plaintiff, *Lesser & Danger*.

Solicitors for the defendant, *Stephenson, Harwood, & Co.*

Solicitor for Oppenheim, *Gilbert E. Samuel*.

Solicitors for Reitlinger, *Steadman, Van Praagh, & Gaylor*.

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From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — April 29.

MERCIER v. MERCIER. (a.)

*Married woman — Joint account — Purchase out of money belonging to wife—Gift to husband—Resulting trust—Capital—Income.*

*In the case of the receipt by a husband of the separate property of his wife there is no general rule of law that in the case of* corpus *belonging to the wife the* onus *of proof of a gift lies on the husband, while in the case of income the* onus *lies on the wife, and she must establish clearly and conclusively that her husband received the income by way of loan. For this purpose the difference between capital and income is only one of degree and not of principle.*

Alexander v. Barnhill, 21 L. R. Ir. 511, 37 W. R. Dig. 5, *discussed.*

This was an appeal from a decision of Buckley, J.

In 1883 the defendant in the action married Colonel Mercier. At the time of the marriage the defendant was possessed of considerable property, but her husband was not a man of large means. After the marriage a joint account was opened in the names of the husband and wife, on which both drew. In 1891 they bought a piece of land at Bournemouth, on which a house was subsequently built. The con-

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

veyance was made to the husband, who paid for the land by a cheque drawn on the joint account. The building was also paid for out of the joint account, though a separate building account was opened. The husband alone drew on this building account. Shortly after the marriage the husband and wife had made wills in each other's favour, but the husband subsequently, without the knowledge of the wife, revoked his will. The husband died in 1901 intestate. The plaintiff was a son of Colonel Mercier by a former marriage, and he now brought the present action as the eldest son and heir-at-law of the intestate, claiming a declaration to the effect that the land at Bournemouth belonged to the husband absolutely. Buckley, J., held that the wife did not intend to make a gift to the husband and that he was a trustee for her.

The plaintiff appealed.

*Butcher, K.C.*, and *E. Ford*, for the appellant.—This account was made up of income of the wife's property. Where the *corpus* of a wife's separate property is received by her husband, the *onus* of proof lies on him to show that it is a gift, but where income only is received by the husband, the *onus* lies on the wife, save perhaps as to the last year's income, and she must establish clearly and conclusively that her husband received her income by way of a loan: *Alexander* v. *Barnhill*, 21 L. R. Ir. 511, 37 W. R. Dig. 5.

They also referred to *Caton* v. *Rideout*, 1 Mac. & G. 599; *Edward* v. *Cheyne* (*No.* 2), 13 A. C. 385, 36 W. R. Dig. 173.

*Henry Terrell, K.C.*, and *MacSwinney*, for the respondent, were not called upon to argue.

VAUGHAN WILLIAMS, L.J., delivered judgment to the effect that on the evidence and on the facts of the case the inference to be drawn was that it was not intended that there should be a gift to the husband. There was therefore a resulting trust in favour of the wife, and the appeal must be dismissed.

ROMER, L.J., also held that on the facts there was no gift to the husband, and the appeal failed. His lordship continued: It has been suggested that one presumption arises if the money comes from *corpus* of the separate property of the wife, and another if it comes from her income. In my opinion, that is not the law, and there is no authority for it. The only thing which lends colour to the suggestion are the observations of Chatterton, V.C., in *Alexander* v. *Barnhill*, which have, I think, been misunderstood. I do not think that the Vice-Chancellor intended in that case to lay down any such general proposition as is contended for. There is no such inherent distinction between capital and income. Suppose the wife had a separate account, and, being a wealthy woman, gave her husband a cheque for £5,000. According to the appellant's argument one presumption would arise if her account were at the time made up of capital, and a different presumption if it were made up of income. The only real difference between capital and income is one of degree. In every case where money of the wife comes to the husband, the only question is whether a gift was intended or not. No doubt in certain cases the fact of the money having been income received by the husband with the consent of the wife may be material, but there is no other distinction in law so far as I am aware between income and capital.

COZENS-HARDY, L.J.—I am of the same opinion. I agree with the judgment of Buckley, J., and I do not think it is possible to add much to his reasoning. I wish, however, to add this, that I entirely adopt what has fallen from Romer, L.J., with reference to the alleged distinction whether in a case like this the money comes from a banking account consisting solely of income of the wife or from one consisting wholly or partly of capital. To my mind there is no difference in principle, though there may be in the importance to be attached to drawings from the fund; but that is a difference of degree and not of principle.

*Appeal dismissed.*

Solicitors, *J. E. Churchill; Smiles & Litchfield.*

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From Chan. Div.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) March 18, 19.

*In re* DRAX.
SAVILE v. DRAX. (*a.*)

*Interest—Charge on land—Order of court—No words charging interest—Interest-bearing debt—Presumption of satisfaction—Statute of Limitations* (3 & 4 *Will.* 4, c. 42), *s.* 28.

*A charge on land created by an instrument or order of the court carries interest, though there are no words in the instrument or order expressly charging interest. If a claim to have money raised and paid out of real estate is not barred by the Statute of Limitations, there is no ground, in the absence of any special circumstances, for raising a presumption of satisfaction.*

This was an appeal from a decision of Joyce, J.

In 1814 Richard Erle Drax Grosvenor contracted to purchase an estate known as Hobbys and paid as a deposit £150, part of the purchase-money, but he died before completing the purchase, leaving his only son, Richard Edward Erle Drax, his heir-at-law.

In 1822 Richard Edward Erle Drax was duly found by inquisition to be a lunatic.

In 1823 the committees of the lunatic were authorized to complete the purchase of Hobbys. £1,627 10*s.*, the balance of the purchase-money, was paid by them out of the rents and profits of the real estates of the lunatic, and by an indenture of release of the 28th of April, 1824 (which was approved by the court) Hobbys was conveyed to trustees in trust for the lunatic, his heirs and assigns.

The said indenture contained the following proviso: "Provided always and it is hereby declared that the sum of £1,627 10*s.* so paid by the said Thomas Grosvenor and Robert Grosvenor, the committees of the estate of the said Richard Edward Erle Drax shall be a lien upon 'the property conveyed' in trust for the said Richard Edward Erle Drax, his executors or administrators."

By an indenture of conveyance dated the 15th of December, 1826, after reciting that the court had approved the contract for the purchase by the committees of the land thereby conveyed for £500, and for payment of the purchase-money out of the rents and profits of the lunatic's estate but that the money to be applied in the purchase should be applied without prejudice to any question which might arise upon the death of the lunatic as to whether the same was real or personal estate of the lunatic, a piece of land at Morden, in the county of Dorset, was conveyed to trustees in trust for the lunatic, his heirs and assigns. And in pursuance of the order of court

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

in that behalf it was thereby declared that the sum of £500 paid for the purchase-money had been so paid and applied without prejudice to any question which might arise upon the death of the lunatic as to whether the same sum of £500 might be real or personal estate of the lunatic.

The lunatic died on the 18th of August, 1828, a bachelor and intestate, leaving his sister, Jane Frances, the wife of John Erle Drax, his heiress-at-law and only next-of-kin. On the 19th of September, 1828, letters of administration to the personal estate of the lunatic were duly granted to Jane Frances Erle Drax.

Jane Frances Erle Drax died on the 25th of September, 1853, leaving her two daughters, Maria Caroline Erle Drax, and the defendant, Sarah Charlotte Erle Drax, her coheiresses-at-law. By her will she gave all her real and personal estate to her husband, John Erle Drax, but such will was inoperative as regarded personal estate not being her separate estate.

On the 24th of May, 1882, letters of administration of the personal estate of the lunatic were granted to John Erle Drax.

John Erle Drax died on the 5th of January, 1887.

The plaintiffs, who were his executors, took out the present summons asking (among other things) for a declaration that they were entitled to a lien upon Hobbys for £1,627 10s. with interest thereon from the date of the death of John Erle Drax, and also to a lien on the Morden property for £500 with interest thereon from the same date and to have such liens enforced by foreclosure or sale.

Joyce, J., made the declarations asked for.

The defendants appealed.

*Badcock, K.C.*, and *Vaughan Hawkins*, for the appellants.—On the death of the lunatic, Mrs. Drax became entitled both to the land and to the charge upon it. It is submitted that the charge thereupon became merged. If it did not merge it is barred under the Statute of Limitations. No proceedings were ever taken to enforce the charge. The argument that it was the same hand to receive and to pay here carries no weight because the charge is not one that bears interest at all. There are no words charging the land with interest. In the case of Hobbys the principal only, is a lien on the land. As to the Morden property, that is not charged even with principal.

The following cases were referred to in the course of the argument: *Page* v. *Newman*, 9 B. & C. 378; *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.*, [1893] A. C. 429; *Lippard* v. *Ricketts*, 20 W. R. 898, L. R. 14 Eq. 291; *Eardley* v. *Knight*, 37 W. R. 704, 41 Ch. D. 537; *Thompson* v. *Drew*, 20 Beav. 49, 4 W. R. Ch. Dig. 53; *Re Horner, Fooks* v. *Horner*, 44 W. R. 556, [1896] 2 Ch. 188; *Carey* v. *Lloyd*, 5 Ir. Ch. Rep. 104; *Webster* v. *British Empire Mutual Life Assurance Co.*, 28 W. R. 818, 15 Ch. D. 169; *Trafford* v. *Ashton*, 1 P. Wms. 415; *Lewis* v. *Freke*, 2 Ves. jun. 507; *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; *In re Kerr's Policy*, 17 W. R. 989, L. R. 8 Eq. 331; *Cooper* v. *Jarman*, 15 W. R. 142, L. R. 3 Eq. 98; and *Attorney-General* v. *Marquis of Ailesbury*, 36 W. R. 737, 12 App. Cas. 672.

*Hughes, K.C.*, *Theobald, K.C.*, *Davenport*, and *L. F. Potts*, for the respondents, were not called upon to argue.

COLLINS, M.R., stated the facts, and continued: Two points have been taken for the appellants. First, it is said that the right to the money as personal property and the right to the land became merged in the same person, and that, therefore, the lien is gone. Now, the lunatic died leaving his sister his heiress-at-law and sole next-of-kin. But the sister was married, and therefore the right with regard to the money, which was the wife's *chose in action*, and the right with regard to the land never coalesced in the same person. Consequently there could be no merger either at law or in equity. The sister died leaving a husband, who then became tenant by the courtesy of the land, and he was in the enjoyment of it until his death in 1887. Clearly there was no merger up to that date. Then counsel fall back upon the Statute of Limitations and say that as no interest was ever paid upon this charge there was no intention to keep the principal sum alive. If interest was payable, of course counsel are met by the difficulty that up to 1887 the obligation to pay and the right to receive were united in the same person, and therefore the statute was not running up to that year, while it has been agreed between the parties that the lapse of time since 1887 is not to be taken into account. Therefore we come to this point—whether as the result of the charge, interest was or was not payable; and this appears to me to be the only point in the case.

It seems to me well established on the authorities that a court of equity has power to allow interest, and in point of fact does so when a charge is created on land, although no words directly charging interest are contained in the instrument creating the charge. Indeed, we go back to the principle laid down in many cases showing that in point of fact the court of equity does charge interest. Many cases to that effect have been cited in the course of the argument, but it is not necessary to go through them; it is in fact admitted that the court has power to charge interest; but counsel for the appellants say that although the court has power to charge interest yet the circumstances of the particular case may lead it to consider that it ought not to order or enforce payment of interest. But in the present case it appears to me—and the learned judge has so held—that the circumstances, instead of rebutting the presumption that interest was payable, assist it, because this special provision was made in order to safeguard the right of the persons entitled to the lunatic's personal estate as against the right of the persons entitled to the land and to adjust those rights between them. What was the object of this but to give to those representing the personal estate as against those representing the land the right to have the charge paid? In my opinion, therefore, it is peculiarly a case in which the court ought to follow its well-settled practice. Accordingly there must be a declaration that interest is payable on the charge. The appeal fails and must be dismissed with costs.

ROMER, L.J.—I am of the same opinion. With regard to the property purchased, and which was conveyed by the deed of the 28th of April, 1824, in my opinion there can be no question but that the provision as to lien inserted in the deed was so inserted to save the rights of those persons who should be interested in the personal estate of the lunatic at his death as against those who should be interested in his real estate, in case they happened to be different persons. That seems clear from the words of the declaration of the lien in the conveyance. The object and intention, to my mind, are clear, that if the persons entitled to the real estate at the death of the lunatic were not the same as the persons entitled to the personal estate, then the former were to recoup to the latter the money spent in acquiring the land. Accordingly in the deed of 1824 we find a declaration that on the death of the lunatic a fixed sum should be recouped from the realty to the personalty in the events which happened. With regard to the convey-

ance of 1826, I think that there can be no real doubt but that it was intended to keep alive the rights of the persons interested in the personal estate so far as the money applied in the purchase of the land was personal estate.

Now I take it to be settled at the present day that if you find in any settlement or contract a provision that a sum of money is to be charged on land, and the money is to be paid at a fixed time, the sum itself [illegible] fixed, then as between the owner of the land [illegible] the person entitled to the money although [illegible]ng is said in the settlement or contract as [illegible]terest in the eye of a court of equity from the [illegible]ixed for payment of the money, that money [illegible]nterest. There might be, no doubt, circum- [illegible] so strong as to negative the presumption that [illegible] was payable—there are none such here—but [illegible]ave stated is the rule, and it is illustrated by [illegible]n the security of a memorandum of deposit of title deeds of lands. There the money so charged bears interest, whether there is an express provision for payment of interest or not. So in the case of portions raisable out of land at a fixed time and to a fixed amount they certainly bear interest. So also legacies charged on land, which stand on a different footing from legacies not so charged, carry interest from the death.

Now, the circumstances of the present case, so far from being such as to induce the court to treat this case as an exception to the rule, show strongly that the rule ought to be applied, because the express object of what was done in this case was to allow the rights to the real and personal estate of the lunatic to be adjusted at his death. Therefore the case clearly falls within the general rule, and interest is payable from the death. The facts of this case show that there has been no merger either at law or in equity, and that there is no bar to the claim by reason of the Statute of Limitations.

It was said that owing to the lapse of time there must be a presumption of satisfaction of the charge, but I am convinced that this cannot be so. There is nothing showing any intention on the part of any of the parties interested that the charge should be treated as satisfied, and I am fortified in that view by the case of *In re Dixon*, 48 W. R. 665, [1900] 2 Ch. 561. It appears to me that in a case like this, where you cannot establish from the Statute of Limitations that a claim to have money paid out of real estate is barred, you ought not to raise the presumption of satisfaction by the application of any general rule. If the statute does not apply at all, you cannot fall back on any general rule. In my opinion the circumstances here are not such as to justify the court in holding that the amount secured can be presumed to have been discharged by lapse of time. It was admitted before us that this case is to be decided as if it had arisen for decision in 1887.

COZENS-HARDY, L.J.—I am of the same opinion. As I understand the judgment of the learned judge below, he thought there was a legal merger, but no merger in equity; but it appears to me that there is not any moment of time at which it can truly be said that there was any merger either at law or in equity.

A more difficult question arises under the Statute of Limitations, and that arises on the answer to be given to the question whether the sum ordered by the court in lunacy to be charged on the land purchased, for the purpose of recouping the lunatic's personal estate, did or did not carry interest from the death of the lunatic, which happened in 1828, having regard to the fact that until 1887 the hand to pay and the hand to receive the interest (if payable) was the same.

It is well settled that where you have an equitable charge on land to secure the payment of a debt, it carries interest, although there is no mention of interest in the instrument of charge. That is established by *Ex parte Hirtzel*, 3 De G. & J. 464, and by *In re Kerr's Policy* where James, V.C., said, in giving judgment, "I think that a deposit of title-deeds to secure a loan is to be considered as an agreement to execute mortgage of the property comprised in the deeds, with interest." It is equally well settled in the case of a portion that, although no mention is made of interest, yet it is a charge which carries interest, and interest at the rate current in the country in which the land charged is situate. For that *Balfour* v. *Cooper*, 31 W. R. 569, is a clear authority. There are many other cases of equitable lien or charge in which the court has given interest, though not mentioned. I am not aware of any case in which the Court of Chancery, while decreeing an equitable charge or lien, has refused to give interest thereon, and I think the view taken by Bacon, V.C., in *Lippard* v. *Ricketts* is the correct one. There he says: "In the case of *In re Kerr's Policy* the court seems to have proceeded on the theory that a debt secured by equitable mortgage will, unless something is said or may be implied to the contrary, carry interest; and it seems to follow that, when the court has once decided that there is a charge, the sum charged must bear interest." *Lippard* v. *Ricketts* was a case in which a person had a charge, not by a mortgage deed bearing interest, but by an order of the court which said nothing about interest. The case was one in which it would have been very easy to hold that interest was payable if it had been one of an ordinary mortgage carrying interest, but it was not: it was a case in which a person had obtained an order giving him a charge upon certain real and personal estate comprised in an annuity deed. Bacon, V.C., held that inasmuch as a charge had been created by the order, that charge must bear interest. Whether the Vice-Chancellor's statement of the law is exhaustive or not, it is not necessary now to consider, but, speaking for myself, I am not prepared to make an exception to the general rule in the present case. This money became payable at the lunatic's death, and it was the intention of the parties that it should be paid out of the land purchased. In my opinion the court would not be giving proper effect to that intention if it refused to allow interest on the sum charged from the time at which the principal sum became payable—that is to say, from the death of the lunatic. I therefore agree that this appeal fails.

Solicitors, *Woodcock, Ryland, & Parker*, for *Preston & Francis*, Bournemouth; *Brown, Ringrose, & Lightbody*.

## High Court of Justice.

Chan. Div. } Farwell, J. } May 26, 27.

*In re* BARONESS LLANOVER.
HERBERT *v.* FRESHFIELD. (No. 2). (*a.*)

*Will—Direction for accumulation of rents and profits—Purchase of land—Accumulations Act,* 1892 (55 & 56 *Vict. c.* 58).

*A testatrix, who died on the* 17*th of January,* 1896, *by her will made in* 1889, *directed that the residue of her property (which consisted largely of surplus rents and profits of landed estate) should be applied to the discharge of incumbrances and the purchase of other landed estate.*

*Held, that this direction was in contravention of the Accumulations Act,* 1892.

Augusta, Baroness Llanover, by her will, dated the 16th of August, 1889, and by subsequent codicils, the last of which was dated the 14th of March, 1892, made certain provisions for her daughter, the plaintiff in the summons.

The testatrix died on the 17th of January, 1896, and her will was duly proved.

By her will she devised her estates to trustees, with full powers of management and leasing, and directed them, after making certain allowances for the plaintiff, to pay the expenses of management and keep down the interest on all incumbrances on the estates out of the rents and profits of the said estate, and she further directed them to apply the surplus rents and profits during the life of the plaintiff, but not for a period of more than twenty years after the death of the testatrix in manner directed concerning the proceeds of her residuary property.

Clause 10 of the will read as follows: "I give the residue of my property not disposed of by any codicil hereto to my trustees in trust to realize the same and apply the proceeds in the discharge of incumbrances on the estates hereinbefore devised or in the purchase of other estates near the devised Llanover estates, and to be held on like trusts and subject to like powers and directions as the said last-mentioned estate."

This clause was said to be in contravention of the Accumulations Act, 1892 (55 & 56 Vict. c. 58), by section 1 of which "no person shall after the passing of this Act settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated." The plaintiff claimed that she was entitled to the surplus rents and profits of the estates devised by the will of the testatrix from the date upon which the trustees first had in their hands or under their control funds sufficient and available for the discharge of a mortgage which she alleged was the only remaining incumbrance upon the estate.

The Accumulation Act became law on the 28th of June, 1892, a short time after the date of the last codicil to the will.

*Warmington, K.C.*, and *Fellowes*, for plaintiff.—There is no question of accumulation during a minority in this case, therefore the general prohibition in the Act takes effect: *In re Clutterbuck, Fellowes* v. *Fellowes*, 49 W. R. 583, [1901] 2 Ch. 285.

*Upjohn, K.C.*, and *Howard Wright*, for defendants.—The Act is not retrospective and even if it is retrospective, the present case is not one of accumulation for the "purchase of land only." The Act does not apply as long as the mortgage is in existence.

*J. I. Stirling*, for other defendants.

FARWELL, J.—I am of opinion that the Accumulations Act, 1892, applies to the will of a testator made before the passing of the Act where the testator died after the passing of the Act. The Act was passed for the purpose of qualifying generally the power of accumulation left to testators and settlors after the general purpose of restraining had been carried out by the Thellusson Act (39 & 40 Geo. 3, c. 98). The latter Act allowed four periods of accumulation, and the Accumulations Act, 1892, qualifies those periods as far as the purchase of land is concerned. Now, on the construction of the Act of 1892 it is plain that a testator does not settle or dispose of any property except by will and death. Lord Davey in *Beddington* v. *Baumann, ante*, p. 383, [1903] App. Cas. 13, stated "The will was an ambulatory document having no force or effect whatever until the death of the gentleman who made the will." An effectual disposition only takes place when the will and the death of the testator coalesce. The Wills Act, 1837 (1 Vict. c. 26), s. 24, makes the will speak from the death of the testator. It is my opinion that the Accumulations Act, 1892, does apply to the present will.

Then it is said that the Act cannot apply because the will directs not only the purchase of land, but the discharge of incumbrances, and the payment off of incumbrances is not a purchase of land. That does not mean that you can evade the Act by putting in additional words to which the Act does not apply; but you must omit the words in paragraph 10 of the the will which are inconsistent with the Act of 1892.

Solicitors for plaintiff, *Hunter & Haynes.*

Solicitors for defendants, *Freshfields.*

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

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Chan. Div. } Farwell, J. } April 25.

INTERNATIONAL TEA STORES CO. *v.* HOBBS. (*a.*)

*Easement—Way enjoyed with the land sold—Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-section* 2.

*The owner of two adjoining houses sold one to a purchaser who was already in occupation, and had at the date of the conveyance enjoyed a way over the premises retained by the vendor.*

*Held, that the purchaser was entitled to a right of way.*

Kay *v.* Oxley, *L. R.* 10 *Q. B.* 360, 23 *W. R. Dig.* 251, *followed.*

Action.

On the 30th of December, 1899, the defendant Hobbs, who was the owner of two houses fronting to Chapel-street, Petersfield, sold one of the houses to the plaintiffs, the International Tea Stores Co. (Limited). This house had been for some years previously occupied by the plaintiffs as assignees of a lease. The other house was occupied by the defendant.

The house sold was conveyed to the plaintiffs by

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

the description of "All that piece or parcel of land situate at Petersfield, in the county of Southampton, and more particularly described in the map or plan drawn in the margin hereof and therein coloured pink, and which piece of land intended to be hereby conveyed has a frontage of twenty-six feet or thereabouts to Chapel-street, and abuts thereon towards the west, and is bounded to the north by a roadway constructed over a brook or stream leading to a yard and blacksmith's shop of the defendant, and towards the east and south (as therein mentioned), together with the messuage or dwelling-house, shop and premises erected and built on the said piece of land, all which said premises are now in the occupation of the company."

The said roadway constructed over a brook was in fact part of the yard belonging to the premises of the defendant, on which he carried on the business of blacksmith, and there was a door, at the back of the premises sold to the plaintiff company, which opened into the yard.

The plaintiff company claimed a right of way over the yard to the door at the back of their premises on the ground that it was enjoyed at the time of the conveyance, and therefore passed under the general words incorporated in the deed by the Conveyancing Act, 1881, and sought to restrain the defendant from obstructing the way.

The Conveyancing and Law of Property Act, 1881, s. 6 (1), provides: "A conveyance shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, . . . ways, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

*Upjohn, K.C.*, and *Vernon*, for the plaintiff company.

*Lord Coleridge, K.C.*, and *Adams*, for the defendant.

FARWELL, J., after stating the facts, continued: I find that there was a way used in fact by the plaintiff company at the date of the conveyance and for many years previously. But then it is urged by counsel for the defendant that the use was wholly permissive. Cases of the sort I am dealing with arise necessarily where the defendant was the owner of the property which has been conveyed to the plaintiff in the action, and is also the owner of other property adjoining, which he does not convey, and over which there is claimed a right of light, or way, or whatever other right it may be. If the defendant himself has been in occupation as well as owner no question of precariousness can arise in any way. In that case the single question would be, Was there a roadway over the tenement retained which was in fact used at the date of the conveyance for the benefit of the tenement sold? This is a different case; for here, although there was unity of title to the two tenements in the defendant, there was not unity of possession, because the plaintiff company were themselves tenants in possession of the tenement sold. The user of the road by them was, of course, not of right. Probably no question would have arisen if they had had the right under the lease; but I have found they had no such right under the lease. They must therefore have used the road either by license or without license. Unless I am prepared to say that in no case can a tenant who has enjoyed in fact a right of way over a made roadway to his tenement obtain, under section 6 of the Conveyancing Act, 1881, the right of way, because he has not had it as of right unless he has enjoyed it in some way or other as of right, it appears to me that I must hold in this case that the fact of license or no license makes no difference. In every case of this sort the use of the road must be either licensed or unlicensed. If it be unlicensed, it is perfectly open to the owner to say, "True you have used the road; but your use was precarious, because I could any day have stopped it." If, on the other hand, the use be by license, it is still open to the licensor to object that the user was equally precarious, in the sense that the license, being *ex hypothesi* a revocable one, might have been revoked at any time; though if there be degrees of precariousness, the licensed use is perhaps less precarious than the unlicensed. But, in my opinion, precariousness has nothing to do with cases of this sort, where there is a privilege which is by its nature known to the law—namely, a right of way which has been in fact enjoyed.

The argument of counsel for the defendant as touching precariousness was, I think, founded upon what I venture to believe was a misconstruction of a judgment of mine in *Burrows* v. *Lang*, 49 W. R. 564, [1901] 2 Ch. 502, where I was using the argument of precariousness to show that the right there claimed was one that was unknown to the law—namely, the right to take water if and whenever the defendant chose to put water into a particular pond. That is a sort of right which by reason of its precariousness does not exist at all: but a right of way, of course, is a matter well known to the law. The real truth is that you need not consider, in a case of this sort, the question of the title to the existing use—that you need not consider whether it was by license or not. The single question that has to be considered is the question of user in fact. If you find that the way has in fact been used, that is all you have to consider, and not the title under which it has been used. I quite agree that you have to take into consideration all the circumstances of the case, and you might possibly find cases where a contract, or something of that sort, would prevent the way claimed from passing under the general words imported by section 6. Considerations such as were referred to in *Birmingham, Dudley, and District Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295, would, I think, be properly taken into consideration in the case of a right of way, as well as in the case of a right of light. I am not sure whether the Court of Appeal in *Birmingham, Dudley, and District Banking Co.* v. *Ross* intended to decide that case on section 6 of the Conveyancing Act, 1881. I incline to think that the case was not decided on that section; but I anyhow think that the statement of Cotton, L.J., had reference to that section, so that I have at any rate an *obiter dictum* to assist me in construing that section. I do not, however, in the present case find any special circumstances, such as those that arose in *Birmingham, Dudley, and District Banking Co.* v. *Ross*, which would prevent the way claimed from passing by virtue of section 6. As already indicated, the circumstance that the way has been in fact used is, in the present case, quite sufficient.

With regard to this question of license or no license being material I have the assistance of a decision exactly in point in *Kay* v. *Oxley*, from which it appears that it is not material. Blackburn, J., says: "I do not think it necessary to consider whether or not that parol license, which was given by the defendant, to use the road was revocable; or whether an action might not have been maintained for obstructing the tenant in doing that which he had a parol license to do; or whether an action for trespass could have been brought against the tenant for using that road. I do not think it material to decide that.

The license was not in fact revoked." The learned judge, therefore, as I understand him, considers the relevant question as this: Was the way in fact enjoyed at the date of the conveyance? If so, the fact that it was enjoyed under a license which had not been revoked was immaterial. If it had been enjoyed in fact, without any license at all, for a number of years, even though no prescriptive right had been, or would have been acquired, yet it would still have been in fact enjoyed. It is in each case a question of fact to be determined on the circumstances of the case, whether a use has or has not been enjoyed within the meaning of section 6. That really disposes of the case, and I must make a declaration that the plaintiff company are entitled to the limited easement asked for.

I wish to deal, however, with another point of view. Some of the cases referred to, such as *Barkshire* v. *Grubb*, 29 W. R. 929, 18 Ch. D. 616, turn in a great measure on the fact that there is a made roadway leading to the plaintiffs' premises. In this particular case there was a made way; and, in my opinion, on the authority of *Roberts* v. *Karr*, 1 Taunt. 495, to which I referred during the course of argument, the fact that the conveyance states that the property is bounded by the roadway leading to the yard, estops the defendant from saying that there is not in fact a roadway constructed and leading to the yard which necessarily passes the door, that as a matter of fact exists in the wall opening on to the yard.

Solicitors, *Ashurst, Morris, Crisp, & Co.; G. & A. Marshall*, for *Shield & Mackarness*, Petersfield.

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Chan. Div.
Buckley, J. } June 21, 27.

NATIONAL TELEPHONE CO. (LIMITED) *v.* MAYOR, &c., OF KINGSTON-UPON-HULL. (*a.*)

*Telegraph — Telephone company — Licence to provide telephonic communication in exchange area — New licence to local authority in respect of same area — Continuance of powers to lay down underground wires acquired by company by agreement with local authority — "For the duration thereof" — Telegraph Act*, 1899 (62 & 63 *Vict. c.* 38), *s.* 3 (1).

*Section* 3 (1) *of the Telegraph Act*, 1899—*which provides, under certain circumstances, for the continuance of powers acquired by an existing company by agreement with the local authority before the passing of the Act to lay down underground wires in an exchange area, in the event of a new licence being granted to the local authority or to another company in respect of the same exchange area—applies only to the case where the powers of the company are in existence at the date of the grant of the new licence. Accordingly, where the local authority by virtue of a clause contained in the agreement conferring the powers, has duly determined those powers before the date of the grant of the new licence, the section does not operate to continue them.*

*The words in the section, "those powers shall continue for the period specified in the new licence for the duration thereof," refer to the duration of the powers, and not to the duration of the new licence.*

*Assuming, therefore, that the powers of the company are in existence at the date of the grant of the new licence, they will be continued, not during the duration of the new licence, but during the period (if any) which the new licence specifies for their continuance.*

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

Action with witnesses.

The substantial question raised in this action was whether there is anything in section 3 of the Telegraph Act, 1899, which prevents a local authority, desirous of obtaining a licence to establish a telephone system in its area, from exercising any right, which it may otherwise possess, of determining the powers of a telephone company to lay down and continue underground wires within the area.

The following statement of facts is taken from the judgment:

By the Telegraph Act, 1863, s. 6, authority was given to certain companies to place and maintain telegraphs under any street or public road, subject to the restriction, contained in section 9, that they should not do so within the district of any city or municipal borough or town having a population of 30,000 inhabitants or upwards, except with the consent of the bodies having the control of the streets. By the same Act a certain authority was also given to construct telegraphs over or across streets. That Act applied only to companies authorized by special Act, and the plaintiff company is not such a company.

By the Telegraph Act, 1868, authority was given to the Postmaster-General to work telegraphs in connection with the Post Office. That was done by section 2 of the Act of 1868 by including the Postmaster-General within the term "the company" in the Telegraph Act, 1863. The Postmaster-General thus acquired the power, in section 6 of the Act of 1863, to lay telegraphs under streets, but subject to the restriction of section 9, which required the consent of the road authority. The Postmaster-General was, by section 4 of the Act of 1868, authorized to purchase telegraph undertakings, and by section 14 to lease them.

By the Telegraph Act, 1869, s. 4, the Postmaster-General obtained a monopoly in the transmission of telegrams, except as by that Act provided, and "telegraph" and "telegram" were by section 3 so defined as to include telephonic communication. The result was that before and in 1884 the Postmaster-General had, as regards underground telephonic communication, the powers given by the Telegraph Act, 1863, and for that purpose had to obtain the consent of the road authority; and he had a monopoly and the power to grant licences.

On the 29th of November, 1884, by a deed made between the Postmaster-General and the plaintiff company, the Postmaster-General, in exercise of those powers, granted to the company for thirty-one years, expiring on the 31st of December, 1911, a licence and permission to work and use telephones. Under that authority the plaintiff company laid down trunk and other lines, and established telephonic undertakings.

By the Telegraph Act, 1892, s. 5 (1), authority was given to the Postmaster-General to authorize his licensees, during the time and within the area specified in the licence, to exercise the powers conferred on the Postmaster-General by the Telegraph Acts, 1863 and 1878, or any of them, and thereupon the enactments conferring those powers were to apply; but this was made subject to a proviso contained in section 5 (2) (*b*) that the licensees should not exercise those powers without the consent of the urban sanitary authority, and should be subject to any terms and conditions which the urban sanitary authority might attach to such consent. A person, therefore, who received from the Postmaster-General under this Act (1892) an authority to exercise the power in the Act of 1863 to lay underground wires was subject to section 9 of the Act of 1863 as to the consent of the road authority, and to section 5 (2) (*b*) of the Act of 1892 as to the consent of the like

authority; and to this latter consent that authority could attach any terms and conditions.

On the 25th of March, 1896, by a deed made between the Postmaster-General and the plaintiff company, the company sold to the Postmaster-General its trunk lines (article 2), and was confined, as regards its telephonic business, to exchange areas (article 4); and by article 11 the Postmaster-General bound himself from time to time, at the request of the company, to authorize the company to exercise within any exchange area all the powers of executing works conferred upon the Postmaster-General by, *inter alia*, the Telegraph Act, 1863, subject to a proviso that, in exercising such powers, the company should be subject to the restrictions contained in the Acts, including section 5 of the Telegraph Act, 1892.

The result so far, therefore, was that the Postmaster-General had consented, or bound himself to consent, to the company being authorized to exercise the power in section 6 of the Telegraph Act, 1863, subject necessarily to section 9 of the same Act, and subject also to section 5 of the Act of 1892. Before acting on the authority it remained for the company to obtain the necessary consents from the urban sanitary authority, which was in this case the corporation of Kingston-upon-Hull.

In this state of things an agreement was, on the 10th of November, 1897, made between the company and the corporation, and by article 1 of that agreement the corporation consented to the company exercising such of the Postmaster-General's powers as the company might be licensed to exercise under the Telegraph Act, 1892, but subject to a proviso that, as regards underground works, the company should not execute such works without first applying to the corporation for their consent. The result, therefore, was that the company had obtained the corporation's consent as to overhead works, but required a further consent as regards underground works.

By a further agreement, made on the 18th of March, 1899, between the corporation and the company, the corporation granted to the company, as licensees of the Postmaster-General and subject to the terms and conditions thereafter appearing, leave and licence to lay down certain underground works; and, by article 20, it was provided that the corporation might, after passing a special resolution and hearing the company if the company required to be heard, at any time determine that agreement by a six months' notice in writing, and that upon the expiration of that notice the company should withdraw and remove the wires.

His lordship was of opinion that the power of determination could rightly be imposed as a term and condition under section 5 (2) (*b*) of the Act of 1892.

On the 23rd of March, 1899, the Postmaster-General, under section 5 of the Act of 1892 and in accordance with clause 11 of the deed of the 25th of March, 1896, authorized the company to exercise within this urban district the powers of executing works conferred upon the Postmaster-General by, amongst others, the Act of 1863, subject to a proviso that that authority was given subject to the conditions in clause 11 of the deed of 1896, and all other provisions of that deed, and to the provisions of the Telegraph Acts, 1863 to 1897.

Under the authority of the agreement of the 18th of March, 1899, and the licence of the 23rd of March, 1899, the company, between March and August, 1899, laid down a large number of underground pipes in Hull.

In August, 1899, the Bill which subsequently became the Telegraph Act, 1899, was passing through Parliament, and was approaching its final stage. The corporation (unnecessarily as it seemed to his lordship) were alarmed by a clause which it was at a late moment proposed to introduce, and which became section 3 of that Act. Apparently they thought that if the Act passed without their giving a notice to determine under article 20 of the agreement of the 18th of March, 1899, they would have no subsequent power of determination. Accordingly, on the 28th of July, 1899, they gave the company notice that a special resolution would be moved, on the 3rd of August, that in exercise of the power contained in article 20, six months' notice of determination be given.

That notice reached the company on the 29th of July, which was a Saturday. On the 1st of August, which was a Tuesday, the general manager of the company telegraphed asking for a postponement. The corporation declined to postpone, and on the 3rd of August passed the resolution. It would have been possible, though not convenient, to have convened a meeting of the company's board in the interval. A board meeting was not convened, but two directors and the general manager of the company attended on the 3rd of August. They stated that they simply were present individually, and were not in a position to discuss the matter from the company's point of view; but in point of fact they were heard at length and subsequently the motion was passed on the 4th of August. Six months' notice of determination was accordingly given.

On the 9th of August, 1899, the Telegraph Act was passed, and the relevant section contained in it is section 3.

The corporation did not, in fact, enforce against the company the removal of the underground works, but on the 23rd of February, 1900, they wrote that from the expiration of the notice of the 4th of August, 1899, the underground works could remain on sufferance only. Nothing further was done until the 8th of August, 1902. On that date the Postmaster-General granted a licence to the corporation. That licence contained nothing specifying any period for the duration of the powers contained in the agreement of the 18th of March, 1899. It was, in fact, wholly silent on the subject.

The Postmaster-General certified, in the language of section 3 (1) of the Act of 1899, that it was proved to his satisfaction that the company had incurred expenditure in laying down underground wires.

Section 3 (1) is, so far as it is material, as follows: "Where an existing company have before the passing of this Act, under a licence from the Postmaster-General, provided a system of public telephonic communication in any exchange area, and it is proposed to grant a new licence to a local authority or to another company to provide public telephonic communication in the same exchange area, or any part thereof, then [provided the existing company consents (as did the plaintiff company) to two conditions being inserted in their licence] it shall be a condition of the grant of the new licence that where it is proved to the satisfaction of the Postmaster-General that the existing company have incurred or contracted to incur, in the area specified in the new licence, material expenditure in laying down underground wires, and have by agreement with any local authority within that area acquired powers for that purpose, those powers shall continue for the period specified in the new licence for the duration thereof, but, subject as aforesaid, on the terms and conditions specified in the agreement (including any provisions thereof for determination on breach of covenant), except so far as they may be varied by any subsequent agreement with the local authority."

In the present action the plaintiff company claimed declarations (1) that they had by agreement with

the defendants acquired powers under section 3, and that such powers were by the section continued and were in operation until the 31st of December, 1911, the date specified in the new licence to the defendants; and (2) that the notice of determination given by the defendants was inoperative. They also sought to restrain the defendants from removing the underground wires.

*Haldane, K.C., Astbury, K.C., Forbes Lankester,* and *H. H. Gaine,* for the plaintiff company.—The company at the date of the passing of the Act was an existing company and was providing telephonic communication in Hull; since all the conditions mentioned in section 3 have been complied with, the company is protected, and the result is that the powers of laying underground wires which it had acquired by the agreement of the 18th of March, 1899, and which had been revocable, became irrevocable during the period of any new licence which the defendants might obtain. Secondly, the notice to determine the agreement was invalid, because the company were not given an opportunity of being heard under article 20 of that agreement.

*Danckwerts, K.C., Buckmaster, K.C.,* and *R. J. Parker,* for the defendants.—The defendants were entitled to annex to their consent to the underground wires a provision entitling them to withdraw their consent. They did withdraw their consent, and thereupon the powers of the company to continue underground wires came to an end. At the date of the new licence, therefore, there were no powers on which section 3 could operate. Again, the words in the section, "for the duration thereof," mean "for the duration of the licence"; and inasmuch as there is no period specified in the new licence during which the powers of the company are to continue, it follows that the section is not applicable. The company was heard through its agents, and the notice to determine is therefore valid.

They referred to *Wandsworth Board of Works* v. *United Telephone Co.*, 32 W. R. 776, 13 Q. B. D. 904, and *Mayor of Preston* v. *Fulwood Local Board*, 34 W. R. 196, 53 L. T. Rep. 718.

*Haldane, K.C.,* replied.

*Cur. adv. vult.*

BUCKLEY, J., stated the facts, and continued: Under the above circumstances two questions arise for decision—first, whether article 20 of the agreement of the 18th of March, 1899, has been complied with; and, secondly, if it has, then what is the result, having regard to section 3 of the Act of 1899?

Upon the first point I am of opinion that article 20 has been complied with. There is no question but that due notice was given of the special resolution, and that it was passed. I think that the further provision that the company shall be heard, if they require to be heard, has also been complied with. Sufficient notice was given to enable the company in fact to have convened a board meeting if so minded. They did not do so, but the two directors and the general manager of the company who attended were heard at such length as they desired. The matter was one which from the point of view of the corporation, whether rightly or not, was urgent. There was, I think, nothing oppressive in their declining under these circumstances to adjourn the matter. I think the language of article 20 was satisfied. I am therefore of opinion that due notice to determine was given.

Upon the second question the matter therefore stands thus: At the date when the Act was passed the company were in possession of powers which would expire on the 4th of February, 1900. The licence in favour of the corporation was not granted until August, 1902. At that date there existed in the company no powers by agreement with the local authority upon which section 3 could have operation so as to continue them. For this purpose the material date, as regards the existence of the powers, is not the passing of the Act, but the date of the granting of the new licence. Upon this ground, first, I think the plaintiffs fail.

Again, secondly, I have this to say upon the construction of section 3 of the Act of 1899. Section 3 (1) is addressed to the continuation of powers acquired by agreement with the local authority. Section 3 (4) has to do with the extension of the licence granted by the Postmaster-General to the company. The language of the latter is quite free ambiguity. The licence is there to be extended and continue for the period specified in the new licence for the duration of the new licence. This assists me to determine the meaning of the word "thereof" in section 3 (1). That sub-section, I think, is to be so read that the powers shall continue for the period specified in the new licence for the duration of the powers. I think it was intended in this case to leave it to the Postmaster-General to say, in issuing the new licence, what was reasonable as regards the duration of the powers acquired by the old company by agreement with the local authority. The new licence in this case specified nothing as to the duration of the powers. If, therefore, my construction of the section be right, then upon this ground again the plaintiffs have not by the statute obtained any extension of the agreement of March, 1899, but its powers came to an end upon the expiration of the notice given on the 4th of August, 1899.

There is a third way of stating it, which is this: The powers which the company had acquired by agreement were determinable powers. If I assume (contrary to that which I think is the true construction) that the word "thereof" means "of the new licence," then the Act only continues for the period specified in the new licence for the duration of the new licence powers which were determinable and which have been determined.

Upon the above grounds I think that the plaintiffs fail, and I dismiss the action with costs.

Solicitors, *W. E. L. Gaine; Sharpe, Parker, Pritchard, Barham, & Lawrence,* for *E. Laverack,* Hull.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ., and a Jury.) — Jan. 21, 22, 23.

REX v. LYNCH. (a.)

*Criminal law—Law of treason—Procedure—Defect in indictment—Power to quash—Nationality—Change in time of war—Adhering to the King's enemies in the realm or elsewhere—Statute of Treasons* (25 *Ed.* 3, *c.* 7) *Naturalization Act,* 1870 (33 & 34 *Vict. c.* 14), *ss.* 6 *and* 15.

*The prisoner, a British subject, went to the Transvaal and there signed a declaration declaring his willingness to take up arms against Great Britain, and also took the oath of allegiance to the Transvaal Republic. He was then naturalized there, and fought against the British forces. He was indicted for treason under* 25

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

*Ed. 3, Statute 5, c. 2, on a charge of* (inter alia) *adhering to the King's enemies in the realm or elsewhere.*

*Held, that naturalization in time of war is an illegal act, and confers no rights on anyone, and that the prisoner was not protected by the 6th section of the Naturalization Act,* 1870.

*Held, further, that it was not necessary that the prisoner should be within the realm in order to support an indictment under the Act of Edward III.*

*Held, also, that in cases of treason it is not usual to quash the indictment, but the prisoner can proceed by way of motion in arrest of judgment.*

This was the trial at bar of Arthur Lynch, M.P. for County Galway, for high treason.

The indictment was framed under 25 Ed. 3, Statute 5, c. 2, which provides that the crime of high treason is committed if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm.

The indictment set out the following counts:

First count.—Adhering to, aiding, and comforting the Government of the South African Republic and the burghers and men of the said South African Republic under the said Government, enemies of the late Queen. Overt acts in South African Republic: (1) Declaration (exhibit 6); (2) oath of allegiance (exhibit 7); (3) oath as colonel of Irish corps (exhibit 9); (4) oath as special justice of the peace to Irish corps (exhibit 8); (5) departing from Pretoria with intent to join enemies in Natal; (6) publishing address to Irishmen (exhibit 11); (7) commanding 2nd Irish Brigade in South African Republic; (8) inquiry at Vereeniging; (9) recruiting at Johannesburg; (10) commandeering horses, &c., at Johannesburg; (11) consulting with enemies to levy war against the late Queen in South African Republic.

Second count.—Adhering to, aiding, and comforting the Government of the South African Republic and the burghers and men of the said South African Republic under the said Government, enemies of the late Queen. Overt acts in Natal: (1) Commanding 2nd Irish Brigade in Natal; (2) composing and sending for publication address to Irishmen (exhibit 11); (3) fighting at Sundays River; (4) consulting with enemies to levy war against the late Queen in Natal.

Third count.—Adhering to the Government of the Orange Free State, and the burghers and the men of the said Orange Free State under the said Government, enemies of the late Queen. Overt acts in South African Republic with intent to assist the Government of the South African Republic, and the burghers and men of the South African Republic under the said last-mentioned Government, allies of the said enemies of the late Queen—as in count 1 (*mutatis mutandis*).

Fourth count.—Adhering to the Government of the Orange Free State and the burghers and men of the Orange Free State under the said Government, enemies of the late Queen. Overt acts in Natal with intent to assist the Government of the South African Republic and the burghers and men of the South African Republic under the said last-mentioned Government, allies of the said enemies of the late Queen—as in count 2 (*mutatis mutandis*).

The prisoner having been called upon to plead,

*Avory, K.C.* (*Shee, K.C., H. C. Bower,* and *Dwyer* with him), for the prisoner.—I desire, before pleading, to raise the objection that the indictment discloses no offence against the prisoner, as it only alleges an adhering to the enemy without the realm.

*Sir R. B. Finlay, A.G.* (*Sir E. Carson, S.G., Guy Stevenson,* and *Graham Campbell* with him), for the Crown.—It is not allowable for the defence to raise this defence at this stage. Any motion of this kind must be made in arrest of judgment. In Comyn's Digest, vol. 4, p. 545, it is laid down that an indictment may be quashed upon motion or a *nolle prosequi* entered, but that in an enormous crime, as in treason or felony, the court would put the defendant to his demurrer or plea. Every point that can be taken for the prisoner is open to him, but the matter ought not to be raised in this summary manner.

He referred to the following authorities: 2 Hawkins' Pleas, c. 25, s. 146, p. 337 (6th ed.); 1 East's Pleas of the Crown, p. 110; 7 Will. 3 c. 3; Chitty's Criminal Law, vol. 1, p. 300; *Rex* v. *Wheatley*, 1 W. Bl. 273; *Rex* v. *Johnson*, 1 Wils. 325; *Reg.* v. *Heane*, 12 W. R. 417, 4 B. & S. 947; *Rex* v. *Sheares*, 27 State Trials, col. 255; and *Cranburne's case*, 13 State Trials, col. 221.

*Avory, K.C.*—I submit I am entitled to raise the objection now. The precedents cited by the Attorney-General are relics of a barbarous age. *Reg.* v. *Heane* is really in my favour, for the court held there that the notice was made too late and that the court was not ousted of its right to quash an indictment for the want or defect of a plea.

Lord ALVERSTONE, L.C.J.—I should be loth to disregard the objection taken by Mr. Avory if it were really directed against a rule which was a relic of barbarism, but in my opinion the rule is still in vigour. The mere fact that for the last hundred years trials for high treason have been less numerous does not in my opinion diminish the force of the authorities which have been cited before us, assuming them to be founded in reason and justice. But I am of opinion the contention of the Crown is founded in good sense. I think, without referring at any length to the authorities, that the statement of law in 1 East's Pleas of the Crown is correct. In my view it must be for the discretion of the court whether they will entertain the objection at the present stage, and, as has been pointed out by the Attorney-General, the prisoner is not deprived of the opportunity of raising the point at a later stage, and of carrying this case to the highest Court of Appeal. I am clearly of opinion we ought not to entertain the matter at the present stage.

The prisoner having then pleaded not guilty, evidence was given on behalf of the Crown, in the course of which it was proved that in January, 1900, the prisoner went to the Transvaal, and that on the 10th of January, 1900, he signed a declaration declaring his willingness to take up arms on behalf of the South African Republic, and on the same date he took the oath of allegiance to the Republic. Letters of naturalization were then issued to him and he became a full burgher of the Republic.

The following are the material sections of the Act of 1870 (33 & 34 Vict. c. 14), which deal with the naturalization of English subjects in foreign countries:

Section 6.—"Any British subject who has at any time before, or may at any time after, the passing of this Act . . . voluntarily become naturalized in any foreign state shall from and after the time of his so having become naturalized in such foreign state be deemed to have ceased to be a British subject, and be regarded as an alien . . ."

Section 15.—"Where any British subject has in pursuance of this Act become an alien he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien."

*Shee, K.C.*—I submit that there is no evidence to go to the jury that the prisoner has been guilty of

the crime of high treason. Previous to the Act of 1870, the doctrine of once an Englishman always an Englishman prevailed, but the constant flow of emigration rendered it desirable that the law should be changed. My case rests on the Naturalization Act, 1870, s. 6. The language of that section is so clear that I contend that effect should be given to it: see *Abley* v. *Dale*, 11 C. B. 378. There is no mention in the section of the case of war, and therefore a British subject was entitled to become a foreigner in time of war. The object of the Act was to avoid the difficulties which arise from double, and even sometimes treble nationality. Section 4 of the Act of 1870 proves that war was in the minds of those who drafted the Act. Next I say that the main idea of the Act was naturalization in time of war and not in time of peace. Difficulties have arisen between America and ourselves—*e.g.*, in the case of the war in 1812 as to British subjects fighting against this country, and the Act provided for such cases. It was in fact not intended to treat as a traitor a subject who became naturalized abroad. Since the Act of Edward III. was passed, the civilized world has changed, and the conceptions of a subject's allegiance which then prevailed no longer apply now, and the Legislature has therefore dispensed with limitations in other times considered necessary.

He also referred to Cockburn on Nationality.

*Avory, K.C.*—I desire to support Mr. Shee's argument. Here every count alleges the accused is a British subject, and in order to prevent section 6 from applying the Crown has to read into the section the words "except in time of war," or "except war is in contemplation or when war is imminent." I contend that section 15 of the Act supports my view. That was put into the Act to preserve the liability of a man in respect for an act done before he became an alien.

*Sir R. B. Finlay, A.G.*, and *Sir E. Carson, S.G.*, for the Crown.—The 6th section of the Act has no application to an act which would be in itself a crime. Here was a naturalization which could only be obtained, on this subject agreeing to fight against his country. Furthermore, two of the overt acts alleged took place previous to the naturalization. When war breaks out between two countries all peaceful relations are suspended. Contracts between the subjects of two hostile countries are absolutely void: see *Esposito* v. *Bowden*, 7 E. & B. 763 at p. 781, and *Janson Co.* v. *Driefontein*, *ante*, p. 142, [1902] A. C. 484. The case was all the stronger when the contract was made with the opposing state itself. Section 6 clearly referred only to a state of peace, not to an act at once void and criminal.

They referred to the following American authorities: *Duguet* v. *Rhinelander*, 1 Johns. Cas. 476; *Jackson* v. *New York Insurance Co.*, 2 Johns. Cas. 191; *The Santissima Trinidad*, 7 Wheaton 283; and the following text-books: Hallick's International Law, c. 12, s. 9, p. 43; Hall's International Law (4th ed.), Part III., c. 1, s. 126; Bowen's Legal Dictionary, tit. Expatriation.

*Shee, K.C.*, in reply.

Lord ALVERSTONE, L.C.J.—We none of us have any doubt on this matter, but having regard to the nature of these proceedings, we thought it better the point should be argued out. The indictment, which is framed upon the Act, alleges altogether some fifteen overt acts, but for the purposes of this argument it is important to draw the distinction between the subsequent overt acts and the first two overt acts that are alleged—viz., a declaration to the terms of which I will refer presently, and an oath of allegiance to the Government of the South African Republic—which are admitted to precede the naturalization which Colonel Lynch is supposed to have obtained. The other acts, which may be shortly summarized as taking part in deliberate acts of warfare against the British forces, need not be discussed in detail because they are all acts of the same character—namely, acts of warfare against the forces of the Crown after the period when it is said Lynch obtained his naturalization.

It is not disputed by counsel that but for the Act of 1870 the case must have gone to the jury. Mr. Shee began his argument by stating that he could not contend that before the Act of 1870 what was charged in the indictment would not be a crime according to the law of England. Nor does he contend that it is not a crime at the present time, except so far as he contends that section 6 of the Act of 1870 prevents a man who has obtained naturalization from being charged any longer with the act being unlawful. Therefore it is not necessary to deal with the arguments of the Crown on the second part of the case—that is to say, the acts committed by Lynch after he obtained naturalization. Therefore I had better read the two sections of the Act in order that my statement of the law may be complete in itself. [Lord ALVERSTONE here read the two sections set out above.] It is contended by counsel that having regard to the motive and object of this legislation, that the Act contemplates a person being naturalized in time of war and contemplates protection from the consequences of illegal acts, which acts were done by the subject before naturalization. Now it cannot be seriously denied that the two first material acts here done were done before naturalization—they are the basis of naturalization, and without them naturalization could not have been obtained at all. The first act is that the prisoner took and signed this declaration: "I, the undersigned Arthur Lynch, up to the present an Irishman born in Australia, hereby declare my willingness to take up arms for this Republic in order to maintain and defend its independence, which now is or in the future may be threatened, and therefore desire to take the oath of allegiance as a full burgher in the South African Republic, signed at Pretoria on the 18th of January, 1900.—Arthur Lynch." Of course, upon the evidence, which would be for the consideration of the jury, hostilities were then raging between the Boer Republic and the British forces, war having been declared in the previous month of October. The other document is the oath of allegiance which is taken to the Transvaal Republic on his wishing to obtain the letters of naturalization.

I am quite clearly of opinion that the language of section 6, without the introduction of any words at all, will in no way justify the argument that a person is excused from the consequence of being naturalized, but only deals with what is to happen to a person after he has become naturalized. If it was a crime at the time of the passing of this Act to become naturalized under the circumstances under which the prisoner did become naturalized, there is nothing whatever in the section to make it otherwise than a criminal act. It follows from that, that the very language of section 15 leaves such a person liable to the consequences of the act which he has committed, and in respect of which he *ex hypothesi* is charged.

I now wish in a very few sentences to indicate why I am also clearly of opinion that the subsequent acts must be left to the jury, and that the subsequent acts following on this act are not protected by section 6 of the Act of 1870. Those acts cannot, in my opinion, be regarded as being otherwise than acts of overt treason notwithstanding what passed on the 18th of

January. I wish not merely to adopt the language, which I think is well founded and well expressed in some of those judgments which have been read to us on behalf of the Crown, but I also wish to say that there is, in my opinion, nothing in the Act of 1870 that can justify the contention that an act of treason can give rights to any person whatever; if such a monstrous consequence is to be allowed by the law of England it must be found in clear and explicit language, and not by a construction put upon a section framed with another intent and designed to serve another purpose. Further, in my opinion, for the reasons given in the judgments cited, both of our own courts and those of the United States, whatever a declaration of war may or may not do, it prevents British subjects from making arrangements with the King's enemies, at least when such arrangements constitute crimes against the law of the country to which they relate. Many more reasons might be given for the decision at which we have arrived, but I have felt it right to express, in the plainest language I could use, the main grounds on which I have come to the conclusion that the Act of 1870 affords no defence, and has for the purposes of this trial no bearing upon any one of the overt acts alleged.

WILLS, J.—I am of the same opinion. It is impossible to contend that the two acts which preceded the letters of naturalization were not such acts as are fit to be submitted to the jury; there is certainly nothing in the Act of 1870 which would cover those actions supposing the letters of naturalization to be valid. With regard to the rest of the case, it is in my opinion sufficient to say that I have never been able to comprehend how it could possibly be contended that an act of treason could give rights of any sort, civil rights or rights in the nature of an exemption from criminal responsibility to the person who has been guilty of them. Those preliminary acts having been done in furtherance of the process of getting letters of naturalization, being themselves criminal and treasonable, are at all events evidence of treason. It appears to me impossible that any such exemption as is contended for can be claimed in virtue of the subsequent grant of letters of naturalization; and I think it is worth while to point out that if the argument were sound a regiment or division of the army might desert in the hour of battle and yet no man be subject to the penalties of treason, by each person individually accepting letters of naturalization. It seems to me so extravagant a conclusion that it forms an additional reason for saying that the argument on which it is founded cannot be sound.

CHANNELL, J.—I am of the same opinion. It seems to me a very simple case. The only real question before us is the construction of the 6th section of the Naturalization Act, and admitting the truth of the proposition that it is right for the court to look at the words of the Act and to attribute to them their ordinary meaning, it seems to me there is not one word in the section which can bear the interpretation which is sought to be put upon it. The section is not dealing with the circumstances under which naturalization may be legal or illegal, it is dealing with the consequences of naturalization. As a matter of fact it assumes throughout that naturalization did exist, and was not in itself unlawful. And then it says that where naturalization in a foreign state has or may have taken place it shall have certain consequences. It is agreed that before then naturalization with a foreign state with which we were at peace was lawful, but with an enemy it was obviously illegal and an act of treason.

The result is, therefore, so far as the first act is concerned, it was an act of treason, and would have been if committed before 1870, and there is not a syllable in the Act to make it otherwise now. That being so, it settles all questions without reference to section 15 of the Act. I think the argument that this was one act, a declaration made for the purpose of naturalization followed by naturalization the same day, is correct, and therefore section 15 of the Act does not help us very much; but the overt act was a treason, and there is nothing in the Act to make it otherwise.

The other acts no doubt stand on a different footing, but I adopt everything the Lord Chief Justice has said on that part of the case, and do not desire to add anything.

*Avory, K.C.*—I now desire to submit what I proposed to submit at an earlier stage, that there is no evidence to go to the jury of any treason under the statute of Edward III.—namely, "adhering to the King's enemies in his realm or elsewhere." The words may mean either that the accused person being in the realm has been adherent to the King's enemies wherever they are, or that the enemies being in the realm the accused has been adherent to them wherever he is. The cases show the first is the true interpretation. Every indictment under this Act has alleged the accused was within the realm or else a count of compassing the King's death has been added. [Lord ALVERSTONE, L.C.J., referred to *Rex* v. *Vaughan*, 13 State Trials, col. 486.] That case was not under this Act. The enemy was clearly outside the realm, and this Act has no application here.

*Sir R. B. Finlay, A.G.*—This Act has been in operation 556 years, and this is the first time this construction has been suggested. If Mr. Avory's contention is right, a man might carry on war abroad against this country and yet not be guilty of treason.

He referred to *Mulcahay's case*, L. R. 3 H. L. 306, 17 W. R. H. L Dig. 4, 9; 18 Geo. 3, c. 30, ss. 1 and 2; Coke upon Lyttelton, 3rd Inst., 3, 10, 11, and 261 (B).

The Court then intimated they were satisfied with authorities cited by the Attorney-General, and overruled the point. Counsel on either side then addressed the jury, and the Lord Chief Justice having summed up, the jury found the prisoner guilty, and he was sentenced to death by Wills, J.

Solicitor for the prosecution, *Director of Public Prosecutions.*

Solicitors for the defence, *C. Russell & Co.*

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K. B. Div. (Bruce, J.) — Dec. 16, 18.

HALBRONN v. THE INTERNATIONAL HORSE AGENCY AND EXCHANGE (LIMITED). (a.)

*Principal and agent—Auctioneer—Indemnity—Act done by auctioneer in course of his employment—Damages awarded against him on mistaken view of facts.*

*The plaintiff, an auctioneer, was instructed by the defendants to put up to auction in Paris a thoroughbred mare named Pentecost, which they represented as having been then for the first time imported into France. The plaintiff thereupon advertised the mare for sale. There was another mare of the same name entered in the French*

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

*Stud-book, and the owner of this mare brought an action in the French courts against the present plaintiff, alleging that the true mare Pentecost, of which he was the owner, had been previously imported into France. The owner of the mare recovered judgment against the present plaintiff, who was condemned to pay damages.*

*In an action by the plaintiff against the defendants for an indemnity in respect of the damages he had suffered:*

*Held, that there was evidence that the mare sent by the defendants to the plaintiff was the true mare Pentecost, and that, consequently, the plaintiff had no right of action against the defendants, as the damages recovered in the French courts against the plaintiff were not in consequence of any act done by him in pursuance of his employment by the defendants, but in consequence of the mistake made in the French courts as to the identity of the mare.*

Action tried by Bruce, J., without a jury.

This was an action by an auctioneer for an indemnity in respect of damages which he alleged he had suffered when acting as agent of the defendants for the sale of a mare named Pentecost. There was also a claim for misrepresentation.

The plaintiff, M Chéri Raymond Halbronn, was an auctioneer carrying on business in Paris.

In October, 1898, the defendants instructed him to put up to auction in Paris a bay mare which they represented to be a thoroughbred mare named Pentecost, foaled in England in 1888 by Peter out of Lady Kars, by Mogador out of Belle of Kars, by Knight of Kars, and as having been then for the first time imported into France.

The plaintiff alleged that the defendants undertook to furnish the pedigree of the horse and the necessary certificate issued by Messrs. Weatherby, the keepers of the English Stud-book, verifying the identity of the mare.

The plaintiff advertised the mare in his catalogue and in various French sporting newspapers, and she was sent to him to be sold.

A M. Raoul Richer Delaveau then brought an action in the French courts against the present plaintiff, alleging that the true mare Pentecost had been imported into France in 1893, and that he (M. Delaveau) was the owner. M. Delaveau recovered judgment against the plaintiff, who was condemned to pay 2,000f. by way of damages.

The plaintiff by his pleadings alleged that the mare was consigned to him for sale, that she was not of the pedigree and identity represented, and he claimed as damages the amount of the French judgment together with the costs.

The defendants alleged that the mare they sent over to the plaintiff was in fact the true mare Pentecost. It appeared that there was a Pentecost in the French Stud-book, but the defendants said that the mare there entered was not the true Pentecost.

From the evidence given on behalf of the defendants it appeared that the mare sent by the defendants to the plaintiff was born in Ireland, and taken to a stud farm at Enfield.

In June, 1893, she was sold from the farm to a Mr. Aitken for export abroad.

It was stated that when horses in the stud-book are exported it is necessary to get a certificate for them.

Pentecost was in the stud-book, and a receipt was obtained from Messrs. Weatherby entitling the purchaser to a certificate.

She remained at the farm until March, 1895, when she was sent to Tattersall's for sale with other horses and was bought by a Mr. S. Woodland for nine guineas.

Evidence establishing the identity of the mare was also given.

In his evidence M. Halbronn, the plaintiff, stated that he asked the defendants for a proper certificate from Messrs. Weatherby and that the defendants undertook to send it. He thereupon advertised the mare, but the certificate was not sent. M. Dalaveau then brought an action, and recovered judgment against him. When he, the plaintiff, found that there were difficulties, he did not put the mare up to auction. He himself discovered that the mare was in both English and French stud-books. He wrote to Messrs. Weatherby for a certificate for the purchaser, and they refused to give it until the mystery was cleared up.

Upon the above evidence Bruce, J., held as a fact that Pentecost was not taken away in 1893 and that the mare sent by the defendants to the plaintiff was the true mare Pentecost.

*Roland Vaughan Williams*, for the plaintiff.—The plaintiff has a good cause of action against the defendants on an implied indemnity for all acts done by him within the scope of his authority as auctioneer on their behalf: *Spurrier* v. *Elderton*, 5 Esp. 1. Further, the plaintiff had an express undertaking in writing by the defendants that they would obtain for him a certificate of the mare from Messrs. Weatherby, and acting on the faith of that undertaking the plaintiff had advertised the mare for sale. The defendants failed to obtain the certificate and in consequence the plaintiff had suffered a loss. This loss the defendants should now be liable for: *Frixione* v. *Tagliaferro*, 4 W. R. 373, 10 Moo. P. C. 175; and *Adamson* v. *Jarvis*, 4 Bing. 66.

*G. A. Scott*, for the defendants.—The plaintiff has no right of action against the defendants. The damages recovered in the French court against the plaintiff were not in consequence of any act done by the plaintiff in pursuance of his employment by the defendants, but in consequence of the mistake made as to the identity of the mare. The defendants are in nowise answerable for that mistake and cannot be rendered liable to pay the damages awarded by the French court against the plaintiff. An auctioneer only has a right of indemnity from his principal where the principal has made a mis-statement: see *Adamson* v. *Jarvis*. There was no binding undertaking entered into by the defendants to furnish the certificate upon which the plaintiff can render them liable in law. The object of obtaining the certificate was not for the purpose of the advertisement of the sale, but in order that it might be given to the purchaser of the mare.

*Cur. adv. vult.*

Dec. 18.—BRUCE, J., read the following judgment: It was contended by Mr. Vaughan Williams that the mere fact of the employment of plaintiff as auctioneer by the defendants involved an obligation on the part of the defendants to indemnify the plaintiff against all claims arising out of the plaintiff's conduct as auctioneer in respect of acts done by him within the scope of his authority. I am not prepared to assent to that proposition, although the phrase "claim arising out of the plaintiff's conduct as auctioneer" is a very wide one and the extent of the proposition depends greatly upon the meaning given to that phrase. If one employs an auctioneer to sell a picture by Constable, which is in truth a genuine Constable, and the auctioneer sells it as a Constable, and afterwards the purchaser of the picture brings an action against the auctioneer for falsely selling the picture as a Constable and succeeds in persuading a jury that the picture is not a Constable and so

recovers damages against the auctioneer, the damages so recovered are damages arising not from the conduct of the auctioneer, but are damages arising from a mistaken view of the facts taken by the jury; and if, as I have assumed, the picture were a genuine Constable, the claim for damages would not arise from the mere fact of the sale of the picture by the auctioneer, and the auctioneer would have no claim to recover against the person who had entrusted him with the sale of the picture the damages awarded against him by the verdict of the jury.

So in the present case the damages recovered in the French court against the plaintiff in this action arose, not from any act done by the plaintiff in pursuance of his employment by the defendants, but arose from the mistake as to the identity of the mare Pentecost arising from the fact that some person in France had procured another mare to be entered in the Paris stud-book as Pentecost. In my opinion, the defendants are in no wise answerable for this mistake, and they cannot be rendered liable to pay to the present plaintiff the damages which the French court awarded against him. Mr. Vaughan Williams further contended that there was an agreement by which the defendants promised to furnish a certificate of export issued by Messrs. Weatherby verifying the identity of the mare, and that it was in compliance with such promise, and in reliance on the same, that the plaintiff advertised the mare. But I do not think there is sufficient evidence of any such promise or undertaking.

The plaintiff was employed to sell Pentecost as a thoroughbred mare foaled in England in 1888 by Sir Peter out of Lady Kars, and as having been in October, 1898, for the first time imported into France. And, as I have said, the mare answered that description. It is true that the plaintiff wrote to the defendants on the 26th of October, 1898, asking them to be good enough to send him a certificate from Messrs. Weatherby for the mare, and the defendants answered on the 31st of October, "We will, of course, get you this certificate in good time." The defendants were willing to oblige the plaintiff by endeavouring to get for him a certificate from Messrs. Weatherby, but there was no contract or undertaking by the defendants to procure such a certificate. The plaintiff was aware that there was a double entry of the same mare in the English and in the French stud-book, and that some mistake had occurred respecting one or other of the entries, and he must have known that a certificate of export for Pentecost could not then be granted by Messrs. Weatherby until the confusion arising out of the double entry had been cleared up.

The defendants on the 31st of October, when they said they would get the certificate the plaintiff asked for, were not aware of the double entry and did not know that any difficulty had arisen.

I do not think there was any binding undertaking to furnish the certificate entered into by the defendants upon which the plaintiff can render them liable in law. I think that the undertaking which the defendants entered into with the plaintiff only extended to this, that the mare was the genuine Pentecost foaled in England in 1888 and for the first time imported into France in 1898. That undertaking was never broken, and in my opinion no ground exists for rendering the defendants liable in the present action.

If the defendants had sent the mare to the plaintiff to be sold upon a false description, then the present case would have resembled the case of *Adamson* v. *Jarvis*, upon which Mr. Williams relied. But the facts in that case do not, I think, bear any resemblance to the present. So I think the case of *Frixione* v. *Tagliaferro*, which was much relied upon by Mr. Williams, has little or no bearing on the present case. That was the case of an action brought by an agent against his principal to recover the amount of damages sustained by him in a suit which he defended on their behalf. In that case the agent was authorized by his principals to sell wheat to arrive in June. His principals neglected to provide wheat for a June delivery and consequently an action was brought against the agent for breach of contract, and judgment was given in the Tribunal of Commerce of Genoa against him. The agent sued, in the court at Malta, his principals to recover from them the amount in which he had been condemned in the court at Genoa. The court at Malta decided that the principals were not liable to reimburse the agent, but, on appeal to the Privy Council the decision of the court of Malta was reversed and the principals were held liable. In the judgment in that case there is *dictum* a of the Right Hon. Pemberton Leigh upon which Mr. Williams placed great reliance. It is as follows: 'It is said that the sentence of the court at Genoa was erroneous in law, but this is immaterial. . . . Be that sentence right or wrong, the appellant thereby sustained a heavy loss on behalf of the respondents, and they must bear the consequences." But this *dictum* must be read in connection with the facts proved in that case. It appeared there that the agent (the appellant) communicated at every step in the action brought against him at Genoa with the respondents, and acted with their approval, that he treated the action as their action, and that he defended it for them, and that the respondents approved of his conduct on their behalf. And upon this ground I can well understand why it mattered not whether the judgment of the court at Genoa was right or wrong, because the principals in that case had authorized their agent to defend the proceedings in that court, and so had rendered themselves liable for the consequences resulting from the judgment of the court. In the present case the plaintiff has failed, in my opinion, in making out a good cause of action against the defendants, and I must give judgment for the defendants with costs.

*Judgment for defendants.*

Solicitors for the plaintiff, *Flux, Thompson, & Co.*

Solicitor for the defendants, *T. H. Hiscott.*

## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) June 9.

WEST v. SACKVILLE. (a.)

*Practice—Evidence—Perpetuation of testimony—Right of action—Legitimacy Declaration Act,* 1858 (21 & 22 *Vict. c.* 93), *ss.* 1, 8—*R. S. C.*, 1883, *ord.* 37, *rr.* 35, 36.

*In an action to perpetuate testimony the plaintiff is not entitled as of right to an order for the examination of witnesses, although the action is properly brought within the terms of ord.* 37, *r.* 35. *The court has a discretion as to whether it will make the order or not, and the fact that the matter in controversy can be made the subject of immediate judicial investigation is a fact which the court will take into consideration in exercising that discretion.*

Appeal from a decision of Kekewich, J.

The action was brought by E. H. J. B. Sackville West against Lord Sackville and other members of the Sackville-West family and the Attorney-General for the purpose of perpetuating testimony with regard to the following facts: That the plaintiff was the lawful and eldest son of the defendant Lord Sackville, and was entitled for an estate in tail male expectant on the decease of the said Lord Sackville to the family estates, and to the dignity, title, and honour of Baron Sackville of Knole.

By his statement of claim the plaintiff alleged that the defendant Lord Sackville was, in 1864 or 1866, duly married to one Joséphine Durande Ortéga, either in Spain or in France, and that he (the plaintiff) was the eldest child of the marriage, having been born at Arcachon on the 24th of July, 1869; that the defendants, other than the Attorney-General, falsely asserted that Lord Sackville was never married, and that the lady in question was at the time of her alleged marriage to Lord Sackville the lawful wife of one De La Oliva; that he (the plaintiff) had discovered that the lady was acknowledged by Lord Sackville to be his lawful wife, and the plaintiff to be the lawful issue of the marriage, but that he was unable to bring to trial his rights and claims so long as Lord Sackville was entitled in possession to the said properties and dignity; and that several of the necessary witnesses were old and infirm.

It appeared that in 1897, and therefore at a time previous to the present action, the present defendants, other than the Attorney-General, had themselves commenced an action against the present plaintiff and the Attorney-General to perpetuate testimony with reference to the fact that the plaintiff was not the legitimate son of Lord Sackville—the same fact as now in issue; that in that action several Spanish witnesses were examined at Gibraltar; that the plaintiff had sent a representative to Gibraltar to attend the examination of these witnesses, and who might, if he had chosen, have cross-examined the witnesses. It appeared also, as will be seen from the judgment of Vaughan Williams, L.J., that since the time of the examination of those witnesses an erasure had been discovered in a certain ecclesiastical document material to the case.

Kekewich, J., granted the plaintiff leave to issue letters of request for the examination of certain witnesses resident in Spain, and liberty to sue out a commission for the examination of certain witnesses resident in France, being of opinion that the plaintiff came within rule 35 of order 37, because neither the claim to the peerage nor the claim to the estates could be brought to trial until the happening of Lord Sackville's death.

The defendants, other than the Attorney-General, appealed.

Rules 35, 36, and 37 of order 37 are as follows:

Rule 35: "Any person who would under the circumstances alleged by him to exist become entitled, upon the happening of any future event, to any title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim."

Rule 36: "In all actions to perpetuate testimony touching any honour, title, dignity, or office, or any other matter or thing in which the Crown may have any estate or interest, the Attorney-General may be made a defendant, and in all proceedings in which the depositions taken in any such action, in which the Attorney-General was so made a defendant, may be offered in evidence, such depositions shall be admissible notwithstanding any objection to such depositions upon the ground that the Crown was not a party to the action in which such depositions were taken."

Rule 37: "Witnesses shall not be examined to perpetuate testimony unless an action has been commenced for the purpose."

*Eldon Bankes, K.C.*, and *Ralph Bankes*, for the appellants.—No order ought to have been made—firstly, because the pliantiff's claim can be immediately brought to trial under the Legitimacy Declaration Act, 1858; secondly, because witnesses have already been examined. The question should at any rate be determined during the lifetime of the principal witness, Lord Sackville.

They referred to *Angell* v. *Angell*, 1 Sim. & St. 83; *Watkins* v. *Atchinson*, 10 Hare, App. xlvi.

*Warrington, K.C.*, and *Waggett*, for the respondent.—Great harm to the respondent might result if this order is discharged. He might be unable to prove now what he could prove hereafter in the light of fresh evidence. He is not bound to prove his claim at once so as to suit the pleasure of the appellants.

They referred to *Frederick* v. *Attorney-General*, L. R. 3 P. & M. 270, 23 W. R. Dig. 85.

*Sir R. Finlay, A.G.*, for the Crown.—This is a matter for the discretion of the court, who should, however, remember that Lord Sackville is the most important witness, and that in the interests of justice the question should be determined during his lifetime.

*Eldon Bankes, K.C.*, in reply.

VAUGHAN WILLIAMS, L.J.—I do not think that the order which was made in this action by Kekewich, J., for the examination of these witnesses for the perpetuation of testimony ought to have been made. I do not agree with the suggestion, if such suggestion was really intended to be made, that anyone is entitled as a matter of right to an order of this sort in an action to perpetuate testimony. I think that, even if the circumstances are such that the action to perpetuate testimony clearly will lie, there must always be a discretion in the court as to whether they will make the order or not.

I agree with Kekewich, J., that the plaintiff's case has not been brought before the court in such a way as to induce the court to exercise a discretion in his favour, but I do not think one can decide the case upon that ground.

(a.) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

It was suggested by Mr. Bankes that, because under the old practice a suit for perpetuation of testimony could only be effectively brought where the matter in controversy could not be made the subject of immediate judicial investigation by the party who sought to perpetuate the testimony, it necessarily followed that, inasmuch as the plaintiff here could, if he chose, bring an action under the Legitimacy Declaration Act, this order ought not to have been made. I cannot agree there. I quite agree that when one comes to exercise discretion in the matter it is a very proper thing to take into consideration, but I should hesitate to lay down as an absolute rule that an action to perpetuate testimony can never be brought if the matter in controversy can at once be determined otherwise. For instance, in the present case we find as a fact that the defendants have actually commenced such an action themselves and they have had an examination of witnesses for the purpose of perpetuation of testimony which has been executed at Gibraltar under English action before the court there in the presence of the acting Attorney-General. In this case it is obvious on facts which are common to both sides that since that examination took place a matter has come to be public knowledge which was unknown to both sides at the time of the examination —I mean the fact of the erasure in the ecclesiastical register, a matter which obviously might be of very great importance in reference to the value of the evidence taken in Gibraltar. I should hesitate myself to say that there was any hard and fast rule which would prevent an order either for the further examination or cross-examination of the witnesses under the order obtained by the defendants, or even for the examination of other witnesses who might throw a light on the question of when and at what time this erasure was detected.

It is convenient to see how the matter stands under the order, and just to refer shortly to the old practice. The order is order 37, and the particular rule is rule 35. We have had a discussion to-day as to the effect of the words "the right or claim to which cannot by him be brought to trial before the happening of such event." It is said here that what really is being claimed by the plaintiff is either the title to the peerage or the estate or interest in remainder in tail in this property expectant upon the death of Lord Sackville, and it is said that no action can now be brought to establish either the title to the peerage or the right or claim to the property. I am not sure that it is necessary to decide exactly what these words mean, but, whatever they mean, it seems to me that if the court is of opinion that in substance the plaintiff, by virture of the provisions of the Legitimacy Declaration Act, can try that which plainly on the admission of both sides is the only question really at issue between the parties—that is to say, the legitimacy of the plaintiff—the court ought, in the exercise of its discretion, to refuse the present order. I may as well refer to the sections in Story's Equity Jurisprudence which deal with the matter. First there is section 1505, which says: "The object of all bills of this sort is to preserve or perpetuate testimony when it is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation." Then it is said, in section 1508: "If, therefore, it be possible that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to perpetuate testimony the court of equity will not entertain any bill. The party under such circumstances has it fully in his power to terminate the controversy by commencing a proper action, and therefore there is no reasonable ground to give him the advantage of deferring his proceedings to a future time and substituting thereby written depositions for *vivâ voce* evidence." It seems to me that that rule of practice, which was established of old in the courts of equity, ought to govern the discretion of the court under ord. 37, r. 35.

*Primâ facie*, therefore, it seems to me that an order ought not to be made in this case. But, as I have already said, I think that the two facts, the fact that the defendants have themselves already taken proceedings to perpetuate testimony, and have not only done so, but have examined their witnesses, and the fact that matters have occurred since the examination of the witnesses which clearly must throw a great deal of light on the matter, might be a very good reason for departing from the rule which would ordinarily regulate the discretion of the court in such a matter. I was very anxious, if I could, to prevent any injustice being done to the plaintiff, and having that feeling I sought to see whether we might not do something to assist him. But he takes up the position, which he has a perfect right to take up, of saying that he will not undertake either immediately or within a limited time to bring any action at all to establish any claim. The inference that I draw from that is that the plaintiff does not feel much pressed by the disadvantages which I thought might result to his case if the further examination of these witnesses were not allowed to take place, and that, at all events, if he does feel at all pressed by that, he feels more pressed by the advantage which will accrue to him by postponing the trial of this action, possibly even to the time of Lord Sackville's death. Under the circumstances I think it is desirable in the present case to deal with this case as a case where the plaintiff might really have the question of his legitimacy determined at once if he chose—a question which goes to the root of his claim. Treating the case as such, I do not think that any order ought to be made to assist the plaintiff in such a position.

I have no reason to doubt here but that the defendants have been well advised in this matter as to what is the proper course for them to take up, and I would not take upon myself to criticize their conduct. But, speaking generally, I believe that in every case it is to the interest of the party who believes his cause to be just and right to get all the light thrown upon it that can be thrown upon it, and to leave nothing obscure or in doubt.

ROMER, L.J.—I think that the court was not bound under the circumstances of this case to make an order at plaintiff's instance for the examination of the witnesses referred to in the evidence filed on his behalf. I cannot say that the action was one that on the face of it could not be brought under ord. 37, r. 35, but it must be borne in mind that that rule and the subsequent rules are rules of procedure and are not intended to form a code of law. Rule 35 does not, in my opinion, oblige the court to make an order in favour of the plaintiff in every action which may fall within the terms of that rule. I think that I am therefore entitled to look at the circumstances of the case to see whether an order ought or ought not to be made in favour of the plaintiff in this action. I notice that the only testimony asked for by the plaintiff is to prove that there was a valid marriage between his mother and Lord Sackville. I include in that question of fact two distinct issues, one whether there was a ceremony of marriage between his mother and Lord Sackville in fact, and secondly, even if there was what otherwise would have been a valid marriage, whether the lady was or was not at the time a married woman. The validity of that marriage, then, is the sole question of fact as to which

the plaintiff requires testimony. Now I take it to be clear that the court does not in actions of this kind accede to the demand of the plaintiff to perpetuate testimony when he can bring the fact which he wishes to establish by his evidence to the immediate determination of a competent tribunal. There are very good reasons why the court should not accede to the demand of the plaintiff in such circumstances. The only question in dispute between the parties can, under the Legitimacy Declaration Act of 1858, be effectually and properly determined at once by the Divorce Court on the plaintiff applying under that Act. I think on this short ground the appeal ought to be allowed.

STIRLING, L.J.—I am of the same opinion. This is an action which is brought to perpetuate testimony with reference to the following facts as stated in the statement of claim of the plaintiff—that the defendant is not, as the lawful son of Lord Sackville, entitled to an estate in tail male in certain lands and properties there referred to, or to an estate in the dignity or the title or honour of Baron Sackville of Knole created and granted by letters patent. Now actions and suits, as they formerly were called, for the perpetuation of testimony arose in courts of equity, and the object of them, as stated by Sir John Leach in the case of *Angell* v. *Angell*, which has been referred to, was to prevent a failure of justice. The learned judge there said that "the courts of equity do not entertain bills to perpetuate testimony generally for the purpose of being used upon a future occasion except where it is absolutely necessary to prevent a failure of justice," and he goes on to say that "if it be possible that the matter in question can by the party who filed the bill be made the subject of immediate judicial investigation, no such suit is entertained." In old times, bills to perpetuate testimony would only be entertained by the court where it was absolutely necessary to prevent a failure of justice. Now the procedure with reference to this class of action is governed by the rule which has been referred to—namely, ord. 37, r. 35. It seems to me that, although it may be that the plaintiff brings himself within the terms of that rule, yet, in considering any relief that is to be given to the plaintiff, we are entitled to look at the foundation of the old jurisdiction and the mode in which in former days it has been exercised. There are two matters to which attention must be given, it seems to me, with reference to a case of this kind. The main fact, the fact upon which everything else turns, as to which testimony is to be perpetuated, is the legitimacy of the plaintiff. By the Legitimacy Declaration Act of 1858 means have been provided by which all the facts as to which testimony is sought to be perpetuated can be investigated by a properly-constituted tribunal. According to the statement of the law as laid down by Lord Redesdale in his treatise on Pleading the bill ought to show that the facts as to which the testimony of the witnesses proposed to be examined are conceived to relate cannot be immediately investigated in a court of law. Here it seems to me that the facts as to which the testimony of the witnesses who are proposed to be examined on behalf of the plaintiff relate can, under the Legitimacy Declaration Act, be immediately investigated by the proper court. I should like also to point out another matter that ought to be taken into consideration. A great change was introduced into the law by the rules of 1883. Lord Lindley, then Master of the Rolls, thus speaks in *Ellis* v. *The Duke of Bedford*, 47 W. R. 170, 385, [1899] 1 Ch. 494, "Moreover now, under the Judicature Act actions can be brought merely to declare rights, and this is an innovation of a very important kind. I am referring to ord. 25, r. 5, which says: 'No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.'" Without finally deciding the question, if in the present case the defendants were willing to have the whole case tried in an action simply seeking a declaration of title, as I rather inferred from what fell from the learned counsel in the course of the argument, it would be a matter which to my mind would influence my judgment very much in considering whether the relief which is sought by the present action ought to be given or no.

On these grounds, first, that there is a means provided by the Legislature which can be availed of to investigate the facts as to which testimony is sought to be perpetuated, and secondly, that at all events with the consent of the defendant the matter might be investigated in another way, I think that the present order ought not to have been made, and that the appeal ought to be allowed.

*Appeal allowed.*

Solicitors, *Meynell & Pemberton; Osborn & Osborn; Solicitor to the Treasury.*

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From K. B. Div. (Collins, M.R., and Stirling, L.J.) — May 11.

MAYOR, &c., OF MANCHESTER v. SUGDEN. (*a*.)

*Practice—Costs—Taxation—Case stated by Commissioners of Income Tax—Costs of preparing and settling case—Allowance as between Crown and subject—Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 59—*Ord.* 65, *r.* 27, *regulation* 29.

*Where, on the hearing of a case stated by Commissioners of Income Tax under section 59 of the Taxes Management Act*, 1880, *the court allows costs to the successful party, he is entitled on taxation to be allowed the costs incurred by him in preparing and settling the case.*

Scottish Union and National Insurance Co. *v.* Smiles, 16 *Ct. Sess. Cas.*, *4th series*, 624, *not followed.*

Appeal from an order of Phillimore, J., at chambers.

On the hearing of a case stated by commissioners of income tax for the opinion of the High Court, under section 59 of the Taxes Management Act, 1880, in an appeal to which the Corporation of Manchester were appellants and the surveyor of taxes was respondent, judgment was given for the corporation with costs.

The corporation's bill of costs included a sum for the costs incurred in the settling by their solicitor and counsel of the case which was ultimately stated by the commissioners.

On taxation the taxing-master allowed these costs, and Phillimore, J., refused an application by the surveyor of taxes for a review of taxation.

The surveyor of taxes appealed.

*Sir Robert Finlay, A.G.*, and *Rowlatt*, for the surveyor of taxes.—There is no power to allow these costs on taxation as between the Crown and the subject. Section 59 of the Taxes Management Act, 1880, provides as follows: "(1) Immediately upon the determination of any appeal under the Income Tax Acts by the general commissioners

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

or by the special commissioners . . . the appellant or the surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction to the commissioners who heard the appeal, and having done so may, within twenty-one days after the determination, require the commissioners, by notice in writing addressed to their clerk, to state and sign a case for the opinion of the High Court thereon. The case shall set forth the facts and the determination, and the party requiring the same shall transmit the case, when so stated and signed, to the High Court. . . . (2) (*a*) The party requiring the case shall, before he shall be entitled to have the case stated, pay to the clerk to the commissioners a fee of twenty shillings for and in respect of the case." Costs incurred either by the Crown or by the subject in preparing or settling such a case cannot be allowed on taxation between them, for they were incurred before the case was on the file, and before any proceedings had been instituted in the High Court. This view has been taken by the Court of Session in Scotland. In the case of *Scottish Union and National Insurance Co.* v. *Smiles*, 16 Ct. Sess. Cas., 4th series, 624, it was held that the expenses of preparation and adjustment of a case stated under section 59 of the Taxes Management Act, 1880, incurred before the case is sent to the roll, are not proper charges against the unsuccessful party in the case. The other side will rely on ord. 65, r. 27, regulation 29, which is one of the rules made in January, 1902, and which provides as follows: "On every taxation the taxing-master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." That rule, however, ought not to be construed as meaning that the taxing-master may allow costs which are not by law the subject-matter of taxation at all. They will also rely on *Glover* v. *Booth*, 31 L. J. M. C. 270, 11 W. R. C. L. Dig. 75. But that is a decision on another statute, and the Scotch decision on this statute is to be preferred.

They also cited *Mc Iver & Co. (Limited)* v. *Tate Steamers (Limited)*, 50 W. R. 642, [1902] 2 K. B. 184.

*Lawson Walton, K.C.*, and *Bremner*, for the corporation.—The preparing and settling the case is a part of the procedure of appealing to the High Court; it is a reasonable and a necessary part. There is no ground for differentiating, so far as taxation of costs is concerned, between this part of the procedure and any other part. The costs of preparing and settling the case ought to be treated as part of the costs which are subject to taxation *inter partes*. It was expressly held in *Glover* v. *Booth* that the costs of preparing and settling a case to be stated by magistrates under 20 & 21 Vict. c. 43 are allowable on taxation between party and party. It is desirable that there should be uniformity of practice as to the costs of cases stated by magistrates and the costs of cases stated by commissioners of income tax. Even if the Scotch case were good law at the time when it was decided, the law in this country has since been altered by the rules of January, 1902, which by their comprehensive terms give power to the taxing-master to allow these costs.

*Sir Robert Finlay, A.G.*, replied.

COLLINS, M.R.—I have come to the conclusion that this appeal must be dismissed. The question is as to the allowance on taxation as between party and party of the costs of preparing and settling cases stated by commissioners of income tax, incurred before the cases come into the High Court. By modern practice, when such a case is to be stated, the parties are allowed and even invited to see that it is prepared and settled in proper form, and for that purpose either to submit drafts or to make suggestions as to amendments before it is finally stated. That seems to be a desirable practice, as those cases are often complicated, and large sums of money are involved in them. Moreover, a great saving of expense is thereby effected; for if a case is not properly stated and on that account the court cannot satisfactorily decide the issue between the parties, the court has to send the case back again to be re-stated. If the costs incurred by the parties in helping to prepare and settle the case, although incurred before the case is ripe for hearing, are, as I think they are, proper and necessary costs, it seems to be contrary to common sense and natural justice that the successful party should not be entitled to recover them from the other party. That being the *primâ facie* view of the case, is there any statutory provision which is contrary to that view? It is argued that section 59 of the Taxes Management Act, 1880, does disable parties from recovering from one another costs antecedent to the stating of the case. If that section threw absolutely on the commissioners the duty to state a case, it might be that the costs of preparing and settling the case ought not to be thrown on either party. That is the view which was taken in the Scotch case which has been cited. But if the decision in that case rests on the view that the statute prohibits the allowance of these costs as between party and party, there is authority to show that that is not the view which would be taken in this country. It was decided by the Court of Queen's Bench in *Glover* v. *Booth* that the antecedent expenses of preparing and settling a case to be stated by justices under 20 & 21 Vict. c. 43 might be recovered on taxation. The ground of the decision is that that statute, the provisions of which are similar to those with which we are now dealing, does not prohibit the allowance *inter partes* of such expenses. I am of opinion that that is a correct decision, and that it governs this case. Further, since 1902 we have had the new rule—viz., ord. 65, r. 27, regulation 29—which makes the taxation of costs uniform, and provides for the allowance of all costs which appear to be necessary or proper. I therefore think that the master's order ought to be affirmed, and that the learned judge was right in refusing a review of taxation.

STIRLING, L.J.—I should feel some difficulty in this case but for the change which was made in the rules in 1902. An order has been made on an Inland Revenue officer, who was respondent to an income tax appeal, to pay the appellants their costs of the appeal to the High Court. The question is whether under that order he ought to pay their costs of settling the case which was stated by the commissioners. Section 59 of the Taxes Management Act, 1880, says that if either party is dissatisfied with the determination of the commissioners, he may require the commissioners to state and sign a case for the opinion of the High Court. The case may be stated by the commissioners without referring to the parties; but in complicated cases it is necessary for the commissioners to place the case before the parties and their advisers before they finally state it. Here the case was laid before the appellants and certain alterations were made at their instance. The Judicature Act provides for the making of rules, and order 65 of the rules made under the Act deals with costs. By a new rule added to that order in 1902—viz., rule 27, regulation 29, it is provided that "On every taxation the taxing-master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment

of justice." Ord. 68, r. 2, provides that order 65 shall apply to all proceedings on the Revenue side of the King's Bench Division. Here the taxing-master held that the costs incurred by the appellants in amending the case were necessary or proper for the attainment of justice, and he allowed those costs on taxation as against the Crown. I think that the order of the master ought to be supported, and it is to be observed that this decision is applicable in favour of the Crown as well as in favour of the subject.

*Appeal dismissed.*

Solicitor for the appellant, *Solicitor of Inland Revenue.*

Solicitors for the respondents, *Austin & Austin*, for *W. H. Talbot*, Manchester.

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From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) May 5.

REX *v.* JUSTICES OF LONDON.
*Ex parte* REED. (*a.*)

*Licensing Law—Renewal—Transfer—Change of occupancy—Application by new occupier—Removal after expiration of licence—"Person so licensed"—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14.

*At a general annual licensing meeting H., who was the tenant of a beerhouse and holder of a licence to sell by retail beer to be consumed on the premises, applied for a renewal licence. The application having been refused, H. gave notice of appeal to quarter sessions. H. remained in possession of the house till the appeal could be heard, and in the meantime the licence expired. The appeal was dismissed, and then H. removed from the house. A few days later R. became tenant and went into possession.*

*Held, that, as H. was not a licensed person at the time when he removed from the house, R. was not entitled to apply for a licence under section* 14 *of the Alehouse Act*, 1828.

Simpkin *v.* Justices of Birmingham, 20 *W. R.* 702, *L. R.* 7 *Q. B.* 482, *affirmed.*

Appeal from an order of a Divisional Court (Lord Alverstone, L.C.J., and Wills and Channell, JJ.), discharging a rule *nisi* for a *mandamus* to the justices of London sitting in quarter sessions to hear and determine a licensing appeal.

On the 7th of May, 1902, James Reed, who had recently become the tenant and occupier of a beerhouse called the Manchester Arms, at Walworth, applied to the justices of London sitting at Newington, at a special session for the transfer of licences, under section 14 of the Alehouse Act, 1828, for a licence to sell excisable liquors by retail to be consumed on the premises.

The house was first licensed for the sale of beer by retail to be consumed on the premises before the year 1869, and a renewal licence was granted every year continuously up to and including the year 1901.

In November, 1901, one Hacker became the tenant and occupier of the house, and the then existing licence was transferred to him.

On the 7th of January, 1902, Hacker was convicted of permitting drunkenness on the premises, and was fined 40*s.*, but the conviction was not endorsed on the licence. No conviction had ever been recorded against any of the previous tenants of the house for any offence under the Licensing Acts.

On the 19th of March, 1902, at the general annual licensing meeting, Hacker applied for a renewal licence. The justices refused to grant the application on the ground of the conviction. Hacker thereupon gave notice of appeal to quarter sessions.

On the 5th of April, 1902, the licence expired. Hacker, however, remained in possession of the premises until the appeal could be heard.

On the 18th of April the quarter sessions dismissed the appeal.

On the 21st of April Hacker left the premises, and on the 28th of April Reed became tenant and went into occupation.

Section 14 of the Alehouse Act, 1828, under which Reed applied at the transfer sessions on the 7th of May, enacts (*inter alia*) as follows: "If any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be by sickness or other infirmity rendered incapable of keeping an inn, or shall become bankrupt; or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail, to be drunk or consumed in such house . . . it shall be lawful for the justices assembled as aforesaid at a special session holden under the authority of this Act for the division or place in which the house so kept or having been kept shall be situate, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt, or to any new tenant or occupier of any house having so become unoccupied . . . a licence to sell excisable liquors by retail, to be drunk or consumed in such house or the premises thereunto belonging."

The licensing justices refused to grant a licence to Reed on the ground that the case did not come within section 14. They held, on the authority of *Simpkin* v. *Justices of Birmingham*, 20 W. R. 702, L. R. 7 Q. B. 482, that Hacker did not come within the words "If any person so licensed . . . shall remove from or yield up the possession of the house," inasmuch as he was not "so licensed" when he removed from the house, his licence having at that time expired; and that, therefore, Reed was not in a position to apply under the section as being "any new tenant or occupier of any house having so become unoccupied."

Reed appealed from the refusal of the licensing justices to the quarter sessions. The quarter sessions affirmed the decision of the licensing justices on the ground that Reed had not brought himself within section 14, and the appeal was not heard on its merits.

An application was then made on behalf of Reed for a rule *nisi* for a *mandamus* to the quarter sessions to hear and determine the appeal. A rule was obtained, but was discharged by the Divisional Court.

Reed appealed.

*Avory, K.C.* (*George Elliott* with him), for the appellant.—The question is whether this case comes within the second clause of section 14 of the Alehouse Act, 1828, which enacts that "if any person so licensed, or the heirs, executors, administrators, or assigns of any persons so licensed, shall remove from or yield up the possession of the house specified in such licence," it shall be lawful for the justices to

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

grant a licence to the new tenant or occupier of the house. The respondent justices say it does not, because Hacker, at the time when he removed from the house, was not a person so licensed, the licence having then expired. But the words "any person so licensed" do not necessarily mean a person who was so licensed at the date of the removal; according to their natural interpretation they merely mean a person who has been licensed. It is obvious that, in the case where the executors of a "person so licensed" have removed from the house, "the person so licensed" cannot possibly have been a licensed person at the date of the removal. And there is no reason for so limiting the meaning of the word in the case where the person himself has removed from the house. There is the further question whether the second clause of the section applies in any case where the licence has expired at the time when the application under the section is made. The section is clearly intended to include some cases in which the licence has expired, as, for instance, those to which the words of the third clause are applicable: "If the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail, to be drunk or consumed in such house." The case of having neglected to apply for a new licence almost necessarily presupposes the expiration of the old licence. And accordingly it was held in *Reg.* v. *Justices of Lancashire*, 32 W. R. 20, 11 Q. B. D. 638, overruling *Ex parte Todd*, 3 Q. B. D. 407, 26 W. R. Dig. 126, that in such a case, notwithstanding the expiration of the licence, an application under the section might be made by a new occupier. There is no reason why a new occupier should not be equally entitled to apply under the section after the expiration of the licence, in a case to which the second clause is applicable—viz., where the last licence-holder has removed from or yielded up the possession of the house. The case of *Simpkin* v. *Justices of Birmingham* has been practically overruled by *Reg.* v. *Justices of Lancashire*.

He also cited *Baldwin* v. *Justices of Dover*, [1892] 2 Q. B. 421, 41 W. R. Dig. 115; and *Reg.* v. *Licensing Justices of Market Bosworth*, 35 W. R. 734, and referred to section 53 of the Licensing Act, 1872.

*Low, K.C.*, and *Travers Humphreys*, for the respondent justices.

COLLINS, M.R.—The particular clause which we have to consider is the second clause of section 14 of the Alehouse, Act, 1828. It consists of two alternatives. The first alternative reads thus: "If any person so licensed shall remove from or yield up the possession of the house specified in such licence." The second alternative reads thus: "If the heirs, executors, administrators, or assigns of any person so licensed shall remove from or yield up the possession of the house specified in such licence." It is contended on the part of the appellant that the words "any person so licensed," in the first alternative, include a person who had been so licensed but was not so licensed at the time when he removed from the house. The argument is that the same words, when they occur after the words "heirs, executors, administrators, or assigns," in the second alternative, must of necessity include a person who was not licensed at the date of removal, and that it is reasonable to construe the words where they occur in the first alternative in the same way. But this very point was considered and decided by the Court of Queen's Bench in *Simpkin* v. *Justices of Birmingham* in the year 1872. It was there held that this clause of the section did not apply where the tenant who removed from the house was not a licensed person at the date of the removal. Unless that decision has been overruled by the Court of Appeal it is an authority governing the present case. It is suggested that it has been in substance overruled in the case *Reg.* v. *Justices of Lancashire*. At first sight there is an apparent difference in principle between the two cases. On consideration, however, it is clear that the later case was decided specially on the words of the third clause of section 14, which deals with a different contingency. The clause is as follows: "If the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail to be drunk or consumed in such house." Those words manifestly contemplate the possibility of a licence having expired before the application for a renewal is made; and the court held that the application might be granted, although it was not made till after the expiration of the period for which the old licence was in force. But the judges expressly declined to interfere with the earlier case of *Simpkin* v. *Justices of Birmingham*, which was in fact treated in the argument as being good law. In my opinion this court would not now be justified in going *de novo* into the case of *Simpkin* v. *Justices of Birmingham* and overruling it.

STIRLING and MATHEW, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the appellant, *H. A. Graham & Wigley.*

Solicitors for the respondents, *Laytons.*

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From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — March 13.

LAWFORD v. BILLERICAY RURAL DISTRICT COUNCIL. (a.)

*Local government—Rural district council—Agreement made by council with their engineer to report and prepare plans for a sewage scheme—Agreement not under seal—Remuneration claimed for services rendered—Contract to pay implied from acceptance of benefit—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 56 (1).

*A rural district council employed the plaintiff as engineer in connection with a proposed sewage scheme. The plaintiff performed the services which he was from time to time required to perform, and the council had the benefit of his services. The contract was not under seal.*

*Held (reversing the decision of* Darling, J.), *that the plaintiff was entitled to recover remuneration for the services which he had rendered, although there was no contract under seal, because his services had been accepted by the council, and the whole consideration for payment was therefore executed.*

Clarke *v.* Cuckfield Union, 21 *L. J. Q. B.* 349, *and* Nicholson *v.* Bradfield Union, 14 *W. R.* 731, *L. R.* 1 *Q. B.* 620, *approved and followed.*

Appeal by the plaintiff from a judgment of Darling, J., who held that the agreement for services, which the plaintiff had rendered to the defendant rural district council, not being under their seal, was one that could not be enforced.

The facts were these: In July, 1899, the plaintiff

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

was retained by an agreement under the common seal of the defendants to act as engineer on their behalf for certain sewage works they were about to carry out in the parishes of Shenfield and Hutton. Those works were completed, when the attention of the defendants was called to the fact that the drainage of a portion of their district known as Shenfield Common, which was outside the scope of the original scheme, was unsatisfactory, and the sewage committee were asked to consider the question of extending the original scheme so as to include this additional area. The committee by resolution directed the plaintiff to go to Shenfield Common, make an inspection and report as to the probable cost. This he did, and having made a report, subsequently wrote to the clerk of the defendant council "I presume that the agreement between your council and myself for the Shenfield and Hutton scheme will cover the Shenfield Common extension. I am willing that it should be so, but only on the understanding that half the commission, together with other fees than due, shall be paid within two months of the loan being sanctioned. This can either be indorsed on the agreement or added in the form of a letter from you on behalf of the council." The clerk in his reply informed the plaintiff that the payment of his fees should apply to the Shenfield Common extension, but with no variation.

The acts of the committee were all duly confirmed by the council.

The plaintiff duly performed the services which he was asked from time to time to perform, and the sanction of the Local Government Board was ultimately obtained for the scheme. Tenders were advertised for, but none were accepted.

The plaintiff claimed to be paid his account, and would have been paid had not a question arisen as to the rate of commission he was entitled to charge for part of the work he had performed. The parties being unable to agree as to the amount, the defendants took up the position that as the plaintiff at law could recover nothing by reason of the agreement being unsealed, they were entitled, he having refused their terms, to decline to pay him at all.

The plaintiff then brought his action, which was heard by Darling, J., and dismissed.

The plaintiff appealed.

Section 56 (1) of the Local Government Act, 1894 (56 & 57 Vict. c. 73) is material and is as follows: "A parish or district council may appoint committees, consisting either wholly or partly of members of the council, for the exercise of any powers which, in the opinion of the council, can be properly exercised by committees, but a committee shall not hold office beyond the next annual meeting of the council, and the acts of every such committee shall be submitted to the council for their approval. Provided that where a committee is appointed by any district council for any of the purposes of the Public Health Acts or Highway Acts, the council may authorize the committee to institute any proceeding or do any act which the council might have instituted or done for that purpose, other than the raising of any loan or the making of any rate or contract."

*C. A. Russell, K.C., Danckwerts, K.C.*, and *Montague Lush, K.C.*, for the appellant.—The learned judge was wrong in dismissing the action, because this is a case which falls within the exceptions to the rule that a corporation can only contract under seal. One of the recognized exceptions to that rule is that where the purposes for which a corporation is created render it necessary that goods shall be supplied or work done for such purposes, and goods are supplied or work done, and the corporation gets the benefit thereof, the corporation is under an implied promise to pay and no seal is necessary. That is established by the following cases: *Hall* v. *Swansea Corporation*, 5 Q. B. 526; *Sanders* v. *St. Neot's Union*, 8 Q. B. 810; *Clarke* v. *Cuckfield Union*, 21 L. J. Q. B. 349; *Haigh* v. *North Brierley Union*, 6 W. R. 679, E. B. & E. 873, 28 L. J. Q. B. 62; and *De Grave* v. *Monmouth Corporation*, 4 C. & P. 111. The general rule as to this exception is fully stated by Wightman, J., in *Clarke* v. *Cuckfield Union*, and that decision has been approved in subsequent cases and was adopted by Blackburn, J., in delivering the judgment of the Queen's Bench in *Nicholson* v. *Bradfield Union*, 14 W. R. 731, L. R. 1 Q. B. 620, and referred to again by that learned judge in *Young* v. *Leamington Corporation*, 31 W. R. 925, 8 App. Cas. 517. Where a plaintiff is driven to rely on an express contract a seal is necessary; but not in the case where the law will infer a contract. Here the committee who were duly authorized in that behalf, and whose acts were subsequently approved by the council, ordered the work to be done, and the council took the benefit of it. In *Doe d. Pennington* v. *Taniere*, 12 Q. B. 998, which was brought to decide a similar question that arose as to the validity of a demise by a corporation not under seal, Denman, J., said: "To enforce an executory contract against a corporation it might be necessary to show that it was by deed; but where the corporation have acted upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make a binding contract upon both parties." A seal, moreover, was not necessary in this case, because the matter was referred to a committee and they made the contract with the plaintiff. A district council can so delegate its powers to a committee by section 56 (1) of the Local Government Act, 1894, which enacts that when confirmed by the council the contracts made by the committee shall be binding, and being the contracts of the committee could not be under seal. The decisions with regard to urban sanitary authorities such as *Hunt* v. *Wimbledon Local Board*, 27 W. R. 123, 4 C. P. D. 48, have no application, for the Public Health Act, 1875, expressly requires that every contract made by an urban authority, the amount of which exceeds £50, must be under seal, but there is no such provision as to rural district councils.

They also cited *Church* v. *Imperial Gas Light and Coke Co.*, 6 A. & E. 846; *Ludlow Corporation* v. *Charlton*, 6 M. & W. 815; *Arnold* v. *Poole Corporation*, 4 Man. & G. 860; *Fishmongers' Company* v. *Robertson*, 5 Man. & G. 131; *Paine* v. *Strand Union*, 8 Q. B. 326; *Lamprell* v. *Billericay Union*, 3 Exch. 283; *Lowe* v. *London and North-Western Railway Co.*, 18 Q. B. 632; *Smart* v. *West Ham Union*, 4 W. R. 301, 10 Exch. 867; *London Dock Co.* v. *Sinnott*, 6 W. R. 165, 8 E. & B. 347; *Kidderminster Corporation* v. *Hardwick*, 22 W. R. 160, L. R. 9 Ex. 13; *Dyte* v. *St. Pancras Union*, 27 L. T. Rep. 342; *Austin* v. *Bethnal Green Union*, 22 W. R. 406, L. R. 9 C. P. 91; and *Stevens* v. *Hounslow Burial Board*, 38 W. R. 236, 61 L. T. Rep. 839.

*Macmorran, K.C.*, and *Naldrett*, for the respondent council.—The decision of Darling, J., was in accordance with the weight of authority and should be supported. Whether the plaintiff is suing upon an express contract or upon a *quantum meruit* for work done at the request of the defendants, it is equally necessary to render the defendants liable that the contract should be sealed. The committee can make no valid contract until the proposed contract has been ratified by the council: see Local Government Act, 1894, s. 56 (1). The contract therefore must be treated as being made by the council and not by the committee. It is contained in two letters which

would amount to evidence of a binding contract, no doubt, if the parties had both been private individuals, but the defendant being a body corporate, the contract cannot be enforced because it has not received the seal of the corporation. We do not challenge the plaintiff's statement that there are cases, well established, in which a corporation has been held liable on a contract not under seal; but in all the exception cases the reason, wanting here, is clearly to be seen and shortly may be stated thus: That in all cases of convenience amounting almost to necessity in which if the carrying out of the contract had to be delayed until it could be put into writing and sealed, the purposes for which the corporation was created might be defeated; or in cases of trival matters or matters of constant occurrence, then the necessity of a seal is dispensed with. It is not suggested here that the circumstances were such that there was no time to enter into a contract under seal with the plaintiff. He desires to prove an exception to an exception. That is the position taken up by the defendants, and we say that the appointment of an engineer to carry out certain works and to be remunerated on certain terms is a contract that can only be enforced if it is under seal.

*Lush, K.C.*, in reply.—It is true that the committee cannot themselves make a contract, but they can initiate one which, when confirmed and adopted by the council, becomes by the provisions of section 56 (1) of the Local Government Act, 1894, binding on the rural council: *Firth* v. *Staines*, 45 W. R. 575, [1897] 2 Q. B. 70. If the term "contract" includes getting assistance for the purpose of carrying out the matter delegated to the committee, the delegation is futile, for when they take any steps it would be said they were exceeding their powers. There is an implied legal obligation to pay arising from the doing of work at the request and the acceptance of the benefit of that work, that obligation being imposed by common law, and no contract is necessary; therefore a seal is not necessary.

VAUGHAN WILLIAMS, L.J.—This is an action in which the plaintiff makes a claim against the defendants, the Billericay Rural District Council, for money alleged to be "due from the defendants to the plaintiff under an agreement by the defendants to employ the plaintiff as their engineer, and for services rendered by the plaintiff at the defendants' request, and also damages for breach of the said agreement." That is the claim indorsed upon the writ. Then, in the statement of claim, the plaintiff claims, among other claims, upon a *quantum meruit* for services rendered at the defendants' request. The defence, so far as we have to deal with it here, is the absence of a seal from the agreement. We have now to consider whether that is a good defence. The action was tried before Darling, J., and the learned judge came to the conclusion that the want of the seal constituted a good defence. We have now to say whether that judgment was right. The learned judge was in a less advantageous position than we are in this court, because this is a case on which there are many authorities, generally in the courts of first instance, and not of the Exchequer Chamber or Court of Appeal, and he had not power to overrule any of the decisions, but had to try to reconcile the decisions and arrive at a conclusion from them. We, however, have power to overrule any of those cases if we do not approve of them, except, of course, any case in the House of Lords. There is no direct authority upon the matter in the House of Lords, for Lord Blackburn, in *Young* v. *Leamington Corporation*, distinctly left open the question which is raised in this case, and said that it was desirable that the whole question should be dealt with by the Court of Appeal. I propose now to try to do so.

The choice in this case really is whether we consider that we ought to follow the case of *Clarke* v. *Cuckfield Union*, or whether we ought to follow the cases which are inconsistent with that case. Now, in *Nicholson* v. *Bradfield Union* these cases are dealt with at considerable length. That case was argued by Sir Richard Harington, and in the course of his argument (L. R. 1 Q. B., at p. 622), we find that he marshalled the authorities upon the one side and the other with very great care. First, there is set forth the list of cases in which the rule based upon the assumption that in a case like this the corporation must contract under seal, and then there is set forth the list of the cases to the contrary, and among them the case of *Clarke* v. *Cuckfield Union*. Now, before I say anything further about the authorities, I wish to point out that this is the case of a rural district council. The rural district council appointed a committee and referred some matters to that committee to deal with, and it is desirable that I should state my view as to the legal position in this case, having regard to the provisions of the statute which governs the matter. The statute in question is the Local Government Act, 1894 (56 & 57 Vict. c. 73). I will remark in passing that, as far as I can understand this statute, with respect to the power of delegation, it rather diminishes than increases the power which was previously given by the Public Health Act, 1875. Now, section 56 (1) of the Local Government Act, 1894, deals with this matter, and runs thus: [His lordship read the section, and, continuing, said:] According to the view which I take of the matter, that section does not authorize any council to empower a committee to do any act which is covered by the excepting clause—that is, it does not authorize any council to empower a committee to make any contract. Besides that, it seems to me that in this case not only had the council no power to authorize the committee to make a contract, but also, in my judgment, the committee did not in fact purport to make any contract on behalf of the council. For both these reasons I think that we must deal with the matter as if the contract alleged were a contract by the council, and not deal with it as if the contract were made by the committee. As I understand the argument on behalf of the plaintiff upon this section, it was that this was a case in which, if the question were whether there was a contract by the council, the answer might be in the negative because there was no seal; but that this was not such a case, because we have here to deal with a contract by a committee which has since been confirmed by the council; and that under those circumstances there was no necessity at all for a seal. For the reasons I have given that argument cannot succeed; first, because of the exceptions in the proviso to the section, and secondly, because I do not think that the committee purported to make a contract on behalf of the council. I must therefore deal with this case upon the basis that the question is whether the council has so contracted or so acted as to bind itself.

Having said that, I will turn to the question which we have really to decide, and turning to the cases I find that Blackburn, J., at the conclusion of his judgment in *Nicholson* v. *Bradfield Union*, says: "The case of *Clarke* v. *Cuckfield Union* is on its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision, and, as pointed out in the judgment in that case, there are prior decisions of the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends

to such a case as the present at least, the case was rightly decided; there may be cases in which the circumstances are different from those in *Clarke* v. *Cuckfield Union* and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise, but so far as those prior decisions are inconsistent with the decision in *Clarke* v. *Cuckfield Union*, we prefer to follow the authority of *Clarke* v. *Cuckfield Union*, which we think founded on justice and convenience." In that view of Blackburn, J., I entirely agree. I think that the decision in *Clarke* v. *Cuckfield Union* and the other cases cited before us, which were decided upon the same lines, ought to be preferred to the contrary decisions. I may mention before I leave the case of *Nicholson* v. *Bradfield Union* that it was a case of the supply of coals from time to time to the guardians, for the use of their workhouse, by the plaintiff, and that it was a case as to which it was very difficult to say that it was a matter of convenience or of such frequent occurrence that there was not any necessity for contracting under seal. The case, as I understand it, was decided really on the basis that, the coals having been supplied to and accepted by the defendants, thereupon the law raised an implied contract, from the supply and the acceptance by the corporation, to pay for the coals, and that the contract being thus a contract implied from acts, the defence founded upon the want of a seal was not available. I do not understand that case as having been decided on the old recognized exceptions of necessity or convenience, but as decided purely upon there being an implied contract to pay raised by implication of law upon the acceptance of goods supplied. That was the view taken by Wightman, J., in *Clarke* v. *Cuckfield Union*, and I will read a passage from his judgment from which that appears. After having pointed out the conflict of opinion that existed in the various decisions, he said: "I greatly regret the present state of the law upon a subject so important. It would, perhaps, have been better, and have avoided the uncertainty which now exists, if the old rule had never been relaxed; but being as it is, the question is whether the demand in question comes within any of the recognized exceptions to the general rule. I am disposed to think it does, and that wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, as in the case of the guardians of a poor law union, and orders are given at a board regularly constituted and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods supplied or accepted by the corporation, and the whole consideration is executed, the corporation cannot keep the goods or the benefit and refuse to pay on the ground that, though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal were wanting, and then say, 'No action lies; we are not competent to make a parol contract; and we avail ourselves of our own disability.'"

It seems to me that there again the exception based upon the contract being one arising upon the receipt of the benefit of acts done at the request of a corporate body is recognized in the same way as it was recognized subsequently by Blackburn, J., in *Nicholson* v. *Bradfield Union*.

There is another authority which equally directly recognizes this exception as one of the exceptions to the rule that contracts of corporations must be under seal. That case is *Haigh* v. *North Brierley Union*, in which Erle, J., said: "I am of opinion that this rule should be discharged. The question is one rather of fact than of law. *Sanders* v. *St. Neot's Union* and *Clarke* v. *Cuckfield Union* seem to me to have decided that an action lies against the guardians of a union to recover money for work and labour, though performed under a contract not under seal; and the grounds for that decision are elaborately stated by my brother Wightman in the latter of these two cases"; and then he cited the passage which I have already read from the judgment of Wightman, J. I ought, however, to call attention to the judgment of Crompton, J., in *Haigh* v. *North Brierley Union*, who apparently took the view that if all the work had been done under one antecedent contract a seal might have been necessary. It is not necessary to express any opinion upon that point, for it does not apply to the present case, where there was no single antecedent order but a series of orders, further than to say that I am of opinion that in this case there was no one contract or order which overrode all, but that there was a series of small orders given for the work which was done by the plaintiff. Having expressed this view preferring the decisions which follow the line of reasoning in *Clarke* v. *Cuckfield Union* to the opposite series of decisions, I do not think that it is necessary for me to say anything more about the various authorities which have been cited. I will, however, mention the case of *Young* v. *Leamington Corporation*, but only for the purpose of saying that this question was to a certain extent dealt with by Lord Blackburn in delivering his opinion. Though he does not say so in plain and definite terms, it seems to me that Lord Blackburn did prefer the cases which followed *Clarke* v. *Cuckfield Union* to the cases which were opposed to it—that is, he adhered to his view expressed in *Nicholson* v. *Bradfield Union*. At all events it can safely be said that, the passage from the judgment in *Nicholson* v. *Bradfield Union* having been cited in the House of Lords, and especially the passage from the judgment of Blackburn, J., not one word can be found from any one of the learned lords which casts any doubt upon that which Blackburn, J., had said.

Before I leave this matter I wish to say that this view, that contracts may be implied after the consideration has been executed and the benefit accepted, undoubtedly has been held in a variety of cases, cases in which it was held that no seal was necessary. It was not denied in argument that that would be true in an action for money had and received. It could not be denied that it would be true in an action for goods sold and delivered. That was decided in *De Grave* v. *Monmouth Corporation*, which is referred to in several of the subsequent cases as being a case of authority. Then there is the case which arose frequently of an action of *indebitatus assumpsit* for use and occupation; and there are also the cases in which the corporation was not suing, but the tenant was suing the corporation on the basis of his position as the tenant of the corporation. In the argument in the present case, as in several of the old cases, it was attempted to explain these authorities upon the basis that they were all cases in which the matters were either trivial, or of daily occurrence, or urgent necessity, so that the absence of a seal could be justified under the well-recognized exception. But, as was pointed out by Mr. Lush, if one limits the exception in cases of executed consideration in that way, the real effect is that one does not give any effect to the exception at all; it only leaves the matter just as it was before. Quite independently of this exception, and taking only the old exception, a seal would not be necessary, and therefore it would

have been unnecessary to fall back upon an implied contract arising from an executed consideration. I do not know that it is really necessary for me to go now at any greater length into the matter. I would like, however, to point out that the exception based upon an executed consideration is not one of recent origin, because it was stated by Lord Denman, C.J., in *Doe d. Pennington* v. *Taniere*, where he said: "To enforce an executory contract against a corporation it might be necessary to show that it was by deed; but, where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule that, in general, a corporation can only contract by deed; and it is merely raising a presumption against them, from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise." Although expressed in different language I think that Lord Denman in effect meant to say that a person can rely as against a corporation upon a contract based upon an executed consideration. Under the circumstances of this case I think that our proper course is to differ from the judgment of Darling, J., and to give judgment in favour of the plaintiff. My judgment is based entirely upon the principles which I understand to have been laid down by Wightman, J., in *Clarke* v. *Cuckfield Union* and by Erle, J., in *Haigh* v. *North Brierley Union*.

STIRLING and MATHEW, L.JJ., gave judgment to the same effect.

*Appeal allowed.*

Solicitors for the plaintiff, *Bower, Cotton, & Bower.*

Solicitors for the defendants, *Indermaur & Brown*, for *Lewis & Quennell*, Brentwood.

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## High Court of Justice.

Chan. Div. } Buckley, J. } April 2.

*In re* ANGLO-ORIENTAL CARPET MANUFACTURING CO. (*a.*)

*Company—Debentures—Extension of time—Winding up before registration—Companies Act,* 1900 (63 & 64 *Vict. c.* 43), *ss.* 14, 15.

*An order was made under section* 15 *of the Companies Act,* 1900, *extending the time for registering a charge created by a trust deed on certain debentures until a date fourteen days after the making of the order, but "without prejudice to the rights of parties acquired prior to the time when such trust deed and debentures shall be actually registered." Ten days after the order was made the company passed a resolution for voluntary winding up. On the fourteenth day after the order was made the charge was duly registered.*

*Such registration held not to make the debenture-holders secured creditors as against the general body of creditors, whose rights were protected by the form of the order.*

On the 25th of June, 1901, the Anglo-Oriental Carpet Manufacturing Co. executed a trust deed conveying certain property to trustees to secure the principal and interest agreed to be paid by certain debentures and charging its business and undertaking and other assets by way of a floating charge with repayment of the principal and interest secured or to be secured by such debentures, and on the same day issued a series of debentures. These securities were not registered as required by the Companies Act, 1900, s. 14.

On the 11th of October, 1901, notice was issued convening a meeting for the 21st of October to pass an extraordinary resolution for voluntary winding up. The meeting was adjourned until the 11th of November.

On the 1st of November an order was made extending the time for registration of the trust deed and debentures, until the 15th of November, "without prejudice to the rights of parties acquired prior to the time when such trust deeds and debentures shall be actually registered."

On the 11th of November an extraordinary resolution for voluntary winding up was passed, and on the 15th of November the charge created by the trust deed and debentures was duly registered.

The liquidator issued an originating summons in the winding up to obtain the decision of the court whether, as against the general body of creditors, the debenture-holders were secured creditors.

*McSwinney*, for the liquidator.

*P. O. Lawrence, K.C.*, and *Austen-Cartmell*, for the trustees of the trust deed and the debenture-holders, cited *In re Johnson & Co.*, 50 W. R. 482, [1902] 2 Ch. 101.

*Norton, K.C.*, and *Muir Mackenzie*, for unsecured creditors.

BUCKLEY, J., said that immediately upon the commencement of the winding up it became the duty of the liquidator to collect the assets and divide them among the then existing creditors. At that moment, in the absence of any registration of their security, the debenture-holders were unsecured creditors. The order extending the time for registration under section 15 of the Companies Act, 1900, was made "without prejudice to the rights of parties acquired prior to the time when such trust deed and debentures shall be actually registered," and these words, whatever their precise limits, clearly included and saved the right which the creditors acquired on the passing of the winding-up resolution to have the assets realized and distributed among them *pari passu*.

In making the order in the above form in *In re Joplin Brewery Co.*, 50 W. R. 75, [1902] 1 Ch. 79, he had no intention of deciding what class of creditors would be protected by the words employed, and he could not derive from the order of the Court of Appeal in *In re Johnson & Co.*, any assistance in ascertaining the class of creditors who ought to be protected by the order in a case like the present. The words employed in the order in the latter case appeared to have exactly the same effect as those used in the *Joplin Brewery case*; in the *Joplin Brewery case* there were two classes of creditors only to be considered—(*a*) those who were asking for the order, and (*b*) other creditors. In *In re Johnson & Co.* there were three classes to be considered—(*a*) those who were asking for the order; (*b*) others who were contractually entitled to rank *pari passu* with class (*a*); and (*c*) other creditors. The contractual rights of classes (*a*) and (*b*) *inter se* required the insertion of special provisions; but as between classes (*a*) and (*b*) on the one hand, and class (*c*) on the other, the relevant words were simply "without prejudice to any rights . . .

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

which may have been or may be acquired against the holders of the said debentures . . . prior to the time when the last-mentioned debentures shall be actually registered." These words were in effect the same as those used in the *Joplin Brewery case*, for the only difference in wording, the insertion of "against the holders of the said debentures," made no difference in effect, for the right given by statute to the creditor, was a right as against the holders of unregistered debentures.

The case was, however, in his view, covered by the decision in *In re S. Abrahams & Sons*, 50 W. R. 284, [1902] 1 Ch. 695, and the suggestion made by Stirling, L.J., when considering the form of order submitted in *In re Johnson & Co.*, [1902] 2 Ch., at p. 110.

Solicitors, *Ridsdale & Son*, for *Chadwick & Sons*, Dewsbury; *Pritchard, Englefield, & Co.*

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Chan. Div.
Swinfen Eady, J. } July 4.

WELD-BLUNDELL *v.* WOLSELEY AND OTHERS. (*a.*)

*Settlement—Waste—Timber—Equitable waste—Ornamental timber—Intention of settlor—Inference from existing circumstances.*

*Where, in an action for an injunction by a remainderman under a settlement of real estate to restrain a tenant for life not impeachable for waste from cutting timber, the plaintiff adduces some evidence that some of the timber which is being cut by the defendant (the tenant for life) was either originally planted or was left standing for the purpose of ornament or shelter, by the settlor, the plaintiff has made out a* primâ facie *case for an injunction on the ground of equitable waste, which the defendant must answer.*

Special case.

This was a case stated for the opinion of the court under section 19 of the Arbitration Act, 1889. From the case stated the following facts appeared:

By an indenture of settlement, made the 11th of September, 1869, between Edward Joseph Weld (since deceased) of the first part, Reginald Joseph Weld (the eldest son of the said E. J. Weld) of the second part, and Walter Weld and John Joseph Middleton (trustees) of the third part, the Lulworth estate was settled (*inter alia*) to the use of the said R. J. Weld and his assigns during his life without impeachment of waste, with divers remainders over. At the date of these proceedings the plaintiff, Charles Joseph Weld-Blundell, was contingently entitled under the settlement to an estate for life in remainder. He was also tenant of Lulworth Castle under a lease. The said R. J. Weld (who was, and had been since the death of his father in 1877, tenant for life in possession of the Lulworth estate) was a person of unsound mind, so found by inquisition, and two of the defendants—namely, Edward Talbot Wolseley and Agnes Frances Weld, were the committees of his estate; the other defendants, Henry Duke & Son, were auctioneers employed by the committees.

During the winter 1901-1902 the defendants Duke & Son, acting on the instructions of the other defendants, marked for felling certain trees (540 or thereabouts in number) standing on the said Lulworth estate, and 78 or thereabouts of such 540 trees were accordingly felled.

This action was commenced on the 17th of February, 1902, and by his statement of claim the plaintiff claimed (*inter alia*) an injunction to restrain the defendants from felling or removing any of the said trees.

Copies of the writ of summons and the pleadings in the action were to be taken as part of the case.

By an order of the court dated the 27th of October, 1902, made upon a motion, the hearing whereof was by consent treated as the trial of the action, the court declared that an agreement for a reference contained in certain letters therein specified was binding on the parties. And it was by consent ordered that a special referee should be appointed in manner therein mentioned to make an inquiry and report to the court which of the said 540 trees had properly been or might properly be felled by the defendants, and which of the said trees ought properly to have been or ought properly to be left by the defendants standing.

Copies of the said order and the letters therein specified were to be taken as part of the case.

In pursuance of the said order the Hon. Cecil F. Parker was appointed special referee.

The inquiry was proceeded with, and on the 12th of February, 1903 (the day appointed by the special referee), the Hon. Gerald Lascelles, deputy surveyor of the New Forest and the Crown lands in Hampshire (the only witness called) was examined in support of the plaintiff's case.

A transcript of the shorthand note of his evidence was initialled by the referee, and was to be taken as part of the case.

The said witness having been examined the plaintiff's case was closed by his counsel, and thereupon counsel for the defendants submitted that no evidence had been given that any of the said 540 trees were trees which the defendants were not entitled to fell and might not properly fell, and that no case had been made by the plaintiff requiring an answer by the defendants. It was contended on their behalf that in the absence of evidence that any of the said trees had been planted or designedly left for ornament by the settlor through whom the plaintiff claimed the defendants were entitled to fell all the said trees, and that no such evidence had been given. Counsel for the plaintiff contending to the contrary, the referee was requested by counsel for the defendants, and agreed, to state a case for the opinion of the court before proceeding to hear any evidence on behalf of the defendants. The question submitted for the opinion of the court was: Whether any evidence had been given upon which, in the absence of any evidence on behalf of the defendants, the referee could properly find and report that any of the said 540 trees were such as might not properly be felled by the defendants.

*Neville, K.C.*, and *Barnard Lailey*, for the defendants—The deputy surveyor in his evidence says it is impossible not to come to the conclusion that the woods in question were planted for ornament and shelter. But it is not enough to say that they were planted for those purposes at some former period. There must be some evidence that the settlor himself either actually planted them or allowed them to remain with that intention. [SWINFEN EADY, J.—Suppose an ornamental avenue of elms, leading up to a mansion-house, and standing for perhaps 150 years. What evidence could you have of the intention with which the trees were planted?] There must be some evidence before the court will interfere with the legal rights of a limited owner—rights which exist where, as in this case, he is unimpeachable of waste, and the settlement says nothing about equitable waste. Those rights cannot be taken away by merely proving that the trees are in

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

fact ornamental; the question is what the settlor considered ornamental; but no doubt less evidence would be required in the case of an avenue. [SWINFEN EADY, J.—There the fact would speak for itself.] But even in the case of an avenue the *primâ facie* evidence might be rebutted if it could be proved that the trees had been treated as marketable timber. If the plaintiff's contention is right you have only to prove the present ornamental character.

They cited *Marquis of Downshire* v. *Sandys*, 6 Ves. (2nd ed., 1827) 107; *Wombwell* v. *Belasyse* (cited, 6 Ves., p. 110*a*); *Marker* v. *Marker*, 9 Hare 1; *Halliwell* v. *Phillips*, 6 W. R. 408, 4 Jur. N. S. 607; *Chamberlayne* v. *Dummer*, 3 Bro. C. C. 549.

*Eve, K.C.*, and *Leigh Clare*, for the plaintiff.—The only way to ascertain the intention of the settlor is by inference from existing circumstances. If the woods are clearly suitable for ornament and shelter it is fair to assume they have been planted for those purposes, and it is the same as to subsequent dealings. A man receives an estate in a particular condition—say, with ornamental timber. Is not his retention of that timber a proof that he retains it for the purpose of ornament? From such circumstances the court can infer the intention of the settlor: *Lushington* v. *Boldero*, 6 Madd. 149.

*Neville, K.C.*, replied.

SWINFEN EADY, J.—The issue before the referee was entirely a question of fact. He heard the evidence on one side and has submitted to the court the question of law whether there is any case for the defendants to answer. I am told the referee was selected by reason of his special qualifications and that he has viewed the woods in question, but the special case contains no reference to his having done so.

It has often been said that the question whether any trees have been planted, or left, for ornamental purposes is a question of fact. The main difference in different cases lies in the evidence necessary to establish that fact. There is often great difficulty in saying what constitutes ornamental timber. It may be that nearness to a mansion-house is a sufficient indication, but neither this nor the existence of a park is a necessary element. Mr. Neville says some evidence is requisite that the settlor intended to treat the timber as ornamental, or that he considered it was planted for shelter. There is evidence to show that in Mr. Lascelles' opinion at least some of the woods were designedly planted for shelter. With regard to the Kennel Rings and the pleasure-grounds there, he says he thinks they were planted as part of one scheme to shelter that amphitheatre in which the lake and castle are, and for residential purposes, and (as to a part of them) that they were of great use for shelter. With regard to Kennel Wood he expressed the opinion that it was planted later when they found more shelter was required. These trees were of various ages, some oaks being about 150 years old, and some larch about forty years. These latter would therefore have been planted shortly before the date of the settlement of the 11th of September, 1869. Kennel Wood may be taken as an example of trees possibly planted or left by the settlor for purposes of shelter.

It has been urged that with regard to the way some of the woods were treated, especially as to the great thinning that took place, there is good indication how far the settlor himself treated them as ornamental, but though thinning was extensively done in the Bowling Green Wood, there is no evidence of such thinning elsewhere. As to the drives through some of the woods, though they may have been originally, or at some time, pleasure drives, they are not so now. But there is quite sufficient evidence on the part of the plaintiff to call for an answer from the defendants, not indeed as to all the trees—but even if it be so as to some only, there can be but one answer to the special case. Turner, L.J., in *Micklethwait* v. *Micklethwait*, 5 W. R. 861, 1 De G. & J. 504, at p. 524, says, speaking of a settlor or devisor: "If by his disposition or by his acts he has indicated an intention that there should be a continuous enjoyment in succession of that which he has himself enjoyed, in the state in which he has himself enjoyed it, it must surely be against conscience that a tenant for life claiming under his disposition should, by the exercise of a legal power, defeat that intention. We have here, I think, the clue by which the difficulty of this case can be solved. If a devisor or settlor occupies a mansion-house with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house, and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed. This court therefore in such a case protects the trees against the acts of the tenant for life."

The issue for the court to determine is not whether the timber is now ornamental, but whether it was planted or left by the owners of the estate for the purpose of ornament or shelter, and this as to some of the trees is proved by the evidence. I am of opinion, accordingly, that the special case ought to be answered in the affirmative.

Solicitors, *Colyer & Colyer; Eland, Nettleship, & Butt.*

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## House of Lords.

From C. A. (England). } May 11.

BRADLEY AND ANOTHER v. CARRITT. (*a*.)

*Mortgage—Redemption—Clog on equity of redemption—Collateral advantage to mortgagee—Advantage continuing after redemption — Mortgage of shares — Employment of mortgagee as broker.*

*Collateral stipulations in a mortgage cease to operate on redemption, so that a mortgage security cannot validly provide that the mortgagee shall obtain any advantage which arises after or goes beyond the time when the principal, costs, and interest are repaid, for such would be a fetter upon the mortgagor's right to redeem.*

*Where, therefore, a holder of shares in a tea company mortgaged them to secure an advance, and at the same time agreed to use his best endeavours to secure that the mortgagee should always thereafter have the sale of all the company's teas as broker, and the mortgage was paid off.*

*Held* (Lords Shand *and* Lindley *dissenting*), *that as the bargain between the parties was at an end upon the repayment of the loan, the agreement as to employing the broker after that time was invalid.*

*Decision of the* Court of Appeal (49 *W. R.* 593, [1901] 2 *K. B.* 550) *reversed.*

Appeal from an order of the Court of Appeal (A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) (49 W. R. 593, [1901] 2 K. B. 550), affirming a judgment of Bigham, J.

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The facts are given at length in Lord Lindley's judgment. They are briefly summarized in the following statement:

In May, 1892, in consideration of an advance of £2,250 made by the respondent to the appellant, William Bradley, the said appellant, mortgaged to the respondent 1,500 odd shares in a tea company to secure repayment of the loan, and at the same time agreed to use his best endeavours to secure that the respondent should always thereafter have the sale of all the company's teas as broker, and he agreed in the event of the company's teas being sold otherwise to pay the respondent the amount of commission which he would have earned if the teas had been sold through him.

William Bradley's brother James, without being a mortgagee, entered into a similar agreement, that being of a subsidiary character in view of the majority of the House.

The loan was repaid, and the company having ceased to employ the respondent as broker, he brought the action to recover damages against the brothers for breach of the agreements.

At the trial the jury returned a verdict for respondent for £750, and Bigham, J., gave judgment accordingly.

This was upheld by the Court of Appeal holding that the collateral advantage secured to the mortgagee was one which might be bargained for.

The Bradleys appealed.

*Montague Lush, K.C.*, and *Buckmaster, K.C.*, for the appellants.—The agreement must be confined to the continuance of the security. Where the principal debt, interest, and mortgagee's costs have been paid, the whole consideration is gone. The undertaking here constitutes a clog on the equity of redemption: *Noakes* v. *Rice*, 50 W. R. 305, [1902] A. C. 24. This appeal is almost identical with the Irish case—*Browne* v. *Ryan* [1901] 2 Ir. R. 653. *Salt* v. *Marquis of Northampton*, 40 W. R. 529, [1892] A. C. 1, affirmed the mortgagor's right on redemption to have back his property in its original form. *Santley* v. *Wilde*, 48 W. R. 90, [1899] 2 Ch. 474, was disapproved in *Noakes* v. *Rice* in this House.

*J. A. Hamilton, K.C.*, and *Dawson Miller*, for the respondent.—Nothing unfair in this arrangement: *Mainland* v. *Upjohn*, 37 W. R. 411, 41 Ch. D. 126. The clog on the equity of redemption, if any, was personal.

They referred to *Biggs* v. *Hoddinott*, 47 W. R. 84, [1898] 2 Ch. 307.

*Buckmaster, K.C.*, replied.

THE HOUSE took time for consideration.

May 11.—Lord MACNAGHTEN.—This appeal raises in a slightly different form, and with some difference of circumstance, the question which this House had to consider in the recent case of *Noakes* v. *Rice*. Your lordships, I think, have nothing to do now but to determine whether the distinction between the present case and the case of *Noakes* v. *Rice*, as finally decided, is or is not a solid and substantial difference leading to a different result. Other points, no doubt, were discussed at the bar, but the only effect of the discussion was to incumber and embarrass the argument on the one point which was really arguable. In my view, all these other points were and are immaterial, and I pass them by altogether.

The distinction between *Noakes* v. *Rice* and the case under review is brought out very clearly in the judgment of the Court of Appeal which was delivered by Stirling, L.J. It is, I need not say, a most careful judgment, to which little or nothing could be added by the learned counsel for the respondent. But if I am not mistaken, it shows some trace of the difficulties created by recent decisions and *dicta* of the Court of Appeal. And certainly it is only fair to bear in mind that at the time when it was delivered the case of *Noakes* v. *Rice* had not gone beyond the Court of Appeal, while the principles re-established, or definitely asserted by this House in *Noakes* v. *Rice* had been shaken and obscured by the decision of the Court of Appeal in *Santley* v. *Wilde*. I am aware that Lord Lindley, from whom I should never differ without the greatest hesitation and misgiving, still holds that *Santley* v. *Wilde* was rightly decided. My noble and learned friend will, I am sure, pardon me for saying that I am unable to concur in that view. I think the method of the judgment questionable, and the effect subversive of a settled doctrine of equity. *Santley* v. *Wilde* was the case of a mortgage to secure an advance of money. The loan was the occasion of the mortgage. The end and purpose of the mortgage was to secure the loan; and but for one stipulation in the mortgage deed the transaction would have been a matter of ordinary everyday occurrence. The mortgagee stipulated, of course, for repayment of principal, and for payment of interest properly so called. And by way of further remuneration for the accommodation afforded he stipulated for a share of the profits to be derived from the use of the mortgaged property, which happened to be a theatre held under lease for a term of years. Now that the usury laws have been repealed, there cannot, I think, be any objection to such a stipulation, provided it comes to an end when the mortgagee is paid principal, interest, and costs. But in *Santley* v. *Wilde* the stipulation was that the mortgagee should receive his share of profits after the mortgage was paid off during the continuance of the mortgagor's interest in the property, for the whole term of the lease. That stipulation was, as it seems to me, unquestionably part of the mortgage transaction. Well, the mortgagee calls in the loan. The mortgagor tenders principal, interest, share of profits up to date, and costs, and demands a re-assignment. This demand is refused. Then he brings an action for redemption. Reversing Byrne, J., the Court of Appeal held that the mortgagor was not entitled to redeem. The way by which the court arrived at that conclusion was this: "A mortgage," said the Master of the Rolls, "is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given." I cannot help thinking that the double aspect which this definition apparently presents may have had something to do with the result. For the Court of Appeal proceeded to split up the mortgage transaction into two parts—a security for payment of the debt and a security for the discharge of an additional obligation. They said in effect, "The mortgagor may pay off the debt if he likes, but that will not discharge the mortgage. The mortgage will remain as a security for the performance of the obligation relating to the share of profits. As long as that obligation lasts the mortgage stands." The result, therefore, was, to use the words of Cozens-Hardy, J., that "the proviso for redemption was nugatory," because it only came into operation when there was "nothing on which it could operate." That seems to me to be a very far-reaching decision. It reduces the rule that a mortgage cannot be made irredeemable to a dead letter. You have only to tack on some stipulation, such as men of business might well agree to if there were no mortgage, and the thing is done. In *Noakes* v. *Rice* the mortgagee suffered, it would seem, merely because his legal advisers had the misfortune to know a little law, and had not learned

the secret of *Santley* v. *Wilde*. They thought they could make the covenant on which they meant to rely run with the land. If they had not puzzled over a matter which is often one of some difficulty—if they had only inserted a covenant to the effect that the mortgagor and his assigns should get their beer from the mortgagee, and from no one else, so long as the lease lasted, and if the proviso for redemption had been so expressed as to cover that obligation, the mortgage, according to *Santley* v. *Wilde*, would have been irredeemable and the covenant open to no objection.

Now, what was the Court of Appeal to do when it was confronted by the decision in *Santley* v. *Wilde*, and at the same time warned by what was said in *Biggs* v. *Hoddinott*, that judges were not to go one step beyond what had been actually decided? I must say I think the court took the only course open to it.

It is observed in the judgment of the Court of Appeal that it has never been laid down that it is essential for the validity of what are called, not very happily, I think, collateral stipulations, that they should cease to operate on redemption. That is perfectly true. But it may be said with equal truth that, putting aside the case of *Santley* v. *Wilde*, there is no case to be found in the books from the earliest period to the present day in which a mortgagee after redemption ever attempted to keep on foot the benefit of any collateral stipulation which was part and parcel of the mortgage transaction. And that surely is far more significant. You could hardly expect to find in any judicial utterance a note of warning against an experiment which before *Santley* v. *Wilde* no one ever thought of trying. Then it is to be observed that it was the view of Cozens-Hardy, J., and of the Court of Appeal in *Noakes* v. *Rice*, that the covenant in question in that case imposed an actual burden on the land which was the subject of the mortgage. "The covenant," said Collins, L.J., "imposes a tie upon the house, not a personal restriction upon the mortgagor. Giving great weight to this circumstance, and intending, no doubt, to keep strictly within the line of decided cases, the learned judges of the Court of Appeal came to the conclusion that a direct fetter on the equity of redemption, such as that which was supposed to exist in *Noakes* v. *Rice*, was not permissible, but that a fetter, or restriction operating indirectly, though it might have the same effect, was not open to objection, and, indeed, was sanctioned by principles said to have been laid down in *Biggs* v. *Hoddinott*.

The real question is whether this distinction can be supported. It is necessary, I think, to examine closely the reasoning on which the conclusion of the learned judges of the Court of Appeal was based. At the outset they were met by a passage in a former judgment of Rigby, L.J. "The property," said Rigby, L.J., in *Noakes* v. *Rice*, "which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not, either expressly or by implication, reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force." That was very much what was said in this House when the case was before your lordships. And it is quite right so far as it goes. To that expression of opinion exception was taken. The words "by implication" are explained away by saying it is "an expression which we consider to have been used by Rigby, L.J., with reference to a class of cases in which the obligation takes the form of a penal sum or liquidated damages by way of penalty on the doing of a particular thing." I am not quite sure that I understand the force or application of that observation. Then the judgment goes on to observe, "It is said, however, that the shares, after redemption, are fettered, inasmuch as the stipulations into which the mortgagor had entered would prevent him from dealing so freely with his property as he otherwise would." Then follow these important words: "It is quite possible that an indirect effect of this nature may flow from these stipulations, but the same result would have followed if the stipulations had been entered into on the occasion of an advance being made by the plaintiff, to the defendant W. M. Bradley, on his personal security, and in that case the stipulation would, as it seems to us, be perfectly valid." There again I have some difficulty in following the reasoning of the Court of Appeal. I should not have supposed that any one would contend that the peculiar doctrines of equity applicable to mortgage transactions apply in all cases, whether there is a mortgage or not, and I rather doubt whether the circumstance that a stipulation is valid when it is not part of a mortgage transaction is an argument for its validity when it is.

The judgment concludes by repeating what was said at the outset: "There is no decision that such indirect effect of the stipulations brings them within the doctrine of equity under consideration, and so to hold would," it adds, "reduce the operation of the decision in *Biggs* v. *Hoddinott* within very narrow limits. For these reasons we think that the equity of redemption ought not in the present case to be held to be clogged."

I have stated, in the words of their judgment, the reasons which induced the learned judges of the Court of Appeal to decide against the present appellants. I doubt whether those reasons can be regarded as altogether satisfactory. As to the last reason, I must say, speaking for myself, that I am not sure that it would be a great misfortune if the operation of every decision were to be confined to the matter decided, and the principles on which the decision rests. Harm, I think, is sometimes done by general expressions, even in praise of a principle which everybody admires in the abstract, when they are not necessary for the purpose in hand. Though true in themselves, they are apt to be misunderstood owing to the connection in which they are found. One learned judge, we know, thought *Santley* v. *Wilde* was covered by *Biggs* v. *Hoddinott*, though the actual decision in *Biggs* v. *Hoddinott* does not, I think, touch the point raised in *Santley* v. *Wilde*. *Biggs* v. *Hoddinott* was a plain case. It purported to decide two things. In the first place, it purported to decide that a mortgage may be made irredeemable for a reasonable period. Well, everybody knows that when money was placed out on mortgage as an investment nothing was more common than to make the mortgage irredeemable for a certain limited time. It was an old and well established practice, and a very reasonable practice too. I do not understand that in the case of *Teevan* v. *Smith*, 30 W. R. 716, 20 Ch. D. 724, Jessel, M.R., treated the point as open to any possible doubt. He referred to it, I think, as a practice well understood and perfectly valid. The other matter which *Biggs* v. *Hoddinott* purported to decide was that a stipulation for additional remuneration during the continuance of the mortgage was valid. That, again, was a matter which was hardly open to question after the repeal of the usury laws. As Lord Davey pointed out in *Noakes* v. *Rice*, the additional remuneration is only interest in another form. Such a stipulation does not prevent the mortgagor getting back his property or impede or obstruct redemption.

It seems to me to be playing with words to say that on redemption these shares came back to Mr. Bradley no worse they were when he mortgaged them. If I

part with property owing to a temporary necessity and the property is returned to me afterwards, do I get it back just as it was when it comes enveloped in an atmosphere of danger which was not present when I parted with it? Is it none the worse—is its usefulness to me unimpaired, if it now requires delicate handling and cautious treatment to prevent it becoming a source of mischief to its owner? Mr. Bradley could not have safely sold or mortgaged any of these shares when he got them back. True their value to a purchaser or a mortgagee would be just the same. But what would have been Mr. Bradley's position? We were told, and it seems to stand to reason, that the only market for shares of this description is to be found among tea brokers. Tea brokers want to get hold of shares in a tea company in order to have the sale of the company's teas. That means or points to the displacement of the acting broker. A change of brokers in Mr. Bradley's company would, if the respondent be right, necessarily expose Mr. Bradley to a heavy liability. The Court of Appeal says that is not enough; the mortgagee has not retained any direct hold upon the shares, though he may have indirectly brought about the same result. I do not think it is necessary that there should be any hold upon the property, direct or indirect. I think, as I ventured to say in *Noakes* v. *Rice*, that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. And I think your lordships gave sanction to that proposition when you approved the decision in the Irish case of *Browne* v. *Ryan*. Can you impose on the equity of redemption a fetter operating indirectly when you cannot, as it is admitted, impose a fetter which operates directly? I should have thought that that question answered itself—you cannot do indirectly that which you must not do directly.

The result, therefore, in my opinion, is that the judgment of the Court of Appeal cannot be maintained, and the action must fail so far as it regards Mr. W. M. Bradley. It fails too, I think, as regards Mr. James Bradley. His liability, in my opinion, was only secondary and subsidiary to his brother's liability. When Mr. Carritt, by his own act in calling in the loan, put an end to the liability of Mr. W. M. Bradley, the liability of Mr. James Bradley fell with it.

For the reasons I have given I move your lordships that the appeal be allowed and the action dismissed, and that the respondent do pay the costs both here and below.

Lord SHAND.—In this case I have had the advantage of reading and carefully considering the judgment of my noble and learned friend Lord Lindley, and I agree with him in thinking that the judgments of Bigham, J., and of the Court of Appeal should be affirmed and the appeal dismissed. It is unnecessary for me to recapitulate the facts of the case, which have been fully stated by his lordship, and as I am in complete agreement with him in the grounds of judgment, I shall make only a few observations in addition.

In the case of James Bradley there is merely a reference to the loan which the plaintiff Mr. Carritt had given to his brother; and in consideration of this he agrees as a shareholder in the Sephinjuri Bheel Tea Co., and in every other capacity, that Mr. Carritt or any firm of brokers of which he shall for the time being be a partner "shall always hereafter have the sale of all the company's teas as broker, and in case of any of the company's teas being sold otherwise than through you or your firm I personally engage and agree to pay you the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm." This obligation is unconditional and simple. In respect of a loan given an obligation is granted, and not a word is added which can suggest the argument as to fettering or clogging the security afforded by the temporary transfer of shares in the case of his brother William McKenzie Bradley, in the action against him.

Then as regards William. After an acknowledgment of money lent, an obligation for repayment with interest, a bill, and a transfer of shares in the Sephinjuri Bheel Tea Co. as security, subject, of course, to a right of redemption on the repayment of the loan and interest, the agreement proceeds:

"4. I further agree as a shareholder in the Sephinjuri Bheel Tea Co. (Limited), and in every other capacity, to use my best endeavours to secure that you or any firm of brokers of which you for the time being shall be a partner (as you shall elect) shall always have the sale of all the company's teas as broker." With this addition: "And in the event of any of the company's teas being sold otherwise than through you or your firm, I personally engage and agree to pay to you or your firm the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm."

I confess I think it was unfortunate for the law that the rule, now called a principle, "Once a mortgage always a mortgage," with all its consequences, was ever carried further than was necessary for the purpose of relieving borrowers from forfeiture of their property on non-payment of the sum lent on a fixed day. I strongly agree with the expressions of opinion of Lord Bramwell in the case of *Salt* v. *Marquis of Northampton*, of Bowen, L.J., and Lord Lindley, Chitty, L.J., and the present Master of the Rolls in the case of *Biggs* v. *Hoddinott*, that in agreements and obligations which cannot be represented to be unconscionable, or to have been procured by fraud or undue influence, and which are expressed in clear language quite understood by the parties who have entered into them, effect should be given to the terms used, having regard to the true nature of their bargain. The origin of the rule is, however, to be traced, I believe, not to its natural and reasonable meaning in itself, but to the provisions of the usury laws which existed when it was introduced. "Once a mortgage always a mortgage," however, had, and I think still has, down to the present date, application only where the power of redemption by repayment of the loan is itself fettered or clogged by conditions which prevent full redemption even where such repayment is made or offered. And I agree with Lord Lindley in holding that this is not a case of that class, and that where, as here, redemption can be fully obtained by repayment of the loan and interest, a separate obligation for a different or collateral advantage to the lender is valid and enforceable.

It was argued that by article 4 of the agreement Mr. William Bradley became bound to remain for all time a shareholder of the Sephinjuri Bheel Tea Co., and that this obligation was a fetter on his right to redeem his shares and to dispose of them, which by agreement affected the shares as his property even after the redemption of the loan. I am clearly of opinion that there was no such obligation undertaken either expressly or by implication. If he continued to be a shareholder, no doubt he undertook to use his influence in that character to continue Mr. Carritt as broker; but he was quite free to sell his shares, as he was also free to redeem them on repayment of the loan. The true force of the agreement was contained in the entirely separate obligation that if the company's teas should be sold otherwise than through

Mr. Carritt's firm, he nevertheless personally bound himself to pay the broker's commission to Mr. Carritt or his firm. It may be assumed that if he had not agreed to grant that obligation he would not have obtained the loan. By the agreement there was no restraint, fetter, or impediment on the power to redeem the mortgage. On payment of principal and interest Mr. William Bradley was entitled to have the mortgage entirely discharged or redeemed, and to recover the subject of the mortgage exactly as he had previously possessed it. The case is entirely distinguished from such a case as that of *Noakes* v. *Rice*, or similar cases, where, even after repayment of the principal and interest of the loan, the subject of the security still remained fettered by the condition that it was by the agreement to be a tied house. So in all the cases which have occurred in which the rule "Once a mortgage always a mortgage" has been enforced, the subject of the mortgage, notwithstanding the redemption by repayment of principal and interest remained in some way fettered. Here the merely personal obligation to continue to pay commission on the withdrawal of the business of selling the teas in no way affects the subject of the security. The obligation was entirely separable and separate from anything relating to the subject of the security, which was Mr. Bradley's shares in the company, and there is no reason for holding that the obligation is in any way invalid. It appears to me, on my construction of the agreement, that if the appellants are to succeed in their present argument, the rule of law said to be founded on equity must henceforth not be merely "Once a mortgage always a mortgage," but "Once a mortgage and a separate personal agreement or obligation by the mortgagor, always a mortgage only, and no such binding agreement or obligation"; and that it may be contended hereafter that the rule in this form may be enforced even where the security and the subject of the security can be completely redeemed by the simple repayment of principal and interest. I confess I think such a proposition is unreasonable and unwarranted, for it operates so as to prevent the owner of a property from using its value to the full extent in obtaining a loan on it, and enables him to disregard a clear obligation undertaken for onerous causes. If the right of redemption of the mortgage is quite unfettered, the authorities cited do not, I think, apply; and that is the case here.

In the case of *Noakes* v. *Rice* I simply concurred in the judgment given. The Lord Chancellor had entirely expressed the view of the law which I strongly hold in his judgment which he gave, to the effect that Lord Lindley had "given a most authoritative exposition of the true effect of the rule in the case of *Santley* v. *Wilde*." Lord Lindley had there said, in words which the Lord Chancellor quoted and in which I entirely agree: "Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this that once a mortgage always a mortgage, but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation, the payment or performance of which is to be secured, is a clog or fetter within the rule." The Lord Chancellor carefully added: "It is and must be in each case a question of the particular thing which is advanced as a clog or fetter, and in some cases it may be seen to come very near the line. Whatever rule is laid down one can reduce it to something like an absurdity by taking an extreme case."

The only case to which I think it necessary to refer is that of *Browne* v. *Ryan*, one of that very class which, as the Lord Chancellor says, "may be said to come very near the line." In that case the mortgagee sought damages for the breach of a contract depriving the mortgagor of his property even after its redemption by him, thus leaving a fetter on the subject of the security, as Lord Lindley observes in his judgment in this case; and so it may be taken simply as an illustration of the rule, "once a mortgage always a mortgage," and is in this view clearly to be distinguished from the present case, for in this case there is no fetter of any kind on the power of redemption.

Lord DAVEY.—In advising this House in the case of *Noakes* v. *Rice*, I endeavoured to express my views as to the meaning and effect of the equitable rules affecting the redemption of mortgage securities. I see no reason to dissent from anything which I then said, and I need not repeat it. I might, however, have added that the expression "clogging" or "fettering" the equity of redemption is not the happiest mode of expressing the object to which the third rule referred to by me is directed. The principle, as it appears to me, is that on payment of the principal, interest, and costs, together with any bonus or anything in the nature of a bonus which has been properly stipulated for, and has become payable, the mortgage contract comes to an end, and the mortgagee is entitled to get his property back, unaltered in character, condition, and incidents, and is henceforth relieved from the burden imposed upon him by the contract. If this be the true principle (as I think it is), the decision of the present case presents no difficulty. There can be no doubt that the obligation assumed by the first appellant in clause 4 of the agreement of the 16th of May, 1892, is part of the mortgage contract, and the corresponding advantage to the respondent was derived therefrom exclusively. The form of the agreement shows this. It begins with the words, "In consideration of two thousand and fifty pounds this day advanced by you to me." Then follow six numbered paragraphs containing the terms agreed to by the mortgagee, including the fourth clause, which commences with the words "I further agree," and so forth. If, therefore, any breach of the agreement in clause 4 had taken place during the currency of the mortgage, or any moneys had become exigible under it, I make no doubt that the appellant William Bradley would have been liable. But the mortgage has now been paid off, and everything which became due during the currency of it has been paid. The breach which is complained of has taken place since redemption, and I am really at a loss to understand how, consistently with the equitable doctrine, a mortgagee can insist on retaining the benefit of a covenant in the mortgage contract materially affecting the enjoyment of the mortgaged property after all principal, interest, and costs, and everything which has become payable before redemption, has been paid. I agree with Lord Macnaghten in thinking that the case of *Santley* v. *Wilde* was wrongly decided. I thought so when *Noakes* v. *Rice* was under consideration in this House, and a further examination of the report of the case has confirmed me in my opinion. Two of the learned judges who decided that case in the Court of Appeal thought that it was covered by the case of *Biggs* v. *Hoddinott*. I cannot agree. It is, to my mind, plainly distinguishable. All that I understand to have been decided in *Biggs* v. *Hoddinott* is, first, that the stipulations for the continuance of a loan for five years was valid; and secondly, that a covenant to take beer from the mortgagee limited to the continuance of the security did not clog the equity of redemption, and was enforceable by injunction. Lord Lindley, however, based

his decision in *Santley* v. *Wilde* on a broader ground; but he seems to me to have divided the transaction into two parts—namely, a loan of £2,000 and a sale of two-thirds of the profits of the theatre. That seems to me a fallacious and wrong way of looking at the transaction, which was a mortgage transaction, and the only consideration for the grant of two-thirds of the profits was the loan of the money. It appears to me that the claim to retain the security as a security for the share of profits was in fact imposing a fetter on the redemption on payment of principal, interest, and costs. And I understand this to be the view taken by Lord Macnaghten.

It is, in my opinion, idle to say that the mortgagor in this case has got his property back unfettered, or that he has the unrestricted enjoyment of it, if the agreements contained in the fourth clause of the contract of the 10th of May, 1892, are held to constitute a continuing obligation. It is said that the performance of these agreements is not secured on the shares. But that is not necessary. The agreements which were held objectionable, both in *Browne* v. *Ryan* and *Noakes* v. *Rice*, did not constitute charges on the mortgaged premises, but they fettered the mortgagor in the one case in the free disposition, and in the other the free enjoyment, of his property. In the present case the agreement is that the appellant W. M. Bradley will "as a shareholder" use his best endeavours to secure the sale of the company's teas to the respondent or his firm, and in the event of the teas being sold through another broker will pay to the respondent the amount of the commission which he or his firm might have earned. In other words, he agrees to use the voting power attached to his shares in a particular way for the respondent's benefit. Now, what is a share? It is a bundle of rights, of which the right of voting at meetings of the company is not the least important. Can it be said that the mortgagee does not retain a hold upon the shares which form the mortgaged property, or that the mortgagor has had full redemption of it when the latter is not free to exercise a material right in such manner as he may think most conducive to his own interests? He may think it advantageous or otherwise to deal with his shares without losing the influence in the company's counsels which might enable him to secure the performance of the first part of the agreement, or running a serious risk of liability under the second part. He may think it advantageous to the company to employ another broker, or that the change would produce a better return on his shares; but if he gives effect to his opinion he incurs what is in effect a heavy penalty.

I can see no difference in principle between this case and the case of *Browne* v. *Ryan*, which has already been approved in this House. The respondent can no more claim to be continuously employed as broker for the sale of the teas of the appellant's company, or to be compensated for the loss of his commission if not so employed, than the land agent in *Browne* v. *Ryan*, who claimed to be employed in the sale of the farmer's estate, or to be compensated for the loss of his commission. I am therefore of opinion that, even if the fourth clause of the contract bears the construction which has been put upon it by the courts below, the agreements contained in it are such as cannot, in the circumstances, be enforced by the courts of this country. But I doubt whether we ought to put that construction on the clause in question. *Primâ facie*, a clause in a mortgage contract is limited to the duration of the mortgage relation between the contracting parties. In this clause we have the words "always hereafter" but I observe that in two other clauses (the third and the tenth) a similar phrase, "at any time hereafter," is used and is limited by the context to the duration of the mortgage. I am disposed to say that the words "always hereafter," having regard to the nature and purport of the agreement, in like manner mean at any time hereafter during the currency of the loan. But in the view which I take of the case it is not necessary for me to express a decided opinion on the question.

With regard to the appellant James Bradley's agreement, I think it was part of the same transaction and ancillary to the principal agreement and by way of further security and increased remuneration to him for the use of his money; and I am of opinion that it must be construed in the same way, and stand or fall with the principal agreement.

I am therefore of opinion that the decision of the the Court of Appeal should be reversed, and instead thereof the action should be dismissed with costs, and the respondent should pay the costs in the Court of Appeal and in this House.

Lord ROBERTSON.—In considering this case, I have found myself greatly aided by first forming a clear conception of what is the respondent's theory of Mr. William Bradley's rights and duties as a shareholder of this company. Before this loan and agreement, Mr. William Bradley was entitled, like everyone else, to use his position as a shareholder solely for his own benefit. In particular, he could vote for such tea brokers as he thought would bring in good profits, and therefore good dividends on his 1 541 shares. Now, according to the respondent, he is not entitled to do this. On the contrary, he is bound to vote in the important matter of choosing a tea broker, not in the interests of himself, the shareholder, but in the interests of the respondent, the candidate for the tea brokership. It is true he has the option (somewhat derisory, as I cannot but think) of voting freely and paying two tea brokers; for, if the respondent is not appointed, then Mr. William Bradley has got to make good to the respondent the commission lost by that gentleman's non-employment, as well as to contribute to pay the broker who is appointed. This, according to the respondent, is to be the tenure of his share by Mr. William Bradley for all time, or at least so long as the respondent or his firm carry on business. Now, if it be asked why is Mr. William Bradley thus limited in his enjoyment of his shares and made bound to use them for the respondent's benefit? the answer must be, Because, once upon a time, the respondent lent Mr. Bradley money, long since repaid, and gave him his shares in security, long since re-transferred. This is not merely historically the fact, but the mortgage itself sets out that this limitation of Mr. Bradley's right to deal with those shares as his own is agreed to in consideration of the advance.

Accordingly, on this question of fact it seems to me perfectly plain that, if the respondent is right in his law, one result of the agreement was that, in consideration of the advance, Mr. William Bradley had the respondent permanently quartered upon him, and that as regards that part of his estate—namely, the 1,541 shares—Mr. Bradley was bound to use it, in one important relation, no longer for his own interest, but for the respondent's, and his own so far as his own only did not conflict with the respondent's.

Now, when I turn to the law of the case, I speak with much more diffidence; for the system of jurisprudence in which I was trained does not in the matter of mortgages impose any restraint on free contracts. But I have made it my duty to study and understand the law now in question. I do not hold myself entitled to question or detract from it; and I am unable to resist the conclusion that the appellants are entitled to prevail. I entirely agree in the judgment of Lord Davey.

Lord LINDLEY.—Mr. Carritt (the respondent in this case) brought an action against several persons, including the two appellants, for the recovery of damages for breaches by them of certain agreements entered into by them with him. The agreements sued upon were contained in three letters—namely, first, a letter dated the 14th of August, 1889, signed by William Bradley on behalf of himself and all the other defendants; secondly, a letter dated the 16th of May, 1892, signed by William Bradley alone; and thirdly, a letter of the same date, signed by James Bradley alone. The plaintiff discontinued his action against the defendants other than the two Bradleys, and the action against them was tried before Bigham, J., and a special jury. The plaintiff obtained a verdict and judgment for £750 against the two Bradleys for their breaches of their agreements of the 16th of May, 1892. From this verdict and judgment they appealed to the Court of Appeal, and asked that the verdict and judgment against them might be set aside, and that judgment might be entered for them with costs, or that a new trial might be directed. This appeal was dismissed with costs. The two Bradleys now appeal to your lordships and ask that judgment may be entered for them.

No question now arises as to the first agreement of 1889, and except as part of the history of the two letters of the 16th of May, 1892, the letter of 1889 is of no importance. The two Bradleys put in a joint amended defence, and alleged that if the letters of the 16th of May, 1892, were to be construed as the plaintiff contended, then those letters did not express the real agreement between the parties, and ought to be rectified; and in the court below evidence was gone into to establish this defence. The attempt to do so failed, and it was not seriously renewed either in the Court of Appeal or before your lordships, and it is unnecessary to refer further to this controversy.

The questions raised by this appeal are: First, the true construction of the two letters of the 16th of May, 1892; secondly, their validity, having regard to equitable doctrines relating to mortgage transactions; and, thirdly, the form of the judgment as entered against the two appellants.

The two letters in question are set out in the record, and I will not detain your lordships by reading them at length. The first of them—namely, that signed by William Bradley—is the most important, and the only one which need be considered in discussing the meaning and validity of both. In order to understand this letter the position of the writer and of Mr. Carritt, to whom it was written, should be known. The tea company mentioned in the letter had been formed in 1889 by the Bradleys, and Mr. Carritt had assisted them in the issue of debentures on the formation of the company. Mr. Carritt was a member of a firm of tea brokers, carrying on business under the name of Lloyd, Mathesn, & Carritt. In 1889 that firm had been appointed the tea brokers of the tea company, and the firm had been its tea brokers ever since. There had been some controversy, however, about the permanency of their appointment, and different views on this subject had been expressed. The two Bradleys were large shareholders in this tea company, and were also directors of it. William Bradley wanted to borrow £2 250, and Mr. Carritt lent it him on the terms mentioned in the letter. It is quite immaterial to consider the sources from which Mr. Carritt obtained the money. As between him and William Bradley, Mr. Carritt was the lender, and the advance of the money is not disputed.

The letter states that in consideration of the advance William Bradley agrees to repay it with interest at 7 per cent., and as security he hands over—first, his promissory note for that amount and interest; and secondly, a transfer of 1,541 fully paid up shares in the tea company, and a certificate for those shares in Bradley's name. Then comes a power of sale in default of payment (clause 3), and this is followed lower down by a special power to sell forty-one of the shares even before any default is made (clause 5). So far there is nothing more than a loan; a promise to pay; a promissory note; and an agreement for a mortgage of a certain number of shares with the powers of sale mentioned. There is another clause (6) by which Bradley agrees to execute any further document which Mr. Carritt shall require for perfecting or giving effect to the security intended to be thereby made. In addition, however, to this mortgage transaction there is another clause (4), which runs thus: "I further agree, as a shareholder in the Sephinjuri Bheel Tea Co. and in every other capacity to use my best endeavours to secure that you or any firm of brokers of which you for the time being shall be a partner (as you shall elect) shall always hereafter have the sale of all the company's teas as broker. And in the event of any of the company's teas then being sold otherwise than through you or your firm, I personally engage and agree to pay to you or your firm the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm. This engagement on my part is in addition to and without prejudice to any previous engagements to you, and in particular to the contract of the 14th of August, 1889, by which I agreed on behalf of the proprietors to give you the sale of all the company's teas." The plaintiff's action, so far as Mr. William Bradley is concerned, is for a breach of this agreement. The loan was called in and was paid off, and the shares which had been transferred and registered in the name of Mr. Carritt or his nominee were duly re-transferred to and registered in the name of William Bradley. But in August, 1899, the company changed their tea brokers and ceased to employ Mr. Carritt or his firm, and this action was then brought.

The first question which arises is the true construction of this clause 4. The defendants contend that when the loan was paid off this clause ceased to be operative; that it was part of the security for the loan, and that the words "always hereafter" ought to be construed as the words "at any time hereafter" in clauses 3 and 5 giving the powers of sale must be construed. This contention appears to me quite untenable. It is obvious that the powers of sale are conferred in order to enable the mortgagee to get back his money and for no other purpose, and the words "at any time hereafter" in those powers have no sensible meaning and no legal operation after the loan is paid. This reasoning is wholly inapplicable to clause 4. Again, to say that clause 4 is part of the security appears to me quite incorrect. It is true that the loan of the money is the consideration for the whole agreement, including clause 4; but the security for the loan is the promise to repay it, the promissory note and the shares with the powers to sell them. Clause 4 is in no sense part of the security for the money, but it is an additional advantage stipulated for by the mortgagee. Clause 4 means what it says. It gives Mr. Carritt the option of himself, or any firm of tea brokers of which he is a member, becoming an applicant for the appointment of tea broker to the company, and binds Mr. William Bradley to use his best endeavours to secure that appointment; and if any other broker should be employed by the company to sell the company's teas, then Bradley undertakes to pay to Carritt, or his firm, as the case may be, the commission lost by their non-employment. The only limit to the duration of this agreement is that set by the possibility of carrying it

out. It would necessarily cease if Mr. Carritt gave up the business of tea broker, or if the company gave up selling tea; but I can discover no other event on which it would come to an end. I can discover no legitimate ground for implying that it was to last only for a reasonable time, nor can I find any measure for such a period. To use Bigham, J.'s, language, the words "always hereafter" in this clause mean, so long as I am in a position to sell the teas and the teas are there for me to sell. It is hardly necessary to add that Mr. James Bradley's letter bears the same meaning. This letter is to the same effect as clause 4, but Mr. James Bradley did not make himself liable for the loan, although the loan was the consideration for the promise he made.

I pass now to the second question—namely, the validity of the contracts sued upon, and it will be convenient to take Mr. James Bradley's letter first. If he had been sued separately for a breach of his contract, I cannot conceive what defence he would have had to the action. Legal defence is out of the question; and there being no fraud, undue influence, oppression, or extortion, I can discover no ground whatever for the interference of a court of equity with the legal rights of the plaintiff. Mr. James Bradley contracted as a principal; he was not a mortgagee; he was not a surety, or in any way responsible for the mortgage debt; he had no interest in the shares mortgaged; he would not be a necessary or proper party to any suit in equity by or against Mr. William Bradley for the redemption or foreclosure of his mortgage. I cannot see that Mr. James Bradley's position is altered by the fact that he has been made a co-defendant with Mr. William Bradley in the present action, or by the fact that the two defendants have joined in defending it. This procedure was, I suppose, adopted to save expense, but it cannot, in my judgment, affect the merits of the case in any way whatever. As regards Mr. James Bradley, I am unable to discover any defence or semblance of defence to the plaintiff's action.

Mr. William Bradley's position is no doubt different, for he was a mortgagee, and he is sued upon an agreement imposing upon him an obligation beyond that of repaying the money lent, with interest and costs, and which agreement was entered into in consideration of the loan for which he mortgaged his shares.

Before considering the validity or invalidity of this additional agreement it is essential to bear in mind that Mr. William Bradley raised no defence to the action on the ground of fraud, undue influence, extortion, or oppression. No issue was raised or left to the jury on which a verdict could have been given for the defendant on any of these grounds. The only defence set up was mistake, and this failed. The legal point that the agreement was invalid on equitable doctrines applicable to the admitted or established facts is of course still open to argument. But no other defence can, I apprehend, be now properly listened to. I allude more particularly to such a possible ground of defence as oppression or unfairness in the bargain. Bigham, J., and the Court of Appeal both alluded to this suggested defence, and said that, in their opinion, the agreement was not oppressive or unreasonable; and I agree with them.

If the agreement contained in clause 4 is to be held invalid, it must be upon some equitable principle applicable to the terms of the bargain itself, and to the facts not now in controversy. The equitable grounds relied on are, as I understand them, two in number—namely, first, that clause 4 is a clog on the redemption, and infringes the well-settled equitable principle, Once a mortgage always a mortgage; secondly, that it is part of the mortgage transaction, and must, as a matter of law, cease with it, in conformity with the rule, Once a mortgage always a mortgage, and nothing but a mortgage.

As to the first ground, clause 4 gives the mortgagee of the shares no right or interest in them, legal or equitable. So long as he holds them as mortgagee he has the ordinary rights of a mortgagee, with the rights of selling them conferred by the other clauses of the agreement; but when he is paid off his principal, interest, and costs, he is bound to re-transfer the shares to the mortgagor, and clause 4 contains nothing whatever which entitles or purports to entitle the mortgagee to retain the shares or to control the use of them when returned to the mortgagor. Clause 4 in no way fetters the right to redeem nor obstructs the mortgagor in the practical exercise of that right, or of the use or enjoyment of his shares when he gets them back. He can then do what he likes with them free from all control by the mortgagee. How it can be said that clause 4 clogs the equity of redemption or infringes the rule, Once a mortgage always a mortgage, passes my comprehension. It is admitted that after redemption the mortgagor can sell the shares; but it is said that so long as he holds them he is bound to use whatever influence they give him in favour of the mortgagee so as to enable him to retain his position of broker to the tea company. This observation, so far as it is true, applies to whatever shares Mr. William Bradley might happen to hold when it became necessary to use his influence in Mr. Carritt's favour. But clause 4 gives Mr. Carritt no legal or equitable right to have shares, still less any particular shares held by Mr. Bradley used in any particular way. By the first part of clause 4 Mr. Bradley has bound himself to use his best endeavours to secure the tea brokerage for Mr. Carritt; this might or might not involve voting for him. The votes conferred by the shares might be too few to be of any use, and other endeavours than voting in respect of them might be more likely to prevail. But to say that the equitable principle under discussion is infringed, and that clause 4 is invalid simply because it might be necessary for Mr. Bradley to use the influence which the mortgaged shares, if retained, would confer in order to perform his engagement to Mr. Carritt, seems to me to stretch the doctrine under consideration to an extent not warranted by principle or authority.

The second part of clause 4 binds Mr. Bradley to pay commission if Mr. Carritt loses the tea brokerage to the company, even although Mr. Bradley may have used his best endeavours to prevent such loss. The second part of clause 4 increases the inducement to make such endeavours, but that is its only bearing on the present controversy; and it is plain from the summing up of Bigham J., that the action was for a breach of this part of clause 4 and that the damages were assessed for this breach. The second part of the clause does not depend upon the first part, and comes into operation whether the first has been broken or whether it has been duly performed.

But then reliance is placed upon authority, and especially on *Salt* v. *Northampton*, *Noakes* v. *Rice*, *Browne* v. *Ryan*, and the disapproval by some of your lordships of *Santley* v. *Wilde*. I will therefore shortly refer to these cases. *Salt* v. *Northampton* turned entirely on the question whether the policy then in question was mortgaged, and for what. As soon as that was settled, there was no difficulty in applying the doctrine, Once a mortgage always a mortgage. That case does not appear to assist your lordships to decide the present controversy one way or the other. In *Noakes* v. *Rice*, if the decision had been the other way, and the contract had been upheld, the public-house, which was free when mortgaged, would have been tied to the mort-

gagee when redeemed. In *Browne* v. *Ryan* the mortgagee, who was an auctioneer, had stipulated for the right to sell the mortgaged property within twelve months after redemption, and whether the mortgagor desired to sell or not. In *Noakes* v. *Rice* this House approved that decision, although I expressed my doubts about its correctness. It goes further than any other case that I know of. I have searched in vain for any similar case in which the Court of Chancery restrained a common law action. But treating *Browne* v. *Ryan* as having been properly decided, the difference between that case and this is apparent, for the mortgagee there sought damages for the breach of a contract depriving the mortgagor of his property, even after its redemption by him. In *Santley* v. *Wilde* the Court of Appeal held that upon the true construction of the contract the property mortgaged, which was a theatre held for a short term of years, was made a security—first, for money borrowed and interest; and secondly, for the performance of an agreement entitling the mortgagee to a share of profits earned by the mortgagor during the lease, even although the loan might have been repaid with interest. The Court of Appeal, over which I then presided, considered that the security for both of these was valid. In *Noakes* v. *Rice* two of your lordships thought this decision wrong, and so did the Court of Appeal in Ireland in *Browne* v. *Ryan*. The error in the decision in *Santley* v. *Wilde*, in the view of those who think it wrong, was that the property mortgaged was burdened with more than the loan made upon it, and that redemption was impossible. That is not so in the case now before your lordships, as I have endeavoured to show. *Santley* v. *Wilde* was a difficult case, and it may have been wrongly decided, although I do not think it was. Be this as it may, I do not understand that the legal principles laid down in it have been condemned by this House as unsound. I say this after carefully considering the observations made on that case by the noble lords who decided *Noakes* v. *Rice*.

It remains to consider the second ground—namely, that clause 4 is part of the mortgage transaction, and must cease with it, or, in other words, that it infringes the last part of the rule. Once a mortgage always a mortgage, and nothing but a mortgage. When the usury laws were in force, and every device for evading them had to be defeated, the above language was convenient and as free from objection as most concise statements are; for every stipulation in a mortgage in favour of a mortgagee, and conferring pecuniary benefits on him, in addition to repayment of his principal moneys and lawful interest and costs, was open to the objection that it was a cloak for usury. But now that the usury laws are abolished such language is much too wide. *Biggs* v. *Hoddinott*, which was approved by this House in *Noakes* v. *Rice*, shows it to be so.

Laying aside the usury laws, and all rules to prevent their evasion, and laying also aside all considerations of fraud, undue influence, oppression, and illegality on other grounds, I am not aware of any authority which invalidates a contract between a mortgagor and mortgagee, unless it affects or purports to affect the property mortgaged, or the right to redeem it. Any contract which does that has always been held invalid in equity, and must now be treated as invalid by all courts. The restoration of the mortgaged property to the mortgagor on performance of the obligation to secure which it was mortgaged, is the grand object which courts of equity have always steadily kept in view and insisted on, all agreements to the contrary notwithstanding. The wasting away of leasehold or other property does not affect the principle, but only modifies its application. I hope that nothing which ever has fallen from me, or which may fall from me now, will cast any doubt on this matter. But beyond that I am not prepared to go. I cannot bring myself to believe that it is part of the law of this country that mortgagors and mortgagees cannot make what bargains they like with each other so long as such bargains are not inconsistent with the right of the mortgagor to redeem the property mortgaged by discharging the debt or obligation to secure which the mortgage was effected. I have given my reasons already for holding that this principle is not infringed in this case.

Upon the merits therefore, my opinion is that Bigham, J., and the Court of Appeal were right in giving judgment for the plaintiff.

There remains, thirdly, the point of form. The judgment as drawn up is against the two defendants jointly; but they were sued on different contracts, and in strictness the judgment should have been drawn on accordingly—that is, there should have been two judgments for the same sum—one against each defendant, but so worded as to prevent the plaintiff from being paid his damages twice over; for it is plain that the jury did not intend to give the plaintiff two sums of £750. The form of the judgment was not alluded to before Bigham, J., nor before the Court of Appeal. If your lordships agree with me, it will not be necessary to disturb the form of the order, for, although technically irregular, it does no injustice to any of the parties. Neither is it necessary to notice the irregularity, as the judgment is to be reversed as to both defendants. But if your lordships had allowed the appeal as to William Bradley's mortgage, but had affirmed the judgment as to James Bradley, I submit to your lordships that the proper course would have been to reverse the judgment so far it affects William Bradley, and leave it standing as a separate judgment as against James Bradley.

In my opinion, however, the appeal should simply be dismissed with costs.

*Appeal allowed.*

Solicitors for appellants, *Merriman, White & Thomson.*

Solicitors for respondent, *W. A. Crump & Son.*

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## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) And Chan. Div. (Byrne, J.) — June 30; July 22.

*In re* ALLSOPP & SONS (LIMITED). (*a.*)

*Company—Capital—Reduction—Dissentient stockholders—Sanction of court—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 11—*Companies Act,* 1877 (40 & 41 *Vict. c.* 26).

*A scheme for reduction of capital is not necessarily unfair or inequitable because it involves the alteration of rights of voting and priority, as between the different classes of stockholders.*

*Judgment of* Byrne, J., *reversed.*

This was a petition to confirm a reduction of capital that had been duly resolved on by all the

(*a.*) Reported by W. W. RENSHAW, Esq., Barrister-at-Law.

different classes of stockholders of Samuel Allsopp & Sons (Limited).

The capital of the company at the time of the petition amounted to £3,300,000, divided into £1,100,000 6 per cent. cumulative preference stock with preference also as to capital but with no voting power; £1,100,000 7 per cent. non-cumulative preferred ordinary stock, having preference over the deferred ordinary stock as to capital, but having no voting power; £1,100,000 deferred ordinary stock, with all the voting power.

Resolutions had been duly passed by all the different classes of stockholders, by which it was proposed to reduce the capital to the sum of £1,870,000, divided into £1,100,000 6 per cent cumulative preference stock, £550,000 preferred ordinary stock, and £220,000 deferred ordinary stock, by writing off capital lost or unrepresented by available assets to the extent of 10s. in the £ of the preferred ordinary stock, and 16s. in the £ of deferred ordinary stock.

It was also proposed (1) that in the event of the reduction taking place the 6 per cent. preference stockholders should give up entirely £99,900 part of £198,000 this being three years' arrears of cumulative interest due to them on the 30th of June, 1903, and should accept it in lieu of payment of the remaining £99 000 income funded certificates bearing interest at 4 per cent.

(2) that the remainder of the preferred and deferred ordinary stocks should be consolidated, thus forming £77,000 new ordinary stock;

(3) that the 6 per cent. preference stockholders should have seven votes for every £100 stock, and that the new ordinary stockholders should have ten votes for every £100 stock, thus giving to the preference stockholders one half of the voting power of the company and the remaining half to the new ordinary stockholders.

The scheme was opposed by Dr. Alexander, who was one of the preferred ordinary stockholders, and there were also other dissentient preference ordinary stockholders who did not appear.

*Levett, K.C., A. R. Kirby,* and *W. W. Renshaw* supported the petition.—There has been loss of capital to the amount it is proposed to write off, the scheme is not unfair or unreasonable, and has been passed by the majority of shareholders.

*Bassett Hopkins,* for Dr. Alexander.—The loss has not been proved. The scheme is, *ultra vires,* unnecessary, also unfair and inequitable.

June 30.—BYRNE, J.—I am satisfied on the evidence that there has been the loss of capital sought to be established, taking into consideration the loss fairly to be attributed to diminished value of goodwill as being at least £100,000. It is true that I have not accepted one item, accepted by the parties as lost to the amount of something over £90,000, which was brought in as an item of lost capital, but I have accepted the evidence of diminution of goodwill to the extent of £100,000 not before brought into the account as having been proved. It now becomes my duty to say whether or not, looking at the whole scheme proposed, and bearing in mind that the necessary majorities in each class of stockholders have been obtained, the scheme is fair and reasonable in face of the opposition put forward on behalf of the preferred ordinary stockholders. In regard to this matter I think I ought to look at it fairly all round, to remember that it is not necessary to preserve every item of extreme right put forward by individuals, and to look at the matter as a commercial and business transaction, while at the same time regarding with jealousy interference as between classes and as between bodies of individuals having respectable, tangible interests with their legal status and position. I think the right way to consider this matter is, first, to see what are the rights and prospects of the various classes of existing stockholders while the company is a going concern and in the event of a winding up; and, secondly, to compare the position of the preferred ordinary stockholders, in the event of the proposed scheme being carried out, with that which they now hold, because apparently none of the preference stockholders or deferred ordinary stockholders oppose. [The learned judge then reviewed in detail the positions of the different classes of stockholders (1) in the present circumstances of the company, (2) in the case of a winding up, and (3) if the proposed scheme were carried out saying as regards the preferred ordinary stockholders.] Having regard to the loss of capital, they have to face this—that at all events for a series of years they cannot expect to receive, while the company is a going concern, any substantial payment (in fact for some years any payment at all) in respect of their holdings by way of profit. On the other hand, should the company be wound up, they would get back intact one half of their capital, that is to say, they would get back £770,000, subject to some considerable allowance which probably has to be made in case of a forced realization; but whatever it was, they would get all of what was left after satisfying the capital of the 6 per cent. preference stock. Now, what is their position after this comes into operation? While the company is a going concern they will have acquired a greater probability of a comparatively early payment on account of dividend, but they are giving up in respect of that dividend while the company is a going concern two-sevenths of what they would be otherwise entitled to, that is to say, they are giving up to the holders of the deferred ordinary stock £220,000 worth of stock which, if there were dividends earned in the particular year to answer it, would all go to them. But they are giving up a great deal more than that in the event of a winding up, because they are giving up their right to share in the division of the assets in a winding up in the same proportion, that is to say, they give up two-sevenths of what would otherwise be coming to them. And the learned judge continued: You cannot treat it on such broad lines as to say that unless the court saw something which looked like a downright robbery it was not to interfere. The thing is to consider fairly: Is it just and equitable to every class of shareholder? Looking at this matter with a benevolent leaning to assist the general views of the company as expressed in their resolutions, I still cannot help coming to the conclusion that this scheme is not fair and equitable so far as regards the interests of the preferred ordinary stockholders, and, therefore, it not being before me now as to putting any terms or suggesting any modifications, although I have accepted the evidence as to the capital having been lost, I do not think that I ought to confirm a reduction of capital having the results which I have pointed out.

The company appealed.

By the leave of the Court of Appeal the appeal was treated as an interlocutory appeal, and entered in the interlocutory list.

*Haldane, K.C., Levett, K.C., A. R. Kirby,* and *W. W. Renshaw,* for the appellant.

*Bassett Hopkins,* for the respondent.

VAUGHAN WILLIAMS, L.J., in giving judgment, said that nobody could doubt that there had been a loss of capital to the extent alleged and that a reduction of capital was desirable, and the question for the

court to decide was whether the proposed scheme was unfair or inequitable.

The persons at the present time who had the largest interest in the welfare of the company were undoubtedly the 6 per cent. preference stockholders; therefore it was only fair that they should have a voice in the management of the company, which under the proposed scheme they would get by obtaining a voting power equal to that of the remainder of the stockholders. As regards the deferred ordinary stockholders the circumstances of the case rendered it inadvisable to wipe them out entirely, besides which they at the present time had absolute control over the affairs of the company, therefore it was necessary to adopt a scheme to which they could be persuaded to consent even though it took away some of the privileges of the preferred ordinary stockholders. But, taking all the circumstances of the case into consideration, and looking at the matter from a business point of view, and having, regard also to the large majorities by which the scheme was passed at the various meetings, including those of the preferred ordinary stockholders themselves at their own separate meetings, he came to the conclusion that the scheme would not work unfairly or inequitable on anybody.

ROMER and STIRLING, L.JJ., concurred.

*Appeal allowed.*

Solicitors, *Travers, Smith, Robinson, & Co.; Chaves & Chaves.*

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From County Palatine of Lancaster. (Vaughan Williams, Romer, and Stirling, L.JJ.) — June 13, 15; July 14.

FORMBY *v.* BARKER. (*a.*)

*Restrictive covenant—Covenant running with the land—No land retained by covenantee—Breach after death of covenantee—Right of executor to sue.*

*Where a negative or restrictive covenant is imposed upon the user of land it will not be enforced against an owner not a party to the deed containing the covenant, if such covenant is merely personal and collateral to a conveyance of land.*

*In 1868 F sold to X., a land company, all his land situate at a certain place. X. covenanted for themselves, their successors and assigns, with F., his heirs, executors, and administrators, that they would not build a beershop on a certain portion of the land sold. F. died in 1884, and X. conveyed the portion of land to which the restrictive covenant applied, with notice of that covenant, to B. In 1902 B. commenced to build in defiance of the covenant.*

*Held, in an action brought by the sole devisee and administratrix, with the will annexed of F., to restrain B. from building, that no such action could be maintained.*

Tulk *v.* Moxhay, 2 *Ph.* 774, *considered.*

Appeal from a decision of Hall, V.C., of the County Palatine of Lancaster.

The facts were as follows:

By a deed of 1868 Roger Hesketh Formby, the owner of certain land at Formby, in the county of Lancaster, conveyed that land to the Mutual Land Co., their successors and assigns, in fee simple. The deed contained a covenant, which ran as follows: "And the said company do hereby for themselves, their successors and assigns, covenant with the said Roger Hesketh Formby, his heirs, executors, and administrators, that . . . they shall not nor will erect, build, or make on the land coloured pink . . . any beerhouse or shop or any hotel of less annual value than £50."

The deed comprised the whole of the land belonging to R. H. Formby in the neighbourhood.

The deed was not in fact executed by the company, but by virtue of the deed they entered into possession of the said land.

R. H. Formby died in 1884.

In 1902 the defendant, who had purchased the land coloured pink from the company with notice of the restrictive covenant, threatened to build two shops on the land. They were not beershops or beerhouses, but shops wholly unconnected with beer.

The plaintiff, who was the sole beneficiary under the will of R. H. Formby, brought an action in her individual capacity and also as administratrix with the will annexed of R. H. Formby, to restrain the defendant from erecting any shop on the land.

Hall, V.C., held (1) that the erection of a shop not a beershop was not a breach of the covenant; (2) that the plaintiff could not maintain the action in any case, breach or no breach.

The plaintiff appealed.

*Neville, K.C.*, and *F. M. Preston*, for the appellant.—It not being contrary to public policy, it would be unjust to allow a purchaser of land with knowledge of restrictive covenants to back out of them. When a man has been paid for not doing certain acts, it is only fair that he should refrain from doing those acts. The legal personal representative of the covenantee stands in the same position as the covenantee. He is entitled to sue when the act has taken place after the death of the covenantee, if damage is shown.

They cited the following cases: *Renals* v. *Cowlishaw*, 26 W. R. 754, 9 Ch. D. 125; *Haywood* v. *Brunswick Permanent Benefit Building Society*, 30 W. R. 299, 8 Q. B. D. 403; *Western* v. *MacDermott*, 15 W. R. 265, L. R. 2 Ch. App. 72; *Leech* v. *Schweder*, 22 W. R. 633, L. R. 9 Ch. App. 463; *Stokes* v. *Russell*, 3 T. R. 678; *Doherty* v. *Allman*, 26 W. R. 513, 3 App. Cas. 709; and *Lloyd* v. *London, Chatham, and Dover Railway Co.*, 13 W. R. 698, 2 De G. J. & S. 568.

*Astbury, K.C.*, and *W. Dixon MacConkey*, for the respondent.—This is a restrictive covenant in gross, and the legal personal representative of a covenantee, who parted with all his land at the time the covenant was made, cannot bring such an action as this.

*Cur. adv. vult.*

VAUGHAN WILLIAMS, L.J., stated the facts and continued: The first question which has to be decided is whether the building of such a shop would be a breach of the covenant. That depends upon the construction of the covenant. The covenant is ambiguous, but I think one ought to read "shop" as meaning beershop. This view really puts an end to the plaintiff's case, but as another defence was raised and is discussed by the learned Vice-Chancellor, I think it right to deal with that point also. The learned Vice-Chancellor expressed his opinion that even if the plaintiff's construction of the covenant was right and there had been a breach of the covenant, nevertheless the plaintiff was not entitled to sue either as the personal representative of Roger Formby or as residuary devisee under the will of Roger Formby. I agree with the conclusions of the Vice-Chancellor as to there being nothing in the point made by the defendant on the non-execution by the company other than this, that there is no legal covenant. I have no doubt but that the Mutual Land Co. took the estates conveyed subject to the condition contained in the covenant, and I have no doubt but that Formby, during his life, could have enforced that condition

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

and I am inclined to think even by an action for damages. I wish before dealing with the question of the plaintiff's right to sue to point out that that which Roger Formby conveyed was his whole estate, and that he had no contiguous estate which could be benefited by the covenant in question. I wish further to point out that there is in the deed no re-entry clause under which the vendor could go in as of his old estate or indeed as of any estate. In my judgment this covenant is a personal covenant, but I do not think that, having regard to the opinions of the judges delivered in the House of Lords in *Beckham* v. *Drake*, 2 H. L. Cas. 579, the right of action which would have been vested in Roger Formby on a breach in his lifetime is of such a character that a breach after his death would not give a right of action to his personal representative against the covenantors, the Mutual Land Co. The maxim *actio personalis moritur cum persona* has no application to any breaches of contract except those which constitute a mere personal wrong, and, with the exception of actions for breaches which constitute a mere personal wrong, all rights of action for breaches of contract pass to the executors. In an action for breach of covenant or condition proof of damage is not essential, and, in my judgment, there has been, if the plaintiff's construction of the covenant is right, a plain breach in this case, which breach is not a mere personal wrong. But this still leaves the difficulty that the defendant is not a party to the deed, and that there is plainly no covenant running with land on which the defendant could be sued at law. It becomes necessary, therefore, to see if an action for an injunction can be brought upon the principle established by Lord Cottenham's judgment in *Tulk* v. *Moxhay*, 2 Ph. 774. Now, in the marginal note in that case it is said: "A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law." But when the Lord Chancellor begins his judgment he says: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it that the latter shall either use or abstain from using the land purchased in a particular way is what I never knew disputed." These words do not cover the present case, because the land company did not purchase a part of the vendor's land but the whole of it. It becomes necessary, therefore, to consider whether the principle of *Tulk* v. *Moxhay* applies to a case when the vendor sells his whole estate. I have not been able to find any case in which, after the sale of the whole of an estate in land, the benefit of a restrictive covenant has been enforced by injunction against an assignee of the purchaser at the instance of a plaintiff having no land retained by the vendor, although there are cases in which restrictive covenants seem to have been enforced at the instance of plaintiffs other than the vendor for the benefit of whose land it appears, from the terms of the covenant or can be inferred from surrounding circumstances, the covenant was intended to operate. In all other cases the restrictive covenant would seem to be a mere personal covenant collateral to the conveyance.

This is a covenant which cannot run with the land either at law or in equity, and therefore the burden of the covenant cannot be enforced against an assignee of the purchaser. But it is said that the doctrine of *Tulk* v. *Moxhay* is independent of the question whether there is in law or in equity a covenant running with the land, and that doctrine is based upon obligations resting on the conscience of persons taking an estate with notice of a restrictive covenant binding it. The answer, I think, is to be found in a passage in the judgment of Collins, L.J., in *Rogers* v. *Hosegood*, 48 W. R. 659, [1900] 2 Ch. 388. He says: "These authorities establish the proposition that when the benefit has been once clearly annexed to one piece of land it passes by assignment of that land, and may be said to run with it in contemplation as well of equity as of law without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser's conscience is not affected by notice of covenants which were part of the original bargain, but were merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion." It seems to me that in the passage I have just cited the Master of the Rolls assumes that the doctrine of *Tulk* v. *Moxhay* will not apply to a contract which is merely personal and collateral. In my judgment, the covenant in the present case is merely personal and collateral. It has not been entered into for the benefit of any land of the vendor or of any land designated in the conveyance. It is a covenant which, in my judgment, would not pass to the heir of the vendor, notwithstanding the words of the covenant are "covenant with the said Roger Hesketh Formby, his heirs, executors, and administrators." There is no land designated to which the word "heirs" can be applied. Roger Formby could have sued the purchasers for breaches in his lifetime, and I think that his executrix could have sued the purchasers for breaches after the death of Roger Formby, but I do not think that the executrix can sue the assignee of the purchasers. There is no contractual privity and no relation of "dominancy" and "serviency" of lands which will enable an action to be brought against a person not a party to the original contract. Nor do I think that the benefit of this covenant could be dealt with by a devise.

There is a passage in the judgment of Sir George Jessel in *London and South-Western Railway* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 562, which runs as follows: "The doctrine in *Tulk* v. *Moxhay*, rightly considered, appears to me to be either an extension in equity of the doctrine in *Spencer's case* to another line of cases, or else an extension in equity of the doctrine of negative easements, such, for instance, as a right to the access of light which prevents the owner of the servient tenement from building so as to obstruct the light." Again he says, "This is an equitable doctrine establishing an exception to the rules of common law, which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement." I think that in both these paragraphs Sir George Jessel, whether describing the doctrine of *Tulk* v. *Moxhay* as an extension of *Spencer's case*, 1 Smith L. C. 55, or of the equitable doctrine of negative easements, regards it as something arising from the relation of two estates one to the other.

I have only to add that I do not think that either the passage in the judgment of Knight-Bruce, L.J., in *De Mattos* v. *Gibson*, 7 W. R. 152, 403, 514, 4 De G. & J. 276, nor the statement of the law by Lord Cairns in *Doherty* v. *Allman* in any way militates against the conclusion at which I have arrived, that

when a negative or restrictive covenant is imposed upon user of land it will not be enforced against an owner not a party to the deed containing the covenant if such covenant is merely personal and collateral to a conveyance of land.

If it is said that the statement of Knight-Bruce, L.J., which runs thus: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver and seller. This rule, applicable alike in general as I conceive to moveable and immoveable property, and recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no room for any exception in the instance before us," negatives the above conclusion because it shows that the doctrine of *Tulk* v. *Moxhay* applies to personal as well as real property. I answer, first, that the basis of the statement by Knight-Bruce, L.J., is rather the principle of *Lumley* v. *Wagner*, 1 De G. M. & G. 604, than that of *Tulk* v. *Moxhay*, and, secondly, that it is plain that the Lord Justice would not have thought that an injunction ought to have been granted if the plaintiff had assigned the charter-party, nor unless the plaintiff had sustained material damage. And as to what Lord Cairns says in *Doherty* v. *Allman* it only shows that proof of damage is not necessary for the granting of an injunction in a case in which the parties to a contract for valuable consideration, with their eyes open, contract that a particular thing shall not be done. I think for the reasons which I have given the decision of the Vice-Chancellor was right on both points and I think this appeal should be dismissed with costs.

ROMER, L.J.—I agree that we ought not in this case to differ from the view taken by the Vice-Chancellor as to the true construction of the covenant in question. I also agree in thinking that in this case, even if there had been a breach of the covenant, the executors of the covenantee are not entitled to an injunction. If restrictive covenants are entered into with a covenantee, and in respect of or concerning any ascertainable property belonging to the covenantee or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is to say, as one obtained by him for some personal purpose or object. It appears to me that it is not legally permissible for him to assign the benefit of such a covenant to any person or persons he may choose, so as to place the assign or assigns in his position, with power again for them to assign, and so on indefinitely. Clearly at law such a right or power of assigning does not exist, and in equity up to the present time no such right has been recognized. To admit a right to obtain an injunction in such a case in any assign would be extend the principle recognized in *Tulk* v. *Moxhay*, far beyond what is, in my opinion, justifiable. And for the purposes of the present case the executors can only be regarded, and can only be entitled (if at all) to any relief, in the capacity of assigns of the covenant, for the alleged breach of the covenant relied on took place after the death of the covenantee. I think, therefore, that on this ground also the appeal fails.

STIRLING, L.J.—By a deed of the 27th of July, 1868, Roger Hesketh Formby, upon a sale by him of certain real estate, conveyed that estate to the purchaser subject to restrictive covenants expressed to be entered into by the purchaser with him, his heirs, executors, and administrators. At the date of this deed Roger Hesketh Formby was not entitled to any land, freehold, copyhold, or leasehold, other than that which was thereby conveyed. Consequently he was not at that date, nor (if it be material) did he subsequently become, entitled to any land for the protection or benefit of which the restrictive covenants were or could be intended. The plaintiff is his executrix and universal legatee.

In point of fact the deed of 1868 was not executed by the purchaser, and consequently there was no covenant as between vendor and purchaser which could be enforced at law; but with reference to the question whether the obligation intended to be imposed on the purchaser can be enforced in equity this is immaterial; and it seems to me best to consider what the rights of the plaintiff could have been if such a covenant had in fact existed.

She might have brought an action at law; but I have difficulty in seeing that she could have recovered more than nominal damages. However, if substantial damages could be recovered, it would seem to be the duty of the executrix to resort to that remedy, for thus only could the personal estate, which it is her duty to protect, be benefited. I think that in the absence of special circumstances not found in the present case damages would not only be an adequate but the most appropriate remedy.

This being so, I do not think that a court of equity ought to interfere in her favour by way of injunction. If it did, I do not see why the like relief should be denied to any duly constituted legal personal representative of Roger Hesketh Formby at any time, however remote, assuming always that matters remained as they were at the date of his death. This seems to me to amount to a *reductio ad absurdum* of the plaintiff's claim.

To avoid misconception I wish to add that different considerations would apply if the action had been brought by Roger Hesketh Formby in his lifetime.

*Appeal dismissed.*

Solicitors, *Pritchard, Englefield, & Co.*, for *Simpson North, & Co.*, Liverpool; *Chester & Co.*, for *Alfred Stephenson*, Liverpool.

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From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — May 20.

COATES v. MOORE. (a.)

*Bill of sale—Registration—Omissions in copy—Signature of grantor and attesting witness—Affidavit—Form—Covenant to replace worn-out articles—Term for maintenance of security—Bills of Sale Act*, 1878 (41 & 42 *Vict.* c. 31), s. 10, *sub-section* 2—*Bills of Sale Act*, 1882 (45 & 46 *Vict.* c. 33), s. 9, *schedule—Practice—Court of Appeal—Jurisdiction—Appeal from Liverpool Court of Passage—Application for new trial of interpleader issue—Liverpool Court of Passage Act*, 1893 (56 & 57 *Vict.* c. 37), s. 10.

*The copy of a bill of sale filed on registration in pursuance of section* 10, *sub-section* 2, *of the Bills of Sale Act*, 1878, *omitted the signature of the grantor and the signature, address, and description of the attesting*

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

*witness. The affidavit filed with the copy stated that the bill of sale was duly executed by the grantor, and that the execution thereof was witnessed by the attesting witness, and gave the name, address, and description of the attesting witness.*

*Held* (*affirming* Thomas *v.* Roberts, [1893] 1 *Q. B.* 657, 46 *W. R. Dig.* 19), *that the bill of sale was not rendered invalid by the omissions in the filed copy, as they might be supplied by reference to the affidavit.*

*A bill of sale contained a covenant by the grantor that he would not, without the consent of the grantee, assign or underlet any of the chattels thereby assigned, or remove them except for necessary repairs, and would replace such of them as should be worn out by other articles of equal value.*

*Held* (*following* Seed *v.* Bradley, 42 *W. R.* 257, [1894] 1 *Q. B.* 319), *that this covenant was merely for the maintenance of the security, and did not constitute a deviation from the form in the schedule to the Bills of Sale Act*, 1882.

*The Court of Appeal has jurisdiction to entertain an application for a new trial of an interpleader issue tried in the Liverpool Court of Passage.*

Application by the defendant for judgment or a new trial in an interpleader issue tried before the judge of the Liverpool Court of Passage with a jury.

The question to be determined in the issue was whether a bill of sale, under which the plaintiff claimed certain goods which had been taken in execution upon a judgment recovered by the defendant against one Joseph Taggart was valid or not.

By the bill of sale Joseph Taggart as mortgagor assigned to the plaintiff as mortgagee the chattels and things specifically described in the schedule thereto, and also all chattels and things which might at any time during the continuance of the security be substituted for them or any of them, to hold by way of security for repayment of an advance of £50. The bill of sale contained a covenant by the mortgagor that he would not during the continuance of the security, without the written consent of the mortgagee, assign or underlet the said chattels and things expressed to be thereby assigned, or any of them, or remove the same or any of them except for necessary repairs, and would replace such of them as should be worn out by other articles of value equal to the present value of the articles worn out, so as at all times to keep up the total value of the chattels and things comprised in the security to the present value.

The bill of sale was duly executed by the grantor, and attested by a witness, the witness's address and description being added after his name in accordance with the form contained in the schedule to the Bills of Sale Act, 1882. But the copy of the bill of sale filed on registration in pursuance of section 10, sub-section 2, of the Bills of Sale Act, 1878, omitted the signature of the grantor, and the signature, address, and description of the attesting witness. The affidavit filed with the copy of the bill of sale was in correct form, and stated, among the other requisite particulars, that the bill of sale was duly executed by the grantor, and that the execution thereof was witnessed by the attesting witness, and gave the name, address, and description of the attesting witness.

It was contended on the part of the defendant that the bill of sale was invalid—first, because no true copy of its attestation was filed on registration; secondly, because it purported to assign future property.

At the trial the jury returned a verdict for the plaintiff, and the learned judge held that the bill of sale was good.

The defendant appealed.

*J. H. Pugh* (*J. W. Ross Brown* with him), for the plaintiff, took a preliminary objection.—There is no appeal from a judgment of the Court of Passage in an interpleader issue. By section 68 of the Liverpool Court of Passage Procedure Act, 1853, the judgment of the court in any interpleader proceedings shall be final and conclusive. See also section 17 of the Common Law Procedure Act, 1860. Section 45 of the Liverpool Court of Passage Procedure Act, 1853, provides that by the leave of the judge "on the trial of any issue" an application to set aside the verdict or judgment may be made to one of the superior courts at Westminster. And section 10 of the Liverpool Court of Passage Act, 1893, provides that "an appeal shall be allowed upon the trial of any issue in the Court of Passage in every case where an appeal would be allowed on a trial at *nisi prius* and subject to the same rules, regulations, and provisions." But neither of the two last-mentioned sections apply to interpleader issues. Even if section 10 of the Act of 1893 applies to interpleader issues at all, the right of appeal is only given subject to the rules. And by ord. 57, r. 11, the judgment in an interpleader issue shall be final and conclusive unless by special leave of the judge or of the Court of Appeal. Here no such leave has been obtained.

*F. A. Greer*, for the defendant.—Section 10 of the Liverpool Court of Passage Act, 1893, clearly allows an appeal in the case of an interpleader issue. *Robinson* v. *Tucker*, 32 W. R. 697, 14 Q. B. D. 371, shows that neither section 17 of the Common Law Procedure Act, 1860, nor ord. 57, r. 11, prevents an application for a new trial of an interpleader issue.

THE COURT overruled the preliminary objection.

*F. A. Greer*, for the defendant.—This bill of sale is bad on two grounds. Firstly, section 10, sub-section 2, of the Bills of Sale Act, 1878, requires that, on registration of a bill of sale, a true copy of the bill of sale and of every attestation of the execution of the bill of sale, together with an affidavit of the execution and attestation, shall be filed with the registrar. Section 8 says that if any bill of sale is not so registered, it shall be void. In this case there is no copy of the attestation. From a reading of the copy of the bill which was filed it would appear that the bill was never executed at all and never attested at all. Such an omission cannot be cured by the affidavit that the bill was executed and attested: see *Parsons* v. *Brand*, 38 W. R. 388, 25 Q. B. D. 110. In *Thomas* v. *Roberts*, [1894] 1 Q. B. 657, 46 W. R. Dig. 19, a Divisional Court held that the omission of the date of the execution from the copy of the bill of sale might be cured by the affidavit. But the affidavit cannot be looked at to supply the name of the grantor and the name of the attesting witness. Secondly, the assignment of substituted chattels invalidates this bill of sale: *Thomas* v. *Kelly*, 37 W. R. 353, 13 App. Cas. 506. This is not such a mere proviso for substituting goods for goods that are worn out as was held in *Seed* v. *Bradley*, 42 W. R. 257, [1894] 1 Q. B. 319, to be a covenant for maintenance of the security. Here the mortgagor is not to assign without consent. That implies that he may assign with consent. Such a provision goes further than is necessary for the maintenance of the security.

*J. H. Pugh* and *J. W. Ross Brown*, for the plaintiff, were not called upon.

COLLINS, M.R.—In my opinion both the objections which have been taken to this bill of sale fail. The first objection is that in the copy of the bill of sale which had to be filed on registration the places for the signature of the grantor and for the signature, address, and description of the attesting witness are

left in blank. It is contended that this is a failure to comply with the requirements of the Act. Practically the same point was taken in *Thomas* v. *Roberts*, and was overruled. There the date of the bill of sale was omitted in the copy, though it appeared in the original bill of sale and also in the affidavit. In this case, as in that, the matters omitted in the copy are contained in the original bill of sale and in the affidavit. I can see no distinction with regard to this point between the date of a bill of sale and the name of the grantor or the attesting witness. In either case I think the omission can be supplied by reference to the affidavit.

The second objection is that the bill of sale embraces after-acquired property. In *Seed* v. *Bradley* the grantor of a bill of sale covenanted that, so long as any money should remain owing on the security of the bill of sale, he would not remove any of the chattels without the previous consent of the grantee, except for necessary repairs, and would replace any articles damaged or worn out with others of equal value to be included in the security. It was held that such a covenant might be inserted in the bill of sale as being for "the maintenance of the security," and therefore did not constitute a deviation from the form in the schedule to the Bills of Sale Act, 1882. That seems to me to cover this case. I think that what is contemplated in this bill of sale is merely the substitution of chattels for the maintenance of the security.

STIRLING and MATHEW, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the plaintiff, *Ledgard, Street, & Co.*, for *Cecil B. Taylor*, Liverpool.

Solicitors for the defendant, *Sharpe, Parker, & Co.*, for *Richardson & Marsh*, Liverpool.

## High Court of Justice.

Chan. Div. Farwell, J. — May 4.

*In re* METCALF.
METCALF *v.* BLENCOWE. (*a.*)

*Administration — Annuities — Insufficient income — Direction in will for payment out of* corpus*—Abatement—Hotchpot—Distribution.*

*A testator charged his estate with the payment of annuities to certain persons for life, with remainders over to other persons, and directed that if the income derived from his estate was insufficient to pay the annuities in full, money should be raised for the purpose on mortgage of his real estate. It was ascertained some time after the testator's death that the income was insufficient, and money was consequently raised as directed.*

*Held, on distribution, that the annuitants in possession who had received sums of money out of the* corpus *were not liable to bring these sums into hotchpot.*

Potts *v.* Smith, 17 *W. R.* 1083, *L. R.* 8 *Eq.* 683, *followed.*

By his will, made in November, 1880, the testator, who died in 1881, gave an annuity of £400 to his widow as a first charge on his income and capital. He also gave an annuity of £150 to his son Henry and of £450 to Hannah Southgate for her life with remainder to her four children for their lives.

Power was given to the trustees, in case the income was insufficient, to raise the annuities by mortgage of the real estate.

All the annuities were paid in full up to October, 1886, partly out of money raised for the purpose by mortgage of the real estate.

Nothing was paid to the son and Mrs. Southgate after that date.

The widow died in January, 1903, her annuity having been paid in full up to that date, the deficiency being made up out of capital.

Testator's son died on the 29th of August, 1891, and Mrs. Southgate on the 21st of September, 1900.

The matter now came before the court on petition by the legal personal representatives of the son and Mrs. Southgate, asking for distribution of the funds in court.

*Butcher, K.C.*, and *Vaisey*, for the petitioners, referred to the following cases: *Wilkins* v. *Rotherham*, 33 W. R 42, 27 Ch. D. 703; *Heath* v. *Nugent*, 29 Beav. 226, 10 W. R. Ch. Dig. 2; *Allen* v. *Sinclair*, 45 W. R. 596, [1897] 1 Ch. 921; *Carr* v. *Ingleby*, 1 De G. & Sm. 362; and *Potts* v. *Smith*, 17 W. R. 1083, L. R. 8 Eq. 683.

*Upjohn, K.C.*, and *Watson*, for annuitants, referred to *Todd* v. *Bielby*, 27 Beav. 353, 9 W. R. Ch. Dig. 3; and *In re Rees*, 29 W. R. 301, 17 Ch. D. 701.

*Wheeler*, for reversionary annuitants, argued that the sums which had been paid out should be brought into hotchpot: *Innes* v. *Mitchell*, 1 Phillips, 710, at p. 716.

*Dickinson*, for trustees.

FARWELL, J.—This petition raises some very curious points. The testator made his will in November, 1880. His widow had what I may call a right of enjoyment in a certain house and the grounds around it, and she also had a life interest in the residuary real and personal estate subject to certain annuities. She had a paramount annuity of £400 a year. The fund now in court, and to which the petition relates, and of which it asks the distribution, represents the proceeds of sale of real estate in which the widow had a life interest, and on which the annuities were not charged until after her death, except subject to her prior interest. This fund is now to be distributed. The annuities in question are an annuity of £150 to the son Henry and of £450 to Hannah. These two were immediate annuities in possession, taking effect on the testator's death. After the death of Hannah the annuity of £450 given to her is divided amongst her children. The annuities to Hannah and Henry have not been paid in full after a certain date. Henry died on the 29th of August, 1891, and Hannah on the 21st of September, 1900.

On the 9th of August, 1883, an order was made directing a mortgage of the real estate under a power in the will, to which I will refer presently, for the purpose of raising moneys part of which were ordered to be applied in discharging the arrears of the annuities in possession.

The question now raised is whether the annuitants in possession ought to bring into hotchpot sums which they have received; or ought the division to be in accordance with the declaration in *Potts* v. *Smith* as distinguished from the subsequent directions, which purported to follow *Todd* v. *Bielby*.

I am of opinion that the real decision of James, V.C., is expressed in the declaration in *Potts* v. *Smith*. I cannot account for the subsequent additions and directions for bringing into hotchpot which appear in the order in that case, because they seem to

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

me to be inconsistent with the words of the Vice-Chancellor.

The view taken by Lord Romilly which was followed by James, V.C., appears to me to be that you take the value of the annuity according to the events which have happened when the deficiency is ascertained at some period after the death of the testator; you reckon the values according to the events that have happened and you only value what is necessary to be valued—namely, the interest *in futuro* of such of the annuitants as may still be living. To bring into hotchpot all that has been paid in the past would be certainly a novel application of the principles of any of the cases that I have seen. If the testator's estate is proved to be insolvent at his death, so that no distribution can take effect at all, the court cuts the knot by treating everyone as having an interest which is immediately assessable in value and valuing a reversionary interest as much as an interest in possession because it is going to distribute the estate and in order to arrive at such distribution it must in some way or other arrive at the values of the reversionary interests as well as interests in possession. When you have immediate distribution you must have at once immediate assessment of values, or else you cannot distribute. But that is really a rule of the court, and to some extent defeats the object of the testator, who did not intend a person to whom he has given on the death of A. an annuity of £100 to receive £500 down on his own death, before the death of A.

The court has to do the best it can under circumstances which the testator did not contemplate. But where the estate is only ascertained to be of insufficient value at some period after the death of the testator, and the distribution has gone on for such a period, then in none of the cases to which I have been referred has there been any bringing into hotchpot of the sums which have been paid. In the case before me it appears to me that it would be unjust to do so. Bringing into hotchpot is only a rule of the court for the purpose of equally dividing the subject-matter of a gift amongst the objects to whom that gift is made. If that subject-matter is in fact given to A. for life and after his death B., the income which accrues to A. during his own life is something with which B. has nothing whatever to do. So far, therefore, as regards these annuitants in possession paid out of income in the past, it appears to me that on no principle of equity would it be right to make them bring that into hotchpot.

Then it is said this particular sum represents *corpus* and the annuitants in possession under the order of the court in 1883 have had sums paid to them which were raised out of *corpus* under the power of mortgaging.

But on the construction of this particular will I hold that the direction given by the testator for raising by mortgage out of *corpus* negatives any idea of bringing into hotchpot the sums which have been paid to the annuitants in possession. I think the result must be that the minutes as drawn must stand.

Solicitors for trustees, *Tamplin, Tayler, & Joseph.*

Solicitors for reversionary annuitants, *Ikin & Crowther.*

Solicitors for other annuitants, *Stileman & Neate; Ernest Bevir.*

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Chan. Div. Buckley, J. — March 4, 5, 10.

*In re* LONDON AND GLOBE FINANCE CORPORATION (LIMITED). (*a.*)

*Company—Winding up—Director—Prosecution—Payment of costs out of assets — Discretion of court — Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 167.

*In considering whether leave ought to be given to institute criminal proceedings against the director of a company which is being wound up, and whether the costs of the prosecution should be paid out of the assets, the court will consider what course a good citizen, if placed in the position of the company, would feel it his duty to adopt.*

*The various matters which may be taken into consideration by the court, in order to enable it to arrive at a conclusion in such a case, considered.*

On the 30th of October, 1901, an order was made for the compulsory winding up of the London and Globe Finance Corporation.

It was resolved by the statutory meetings of creditors and shareholders that the official receiver should be liquidator of the company, with a committee of inspection of eight members, five of whom were nominated by creditors and three by shareholders.

In the course of the public examinations, of Mr. Whitaker Wright and other directors and officials of the company, a state of affairs was disclosed which caused the official receiver, at the instance of the committee of inspection, to request the public prosecutor to take the requisite steps to institute criminal proceedings against Mr. Whitaker Wright for his alleged misconduct as managing director. The public prosecutor, acting on the advice of the law officers of the Crown, refused to institute a prosecution.

In order to enable a prosecution to be commenced funds to the amount of £1,250 were subscribed.

On the 20th of January, 1903, one of the members of the committee of inspection took out a summons for an order directing the official receiver to institute and carry on criminal proceedings against Mr. Whitaker Wright at the expense of the company's assets.

An offer was made to bring at least £1,250 into court towards meeting the expenses of the prosecution.

At a meeting of the committee of inspection, held on the 13th of February, 1903, four members were present, and unanimously desired a prosecution at the expense of the assets; of the other members of the committee who were not then present one would have voted with the four who were present, one was unable to say what course he would have adopted, one was abroad or inaccessible, and the last (who was alleged to be in business relations with Mr. Whitaker Wright) stated that he would have voted against a prosecution.

Out of creditors whose claims to the total amount of about £1,665,000 were admitted, creditors to the amount of about £650 000 desired a prosecution, others to the amount of £100,000 remained neutral, and one creditor for about £175,000 actively opposed a prosecution.

The admitted claims had been paid a dividend of 1s. in the pound, and it was expected that about another shilling in the pound would be paid. The estimated expenses of the prosecution would, it was stated, amount to about £5,000, and of this £3,750,

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

equal to a dividend of about a half-penny in the pound on admitted claims, would fall upon the assets.

Counsel for the summons asked that it might be heard *in camerâ*, but Buckley, J., declined to adopt this course.

*Avory, K.C.*, and *Clavell Salter*, for the summons.

*Astbury, K.C.*, and *T. L. Wilkinson*, for the creditor opposing the prosecution.

*Rufus Isaacs, K.C.*, and *G. F. Hart*, for the official receiver.

BUCKLEY, J., after stating that he had come to the conclusion that a *primâ facie* case had been made out against Mr. Whitaker Wright, proceeded to consider the principles upon which the power given by section 167 of the Companies Act, 1862, to direct the official receiver to conduct a prosecution at the expense of the assets should be exercised. A criminal prosecution ought not to be conducted by anyone with a view to personal profit, neither should it be instituted from motives of vengeance; the true motive of a prosecution should be a desire to punish the guilty party for the proper enforcement of the law and as a deterrent to others.

The true principle by which he should be guided is the consideration of the course which would be adopted by an honest and upright man who desired to do his duty to the State as a good citizen. If in any case such a man would feel it his duty to conduct a prosecution at his own expense and to his own loss, then in that case the court ought to direct a prosecution. Further, the court could, and in a proper case ought to, direct a prosecution without the assent and even notwithstanding the dissent of the class or many of the class at whose expense the prosecution would be instituted, for the section provided that the court might act "of its own motion."

There were other considerations to which due weight should be given, though in a less degree, among them being, first, the proportion of the class affected who respectively approved and disapproved of the institution of a prosecution, and secondly, the consideration whether the expense of a prosecution would bear hardly upon the creditors. There was nothing in this case to outweigh the wishes of the majority of the creditors who desired a prosecution, nor, under the circumstances of the case, ought an order to be refused because it would bear hardly upon the creditors.

In conclusion the official receiver was directed to institute and conduct against Mr. Whitaker Wright such proceedings as he might be advised, and an order was made for the payment of costs of the prosecution out of the company's assets so far as funds might be required in aid of the £1,250 or other larger sum to be brought into court.

Solicitors, *Simmons & Simmons; A. J. Greenop & Co.; Michael Abrahams, Sons, & Co.*

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Chan. Div.
Swinfen Eady, J. } June 17.

*In re* DIXON.
DIXON *v.* CHARLESWORTH. (*a*)

*Will—Absolute gift—Gift over on death "without a will and childless"—Repugnancy.*

*A testator, after an absolute gift of his residuary, real, and personal estate among his children equally, provided that in case any of his said children should die "without a will and childless," the share of the child or children so dying should go over to the surviving children.*

*Held, that the words "without a will and childless" were repugnant to the absolute estate previously given, and the gift consequently did not take effect.*

A testator who died on the 6th of December, 1876, devised and bequeathed his residuary real and personal estate to his daughter Anne, his son Robert, and his niece Elizabeth upon trust for his wife for life, and after her decease upon trust for his children in equal shares, the shares of the daughters to be free from the control of their husbands, and to be inalienable otherwise than by will.

The will also provided that if any of the testator's children should die "without a will and childless," the share of such child or children should fall back into the residuary trust estate for equal division among the survivors.

The testator's wife died on the 11th of October, 1882.

The testator had six children, two of whom (Anne and Florence) were spinsters; one (Julia) died a spinster in 1899, having appointed Florence her executrix; Mary was a widow; Marjorie was married, and her husband was alive, and a son Robert.

The questions to be determined were whether the shares were now payable, and whether the gift over took effect.

*Edward Ford*, for the trustees.

*William Baker*, for Robert, Mary, and Florence.—The gift over was void for repugnancy.

*Gulliver* v. *Vaux*, 8 De G. M. & G. 167, and *Holmes* v. *Godson*, 4 W. R. 415, 8 De G. M & G. 162.

*George Henderson*, for Marjorie, argued that the gift over was valid.

SWINFEN EADY, J., said that according to the true construction of this will there was a gift to all the testator's children who should survive him. The daughter's shares were to be free from the control of their husbands and to be held for their separate use without power of anticipation. The words "If any die without a will" were repugnant to the previous gift, and the fact that the words "and childless" were added made no difference. Had the words "and childless" stood alone, the gift might have been good, but joined to the previous words they were repugnant to the absolute estate previously given. The shares were all now payable, other than that of the married daughter, whose husband was living. The share of the unmarried daughter who was dead went to her legal personal representative.

Solicitors, *H. S. Harris & Co.*, for *S. H. Bell*, West Hartlepool; *Worthington Evan, Bird & Co.*, for *T. Jones & Burrell*, Durham.

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K. B. Div.
(Bigham, J.) } June 30.

HAMBRO & SON *v.* BURNAND AND OTHERS. (*a*)

*Principal and agent—Underwriter—Scope of authority—"For and on behalf" of principal—Contract for agent's sole interest—Liability of principal—Guarantee policy.*

*Where an agent who is authorized to make contracts "for and on behalf of" his principals, makes a contract*

(*a*.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

(*a*.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

*purporting on the face of it to be on behalf of the principal's, which in fact is for his own interest and not for his principal's, such contract is not, apart from holding out or ratification, binding upon the principals.*

Action tried in the Commercial Court.

This was an action to recover a sum alleged to be due from the defendants under a guarantee policy, whereby the defendants undertook to pay the plaintiffs the amount of certain drafts drawn by Gaze & Sons and accepted by the plaintiffs, in the event of Gaze & Sons not putting the acceptors in funds, at or before maturity, to meet the drafts.

The facts and the arguments sufficiently appear in the judgment.

*Asquith, K.C., Scrutton, K.C.*, and *Mackinnon*, for the plaintiffs.

*Rufus Isaacs, K.C., J. A. Hamilton, K.C.*, and *Read*, for the defendant Read.

*Montague Lush, K.C.*, and *Loehnis*, for the defendant Draffen.

*Bray, K.C.*, and *Ashton*, for the defendant Mordan.

*Maurice Hill*, for the defendant Elwell,

*E. M. Pollock*, for the defendant Burnand.

*Cur. ad. vult.*

June 30.—BIGHAM, J., read the following judgment: This action is brought on what is called a guarantee policy, dated the 1st of October, 1902, subscribed by the defendant Burnand in his own name and in the names of the other four defendants. The whole of the document is in print, with the exception of the dates, the signatures, and the amounts placed against the signatures. It is addressed to the plaintiffs, Messrs. C. J. Hambro & Son, and is in the following words: "To Messrs. C. J. Hambro & Son. In consideration of your accepting at our request the drafts of Henry Gaze & Sons (hereinafter called the drawers) to such an amount as you may think proper, such drafts to be drawn and accepted within one year from the 4th of June, 1902, and in consideration of the premium of £1 per cent. paid to us by the drawers on the execution hereof (the receipt whereof we hereby acknowledge), we, the underwriters, agree that if the drawers do not at or before maturity of any such drafts put you in funds to meet the same, we will, within thirty days of receipt of notice from you of such default on the part of the drawers, pay to you in cash the amount of such drafts and will further indemnify and hold you harmless against all moneys, loss, costs, charges, and expenses which you may have to pay or to which you may be put by reason of your having accepted such drafts, or by reason of any claims made by any company or person in respect of the transactions above mentioned, provided that our liability hereunder shall not exceed the amount of our respective subscriptions hereto, with interest thereon at the rate of 5 per cent. per annum from the time of payment being demanded." The policy is then subscribed with the names of the five defendants, the names of the last four being subscribed in the handwriting of Burnand by procuration. On the 9th of October, 1902, the plaintiffs accepted a draft of Gaze & Sons (Limited), at ninety days' sight, for £1,000. The bill fell due on the 10th of January, 1903, and Gaze & Sons made default in finding money to meet it. Thereupon the plaintiffs claimed under the policy sued on to be paid by each of the five defendants his proportion—viz., £200 of the amount. The substantial question in the case is as to the liability of the four defendants, Draffen, Read, Mordan, and Elwell, to make good this claim; and it is with reference to their liability that I propose first to deal. I shall refer to Burnand's position later on. The first of the four defendants, Colonel Draffen, became a member of Lloyd's in the year 1885. He never personally did any business there, but occasionally he visited the room for the purpose of seeing his friend Burnand. The defendant Read is Burnand's father-in-law. He was for a long time connected with the railway business, but is now retired. He became a member of Lloyd's in 1891, but, like Draffen, he never personally did any business there. The defendant Mordan has been a member for Lloyd's for many years, and is well acquainted with the business done there; for some time he was in Burnand's office learning the business. The fourth defendant, Mr. Elwell, was at one time a merchant at Birmingham; he is now retired. He became a member of Lloyd's in 1887, but, like Draffen and Read, never personally did business there. The object which all these four defendants had in view in becoming members of Lloyd's was to underwrite risks there; and in order to carry out their object they employed the defendant Burnand, also a member of Lloyd's, to do the business for them. Membership is a condition imposed by the committee of Lloyd's on persons desiring to carry on the business of underwriting in the room. The terms of Burnand's employment were in each case reduced to writing. In Draffen's case the document states that Burnand "agrees to open and carry on at Lloyd's an underwriting account for and in the name of Draffen . . . but Burnand shall not underwrite any risks for Draffen to a greater extent than he, Burnand, shall underwrite for himself." Burnand was to receive half the profits by way of salary, but he was not to be considered a partner. There are other provisions in the agreement as to the books to be kept by Burnand and as to the auditing and rendering of accounts. In Read's case the agreement recites that Read, having been admitted a member of Lloyd's, is desirous of carrying on the business of an underwriter there and of appointing Burnand to conduct such business on his behalf. The agreement then provides that Burnand "shall act as the agent of Read for the purpose of underwriting policies of insurance at Lloyd's and carrying on the ordinary business of an underwriter at Lloyd's in the name and on behalf of Read, in accordance with the usual custom of Lloyd's." Burnand's remuneration was to be £200 a year. The other provisions of the agreement, though not in the same words, are similar to those in Draffen's agreement. In Mordan's case the agreement recites that Mordan has for some time been carrying on the business of an underwriter at Lloyds, and it then provides that Burnand "shall act as the agent of Mordan for the purpose of underwriting policies of insurance at Lloyd's and carrying on the ordinary business of an underwriter at Lloyd's." Burnand was to have the sole management of the underwriting, and was to receive £250 a year and 20 per cent. of the net profits as remuneration for his services. The other provisions are substantially the same as in Draffen's and Read's cases. In the case of Elwell, the agreement recites that Elwell is desirous of carrying on the business of an underwriter at Lloyd's and of appointing Burnand to conduct such business on his behalf, and it then provides that "Burnand shall act as the agent of Elwell for the purpose of underwriting policies of insurance at Lloyd's and carrying on the ordinary business of an underwriter at Lloyd's in the name and on behalf of the said Elwell, in accordance with the usual custom of Lloyd's." Burnand's remuneration is to be £260 a year and 20 per cent. of the net profits. The further provisions are in effect the same as in the other three cases. I have set out the terms of the four agreements because it is possible that different considerations might arise with respect

to each case; but for my own part I think the four agreements are substantially the same in their effect; each amounts to an authority to Burnand to carry on an underwriting account at Lloyd's for and on behalf and in the name of the principal. For some years Burnand, acting for the defendants under the authority conferred by these documents, underwrote risks of different kinds at Lloyd's and rendered accounts to the defendants showing the profits and losses resulting therefrom. It was not until the year 1900 that the transactions began out of which the present dispute arises. It appears that at the end of 1899 a representative of Messrs. Barings mentioned to the plaintiffs (who carry on a banking business) that they, Barings, were engaged in financing a firm of Gaze & Sons. Gaze & Sons were at this time tourist agents engaged in a business similar to that carried on by the well-known firm of Messrs Cook & Sons. The financing consisted of accepting Gaze's drafts and taking by way of security what Barings described as "Lloyd's policies"; and it was suggested by Barings that the plaintiffs might think it worth their while to undertake a part of the business. The plaintiffs listened to this suggestion. They were satisfied with the introduction of the business by Barings, and they made little or no inquiry as to the stability of Gaze & Sons. As a result of this introduction Gaze & Sons put themselves into communication with the plaintiffs. This was at the end of 1899, and an arrangement was then made between Gaze & Sons and the plaintiffs that the latter should accept Gaze & Sons' drafts at three months, which Gaze & Sons should get discounted. The proceeds were to be used by Gaze & Sons for the purposes of their business. As the bills fell due Gaze & Sons were to furnish the plaintiffs with the necessary funds for retiring them. It was part of the bargain that Gaze & Sons should obtain and hand to the plaintiffs "Lloyd's policies," guaranteeing that Gaze & Sons should provide the necessary funds at the required time. The commission to be paid by Gaze & Sons to the plaintiffs for the accommodation was fixed at ½ per cent. on the amount of each acceptance. The first policy handed by Gaze & Sons to the plaintiffs was in the form now sued on, but it was for £3,000. It was dated the 1st of January, 1900, and was subscribed by the defendant Burnand in his own name and in the names of three of the other defendants—viz., Draffen, Read, and Elwell—for £250 each. It was also subscribed by a number of other underwriters for small sums, which made up an aggregate further amount of £2,000. In order to illustrate how the business was done I may read two letters of the 29th and 30th of December, 1899:

"London, Dec. 29, 1899.

"Dear Sirs,—We are delivering to you on Monday the form of guarantee agreed upon last Friday, underwritten by Messrs. Faber and Burnand and Angove for a total amount of £3,000, and are instructing our Paris agent to send you on Monday next a draft for £500, which please accept in accordance with our arrangement.

"We trust this will be all in order.

"We are, yours faithfully,

"HENRY GAZE & SON (LIMITED) S. Stamford Parry, per H. O. B.

"Messrs. C. J. Hambro & Son, 70, Old Broad-street, London, E.C."

"70, Old Broad-street, E.C., Dec. 30, 1899.

"Messrs. Gaze & Sons (Limited), 142, Strand, W.C.

"Dear Sirs,—We are in receipt of your letter of yesterday and note the contents thereof.

"If the names of the underwriters are known to us and satisfactory (which we do not doubt) everything will be in order.

"We remain, dear Sirs, yours faithfully,

"C. J. HAMBRO & SON."

Faber, Burnand, and Angove were the agents of the smaller underwriters, who had underwritten the first policy for £2,000. Soon after this policy was handed over, bills to the amount of £2,000 were drawn by Gaze & Son on the plaintiffs, and were accepted. Subsequently further policies were handed to the plaintiffs to secure additional bills, until, by November, 1900, the amount afloat of the plaintiffs' acceptances to Gaze & Sons' drafts reached as much as £14,500. It was noticed by the plaintiffs that the later policies—viz. those after June, 1901—brought to them by Gaze & Sons, were subscribed only by Burnand and his names; the other underwriters whose names appeared on the first policy for two-thirds of the amount no longer being parties. When the plaintiffs observed this they insisted on Gaze & Sons procuring what are called "solvency policies"—that is to say, policies guaranteeing the solvency of the underwriters. These Gaze & Sons accordingly took out with the Royal Exchange Insurance Company and handed to the plaintiffs. Thus the plaintiffs had a triple security for their advances: they had the liability of Gaze & Sons, the guarantee of Burnand and his names, and a warranty by third parties of the solvency of Burnand and his names. After the total amount of the advances had reached £14,500 the bills began to run off. By some means or other, probably by borrowing money elsewhere, Gaze & Sons found means to reduce the amount of their obligations to the plaintiffs, so that by the end of 1901 the bills afloat only amounted to £7,500. These bills were renewed from time to time during 1902, and the last of the series of renewals are now all in the hands of the plaintiffs who have had to take them up out of their own moneys by reason of Gaze & Sons' default. At no time during the period over which this business extended—that is to say, 1900, 1901, 1902—did the plaintiffs see Mr. Burnand. The business between the plaintiffs and Gaze & Sons seems to have been conducted, so far as Gaze & Sons were concerned, by a Mr. Parry, the managing director of the company, and by nobody else. But it now appears that during nearly all this time Burnand was a director of Gaze & Sons. He joined the board in August, 1900; and not only was he a director, but he was personally engaged in financial dealings with that company. Before the end of 1900 the plaintiffs became aware of the fact that Burnand was a director of Gaze & Sons, but they knew no more than that fact would convey to them. The company was never, in my opinion, solvent—that is to say, it never held real assets representing its nominal capital and its liabilities. It was not solvent when the first advances were obtained from the plaintiffs; its position after that date became rapidly worse; and it is now being wound up and has practically no assets. It was very much to Burnand's personal interest to keep Gaze & Sons going; for, having regard to the accounts which I have seen, the stoppage of Gaze & Sons at any time would have meant the stoppage of Burnand, or at all events would have caused him serious inconvenience. Burnand did not go into the witness-box during the trial before me, nor was Mr. Parry called by either side; but I have no doubt whatever that Burnand knew at all times what the financial position of Gaze & Sons was, and that in underwriting the Gaze policies (including the policies sued on) he was acting for himself and in furtherance of his own interests, and not for or in the interests of the four defendants with whose case I am now dealing. His conduct

makes this abundantly clear. Transactions similar to those with the plaintiffs were carried out with other financial houses so that by the end of 1902 the amount owing by Gaze & Sons to different creditors reached the large total of £110,000, the whole being bolstered up by policies such as that now sued on. Thus Burnand has purported to bind each of the four defendants to an amount of upwards of £20,000 on one risk—namely, the solvency of Gaze & Sons. He never obtained any premium for the policies. Gaze & Sons never paid a farthing for them, although each policy contains the statement that Gaze & Sons have paid 1 per cent. premium. Indeed Gaze & Sons' cashier stated in the witness-box that his instructions were to pay no premiums because none were due. Burnand never entered the policies in his business books, where in the ordinary course they should have appeared. He never introduced them into any of the accounts which he rendered to the defendants. At times during the three years over which the transactions extended Gaze & Sons made default in providing money to take up their draft, whereupon the holders of the corresponding policies wrote to the defendants demanding payment. These letters were addressed to the defendants at Lloyd's, the only address then known to the writers. Burnand intercepted the letters and destroyed them, and managed out of his own means, or out of Gaze & Sons', to find the required money, and so to quiet the bankers for the time being. On one occasion, in April, 1902, Mordan received information from a banker which led him to fear that his name was on policies guaranteeing Gaze & Sons. He accordingly went to Gaze & Sons, office to ascertain if it was true. He saw one of the clerks, who said he would inquire and let him know. Later in the day Lawrance, the cashier, under the instructions of Parry, wrote the following letter:—"68, Old Bailey, London, E.C., 24th April, 1902. Dear Sir,—Referring to your call here this afternoon, I beg to say that I have communicated to our chairman the object of your visit, and he wishes me to inform you that your information is quite inaccurate, and, should you deem it necessary to see him, he will be glad to keep any appointment at Gaze's office during to-morrow afternoon.—I am, dear Sir, yours faithfully, T. B. LAWRENCE.—P. C. Mordan, Esq." According to Lawrence's evidence both he and Parry well knew that the letter was untrue. I cannot doubt that Burnand knew of this letter and approved of its being sent. Mordan's answer was as follows:—"Private and confidential Sanfils, Reigate, 25th of April, 1902. Mr. T. B. Lawrence. Dear Sir,—In reply to your letter of yesterday's date, the information I have received was private and confidential, and I have still no reason to doubt its accuracy. Now you are aware that no one is authorised to sign guarantee insurance policies in my name, and that any claims arising thereon would be immediately repudiated. I have nothing more to say. Yours faithfully, PERCY C. MORDAN." At the end of 1902 the present plaintiffs issued a writ against all the five defendants in respect of a default made by Gaze & Sons in providing money for an earlier bill than the bill mentioned in the present action. Burnand instructed a firm of solicitors to appear to this writ. The four defendants never heard of it. Judgment was signed, and when attempts were made to serve bankruptcy notices on them personally in 1903 the defendants became aware for the first time that they had been sued. Some of them (it may be all of them) paid that claim in the vain hope that there were no more. Shortly afterwards the writ in the present action was issued (the 16th of February, 1903). These facts confirm the view I take—namely, that Burnard was issuing the policies for his own purposes, and not for or on behalf of the other four defendants. It was contended on the plaintiffs' behalf in this connection that the earlier policies issued in 1900 were at all events honestly subscribed by Burnand on behalf of the four names, and that the policy sued on, though dated in 1902, was merely a renewal of one of these earlier policies and could not, therefore, be regarded as a policy issued for Burnand's sole benefit. I do not, however, take this view. In my opinion the business was Burnand's, and only Burnand's, from beginning to end. The case, therefore, stands thus. Burnand held the written authorities already referred to. The plaintiffs never saw them or asked to see them or knew of their existence. Burnand issued the policy sued on for his own purposes, and not for or on behalf of the other four defendants. The plaintiffs took it without inquiry, relying solely on the representation on its face. The question is, are the four defendants liable? The first point taken on their behalf was that the underwriting of documents such as that sued on was not business which came within the meaning of the authorities at all. It was said that it was not insurance, and therefore not within the authority; and further it was said that it was not business ordinarily transacted at Lloyd's. Perhaps in a strict sense it would be right to say that the contract sued on is not a contract of insurance; it is not a contract of indemnity against loss; it is an undertaking to pay a sum of money to the holder if someone else fails to find it at the proper time; a loss is not a necessary condition to the liability. But I do not place this narrow construction on the authority given by the defendants to Burnand. I think the authority extends to cover all business ordinarily done at Lloyd's. The words are "underwriting policies of insurance at Lloyd's and carrying on the ordinary business of an underwriter there." Many witnesses were called before me from Lloyd's to speak as to the kinds of business done there, and their evidence satisfies me that the underwriting of policies such as the one sued on forms part of that business. It is, of course, not nearly so common as the underwriting of marine risks, but it is nevertheless part of the ordinary business, and indeed one of the defendants (Elwell) in terms said he understood it to be so. The next point was that, even if the authorities given to Burnand warranted the signing of documents such as this, yet, as this policy was not signed for or on behalf of the four defendants, but for Burnand's benefit only, it did not bind them. It was said that such a contract was outside the authority which he held. There are only three ways in which a man can be bound by a contract made by one who purports to act as his agent in making it. First, he will be bound if the agent had in fact his authority to make the contract on his behalf; secondly, he will be bound if, though the agent had in fact no such authority, he has held out the agent as having such authority and has thereby induced the other party to enter into the contract; and, thirdly, he will become bound if, the contract having been entered into in his name but without his authority, he subsequently ratifies the agent's act. With the second of these three I am not concerned, for the plaintiffs' counsel disclaimed any intention of relying on a holding out, and I think he was right in doing so. There clearly was no holding out. Before the making of the contract sued on the plaintiffs never were in communication either with the defendants or with Burnand, nor did they know of the existence of the written authorities which the defendants had given to Burnand. Both the defendants and Burnand were strangers to them, and remained so to the end of the business. When the policies were handed by Gaze &

Sons to the plaintiffs the only representation made to the plaintiffs was that Burnand had authority to sign for the defendants. This representation was made by Burnand on the face of the policies and in no other way, and apparently the plaintiffs were satisfied; they made no enquiries and took the risk of the representation being true or false. In such circumstances it seems to me that as against the four defendants it is impossible to set up an estoppel by reason of a holding out. It appears to me that it is impossible to treat the representation which Burnand made when he signed the policies *per procuration* as the representation of the other defendants. It was untrue, untrue to his knowledge; and, in my opinion, an agent to make contracts on behalf of another has no power by his own unauthorized falsehood to create an estoppel against his principal so as in effect to entirely alter the scope of the authority. Estoppel can only arise out of the conduct of the man against whom it is set up. A case of ratification was attempted to be set up on behalf of the plaintiffs, but it was confined to two of the defendants—namely, Draffen and Mordan; it was admitted that it could not be relied on for the purpose of fixing either Read or Elwell with liability. With regard to Draffen and Mordan, the acts which are said to amount to a ratification were, in my opinion, not even evidence of a ratification. I need not detail what they were. It is enough to say that they had no reference to the policy sued on. At the time the acts were done these two defendants were in ignorance of the existence of this policy. They had never heard of it. To constitute a valid ratification of the unauthorized acts of an agent "there must be full knowledge of what those acts were or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts whatever they were." See *Marsh* v. *Joseph*, 45 W. R. 209, [1897] 1 Ch. 213, at p. 246. In the present case there was nothing in the facts which would justify me in drawing an inference of the kind mentioned; and as to knowledge I have said that at the time of the alleged acts of ratification the defendants knew nothing about the policy sued on. Holding out and ratification being thus disposed of, it only remains for me to consider whether Burnand had in fact authority to bind, and did bind, his principals by the contract which he purported to make on their behalf. This question presents, to my mind, some difficulty. The plaintiffs contend that Burnand was in fact the general agent of the other four defendants to make contracts of the kind sued on, and that, having purported to make such a contract on their behalf, the defendants are bound. On the other hand, the defendants say that the only authority which Burnand had was to make contracts for their benefit and on their behalf, and that, this contract not having been made for their benefit or on their behalf, but for Burnand's benefit only, they are not bound. In the absence of any holding out, I know of no means of deciding upon these contentions except by a reference to the documents under which alone Burnand's authority existed. These documents all declare that he is authorized to underwrite policies "in the name and on behalf of" the principals; nothing else. Does such a mandate authorize the making of a contract which is to enure only to the benefit of the agent? For my part, I think it does not. The mandate authorizes the making of contracts for and on behalf of the principals. It does not authorize the making of contracts for and on behalf of the agent. No doubt there are many cases in which a general agent to make contracts of a certain kind has been held to bind his principal by a contract of that kind, though made for his own purposes. But all such cases proceed upon the doctrine of estoppel by holding out. They are cases in which the other contracting party has been induced to enter into the contract by a representation made to him by the principal that the agent's acts were authorized. I can find no case where the extent of the authority of a general agent not held out as such has been measured by anything outside or beyond the actual terms in which the agency is created. Sometimes, in order to ascertain whether the principal is liable, the question is asked whether what the agent has done is within "the scope" of his employment. It is in my opinion a loose and unsatisfactory test of the liability; but, applying it in this case, I am satisfied that what Burnand did was not within the scope of his employment. It was to his own knowledge wholly without its scope. Nor is the case one of negligent or of tortious conduct in carrying out the agency entrusted to him. If it were, some liability might fall on the defendants. The making of the contract sued on was a wilful act, not done in carrying out the agency at all, but done wholly outside it. In my view Burnand had no more right to sign this policy on the defendant's behalf than he had to forge their signatures to it. Again, it is sometimes said that where one or two innocent parties must suffer from fraud of a third person, he who has enabled the third party to commit the wrong ought to bear the loss. I do not think this test is applicable to the present case, where the only question is one of authority. But even if it were applicable, it would, in my opinion, be wrong to say that the defendants had in fact enabled Burnand to commit the fraud All they had done was to authorize him to underwrite risks for them; and the giving of such authority afforded him no additional facility for committing frauds. Then again, it is said that even if the plaintiffs had asked to see the authorities, and had read them, they had no means of ascertaining whether the policies were issued for the benefit of the principals or not. That may be true. But my answer is that a man is not to be held liable because it has been difficult or even impossible to ascertain whether he was liable or not If a person contracts with an agent it is for him to see as best he can that the agent is acting within his authority. If the authority exists by reason of a holding out, then the person making the contract must take care that the agent does nothing which the holding out does not warrant; if the authority does not arise from a holding out, then care must be taken to see that what is being done is within the terms of the actual authority. It is often difficult or inconvenient or impolitic to make inquiries about an agent's authority, but that circumstance does not make the principal liable where he is otherwise not liable. The other contracting party takes the risk, and though now and then it turns out that the risk is serious and real, the event is not of sufficient frequency to interfere with business. The view then that I take of this case is that the plaintiffs are not entitled to rely on any authority except such as is to be found in the documents; that the authority to be there found is limited to the making of policies "for" the defendants; that the policy sued on was not made "for" the defendants, and that therefore they are not bound by it. In shorter words, I think it is the plaintiffs whom Burnand cheated and not the defendants, and that the loss must lie where it has fallen. The law is, I think accurately stated in Story's Law of Agency, s. 133, at p. 149 of the ninth edition. Several cases were cited in the course of the argument, and I think it is better that I should notice them. On behalf of the plaintiffs the case of *Summers* v. *Solomon*, 5 W. R. 660, 7 E. & B. 879, was relied on. It is a case which shows that a general

agent may pledge his principal's credit though he does it only for his own benefit. But when examined it will be found that it was a case of holding out. The court found as a fact that the principal had made a continuing representation that goods bought by the agent on a representation by him that they were required for the principal's business would be paid for by the principal. The judgment proceeded on this ground. Then an expression of Lord Davey's in *Keighley* v. *Durrant*, [1901] A. C. 240, at p. 256, 49 W. R. Dig. 41, was mentioned: "Where the intention to contract on behalf of another is expressed in the contract, it passes from the region of speculation to that of fact and becomes irrevocable." This detached passage is, however, quite useless unless read with its context and with reference to the case then under consideration, and when so read it will be seen to have no bearing on the question which I am dealing with. A third case relied upon was *In re Tiedemann & Ledermann Frères*, [1899] 2 Q. B. 66, 47 W. R. Dig. 161. That case is not in point. I do not doubt that if the defendants had ascertained the existence of these policies, and had chosen to ratify them, they could have done so. For the purpose of ratification it is sufficient that the contracts on their face purport to be made on the defendants' behalf. But the question which I have to consider is not whether the defendants could have ratified, but whether the contracts bind them without ratification. Another case cited on behalf of the plaintiffs was *Thorne* v. *Heard*, 44 W. R. 155, [1895] A. C., 495. The question in that case was whether the respondents were "party or privy" to the fraud of one Searle within the meaning of section 8 of the Trustee Act, 1888, so as to debar them from taking advantage of the Statute of Limitations, and Lord Herschell, at p. 502, refers in general terms to the circumstances in which a principal may or may not be liable for the torts of his agent. He says: "It appears to me perfectly clear that in order to charge any person with a fraud which has not been personally committed by him the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal. If the person is doing something within the scope of his authority and purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal." This passage was cited as an authority for the proposition that it is sufficient, in order to make the principal responsible, that the agent should purport to do the act for the principal; and that it does not matter that, in fact, it is not done for the principal. I do not think the passage is really an authority for such a proposition. Lord Herschell was dealing with the responsibility of a principal for the torts of his agent; and, in using the disjunctive "or" in the last sentence, he certainly did not mean to say that by merely purporting to act for the principal he could make the principal responsible for a tort. Another case cited was *Montaignac* v. *Shitta*, 15 App. Cas. 357, 39 W. R. Dig. 178. But this case is of no real value for the purpose in hand. An examination of the facts will show that the agent was acting within his authority, although, perhaps, improvidently; there is no suggestion that he was acting for his own benefit. Moreover, as Lord Herschell says in his judgment, the only question under review was a question of fact. The authorities cited in support of the defendants' contention appear also to be inconclusive. No case in contract was referred to in which it is clearly laid down that a general agent has no authority to bind his principal by a contract of the kind authorized by the terms of the agency, but made for the agent's own purposes. But some cases in tort which are, perhaps, analogous were cited. In *The British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 35 W. R. 590, 18 Q. B. D. 714, it appeared that the defendant company had held out their secretary to the plaintiffs as a person to answer inquiries as to the validity of the defendant company's bonds. The plaintiffs accordingly made inquiries as to the validity of certain bonds which had been offered to them in pledge, and the secretary answered that they were validly issued; this statement was untrue to the secretary's knowledge, and was made by him for his own ends, and not in the interest of his employers. In an action of deceit the defendant company were held not liable. It was said that though the secretary must be taken to have had authority to answer questions of the kind put to him, he had not been held out as having authority to answer such questions when acting for his own ends and not for the benefit of his employers (see per Lord Esher, M.R., 18 Q. B. D., at p. 716). No doubt Bowen, L.J., and Fry, L.J., rely on the fact that the alleged estoppel could not bind the defendants, inasmuch as they were a corporation, but Lord Esher, M.R., puts the decision on the broader ground—namely, that the statement, having been made by the secretary to serve his own ends, could not bind his employers. Lord Selborne, in *Houldsworth* v. *City of Glasgow Bank*, 28 W.R. 677, 5 App. Cas. 317, at p. 326, says: "The master is liable for every such wrong of his servant or agent as is committed in the course of his service, and for the master's benefit" (per Willes, J., in *Barwick* v. *The English Joint Stock Banking Co.*, 15 W. R. 877, L. R. 2 Ex. 259), because although the master may not have authorized the particular act, "he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." To the principle so stated no exception can, in my opinion, be taken, though the manner in which the master is to be answerable, and the nature and extent of the remedies against him, may vary according to the nature and circumstances of particular cases. . . . It is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual; and the decisions in all these cases proceeded, not on the grounds of any imputation of vicarious fraud to the principal, but because (as it was well put by Willes, J., in *Barwick's case*), "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." And the opinion of Lord James of Hereford in *Whitechurch* v. *Cavanagh*, 50 W. R. 218, [1902] A. C. 117, at p. 134, was also read in support of the defendants' case. The rules laid down in these cases of tort may not be strictly applicable to a case of contract, but they appear to me to support the principle that an agent who is not in fact acting for his principal cannot bind him by merely purporting so to act. Since the argument my attention has been called to a passage in Story on Agency, which is to be found at p. 91 of the ninth edition (section 73). In support of this statement there is cited the American case of *North River Bank* v. *Aymar*, 3 Hill,

262. That case appears to be so much in point that I think I ought to refer to it in some detail. The facts are shortly stated in the head note. The terms of the authority are set out on p. 264 of the report. It will be noticed that both the principal and the agent took this document to the plaintiff bank and left it with the manager, the object, of course, being that the bank should act upon it. The case was tried before a jury and the judge directed the jury that as Jacob Fowler had exceeded his authority the plaintiffs could not recover. On appeal to a court of three judges, it was held by Cowen, J., in a judgment in which another judge (Bronson, J.) concurred, that the direction was wrong. The third judge (Chief Justice Nelson) dissented. The reasoning of Cowen, J., is to be found at p. 266. Now I think there is a mistake here. In my opinion the principal is not affected by the lie which the agent tells, unless there was something done by the principal or properly imputable to him which led the other contracting party to believe that he might rely on the statement. In the absence of such conduct on the part of the principal, I do not think the declarations of the agent are evidence against the principal. Nor do I think that the authorities which Cowen, J., cites in support of his proposition really bear it out. Many, if not all, of them will be found to turn upon estoppel by the conduct of the principal himself. The judgment of Nelson, C.J., appears to me in accordance with principle and with authority. Giving the whole case the best consideration I can, I feel myself bound to hold that the four defendants are not responsible on the policy sued on. I have now only to deal with the defendant Burnand. That he is liable in this action I have no doubt. It was said that the directors of Gaze & Sons had borrowed beyond the company's borrowing powers, and that therefore, the company were not legally compellable to pay the debt to the plaintiffs; and it was argued that, Gaze & Sons not being legally compellable to pay, Burnand could not be liable. I do not know whether it is true that the borrowing powers had been exceeded. But even if it is true, I do not think it matters. For a good consideration Burnand promised to pay if for any reason Gaze & Sons did not do so. Gaze and Sons did not pay. Therefore Burnand must do so. There will be judgment against Burnand for £250 and interest, with costs; and judgment for the other four defendants with costs, the plaintiffs to have costs against all the defendants of the issue as to whether the guarantee was Lloyd's business.

Solicitors for the plaintiffs, *Parker, Garrett, Holman, & Howden.*

Solicitors for the defendants, *Swann, Bradley, & Co.; Merriman Pike, & Merriman; Ward, Bowie, & Co.; R. A. Read, jun.; Church, Rendell, & Co.*, for *J. B. Clarke & Co.*, Birmingham.

## Privy Council.

[*From the Supreme Court of New South Wales.*]

Feb. 13.

WALKER *v.* WALKER. (*a.*)

*Practice—Appeal* in formâ pauperis—*Appeal to Privy Council without leave—New South Wales, Law of.*

*It is a rule of general, if not universal, application that the Judicial Committee of the Privy Council will not entertain a petition for leave to prosecute an appeal* in formâ pauperis, *where the court below has power to grant leave on the usual conditions, unless leave has been applied for within due time to the court from which it is proposed that the appeal should be brought.*

This was a petition for special leave to appeal and to prosecute the appeal *in formâ pauperis.*

The circumstances under which it arose are dealt with in their lordships' judgment.

*Beebee*, for the petitioner.

The judgment of their lordships (Lords MACNAGHTEN, SHAND, ROBERTSON, LINDLEY, and Sir ARTHUR WILSON) was delivered by

Lord MACNAGHTEN.—This petition was before their lordships on the 3rd of February. It was an application for special leave to appeal and to prosecute the appeal *in formâ pauperis.* It appeared that no application for leave to appeal had been made to the Supreme Court of New South Wales from which it was desired that an appeal should be brought. On that ground, apart from all other objections, it seemed to their lordships that the application was irregular.

The learned counsel for the petitioner referred their lordships to a case in New South Wales, *Ex parte the Commissioner for Railways* (20 N. S. W. Rep. Equity, 28), and stated that that case was understood in New South Wales to have laid down the rule that a litigant desiring to prosecute his appeal to his Majesty in Council *in formâ pauperis* ought to "apply direct to the Privy Council" without applying in the first instance to the Supreme Court for leave to appeal. Their lordships do not think that the judgment of Simpson, J., to which particular reference was made, is open to that construction. All that the learned judge seems to have meant was that the Supreme Court could not authorize an intending appellant to prosecute his appeal before his Majesty in Council *in formâ pauperis.*

It was also suggested that the practice of this committee had not been uniform, and the registrar informed their lordships that he could not say that there was no foundation for that suggestion.

As it is most important that the practice should be uniform, and the rule clearly laid down, their lordships directed that further inquiries should be made, and that in the meantime the petition should stand over.

The registrar has informed their lordships that during the last four years there have been ten applications for leave to prosecute an appeal *in formâ pauperis* bearing on the point under consideration, and that in one of those cases leave was granted, although it appeared from the petition that no application for leave to appeal had been made to the court below. The circumstances of that case were so peculiar as to justify a departure from the ordinary rule. With the exception of that case the practice on the point now in question seems to have been uniform, and certainly there was one case—an unreported case—from New South Wales (*Comber* v. *Hogg*, heard on the 27th of November, 1900) in which it appears from the shorthand notes that the application was refused expressly on the ground that no application for leave to appeal had been made to the Supreme Court.

Their lorships desire that it should be clearly understood, as a rule of general if not universal application, that this committee will not entertain a petition for leave to prosecute an appeal *in formâ pauperis*, where the court below has power to grant leave on the usual conditions, unless in the first instance an

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

application for leave to appeal has been made within due time to the court from which it is proposed that the appeal should be brought.

The order in the present case from which it was proposed to appeal was made on the 23rd of May, 1901. The time for applying to the Supreme Court for leave to appeal is the period of fourteen days only. When the prescribed period has expired without any application having been made for leave to appeal, the successful litigant is entitled to rely upon his decree and to feel assured that the litigation is at an end. The application for leave to appeal and to appeal *in formâ pauperis* was not lodged in the Privy Council Office until the expiration of more than eighteen months from the date of the order. In these circumstances the application, even if it were not irregular, would be absurd. But their lordships desire it to be understood that, in their opinion, this petition ought to be refused on the ground that no application for leave to appeal was made within due time to the Supreme Court in New South Wales.

Their lordships will accordingly humbly advise his Majesty to dismiss the petition, but that in accordance with the usual practice the Council office fees should be remitted.

Solicitors, *Hewlett, Birch-Reynardson, & Co.*

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## Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) June 10.

*In re* MACINTOSH, DIXON, & CO. (*a*.)

*Solicitor and client—Practice—Bill of costs—Order for taxation—Time limit—Extension of time—Jurisdiction of taxing officer—Solicitors Act,* 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*R. S. C.*, 1883, *ord.* 65, *r.* 27, *regulation* 57.

*The direction in an order of course for taxation of a bill delivered more than one month and less than twelve months, on the client's application, that "the said master is to make his certificate in a month, unless the said master shall think fit to extend the time to enable him to make his certificate, or this order is to be of no effect," is not a direction by the court or a judge which deprives the taxing officer of the jurisdiction given to him by regulation* 57 *of rule* 27 *of order* 65, *and consequently the taxing-master can grant an extension of time for the taxation on an application made after the expiration of the month limited by the order. Time limits, however, whether prescribed by section* 37 *of the Solicitors Act,* 1843, *or by the rules of the court, ought not to be lightly disregarded; and therefore such an extension of time should not be made as of course, but only if it appears to the taxing officer to be required by the justice of the case.*

This was an appeal from a decision of Byrne, J.

In December, 1902, an order of course was made for taxation of a solicitor's bill, which had been delivered in January, 1902. The order directed taxation in the ordinary form and concluded with these words: "But the said master is to make his certificate within a month (unless the said master shall extend the time to make his certificate) or this order is to be of no effect."

The order was not served upon the solicitor until after the expiration of the month.

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The master appointed a day for taxation. The solicitor attended on that day and took the objection that the month having expired there was no longer any jurisdiction to tax. The master held that there was jurisdiction.

The solicitor then moved before Byrne, J., to stay proceedings.

Byrne, J., held that the order for taxation was abortive, a month having elapsed before the service of the order, so that the taxing-master had no longer jurisdiction to tax. He accordingly stayed the proceedings.

The client appealed.

By regulation 57 of rule 27 of order 65 "The taxing-officer shall have power to limit or extend the time for any proceeding before him, and where by any general order, or any order of the court or a judge, a time is appointed for any proceeding before or by a taxing-officer, unless the court or judge shall otherwise direct, such officer shall have power from time to time to extend the time appointed upon such terms (if any) as the justice of the case may require, and although the application for the same is not made until after the expiration of the time appointed, it shall not be necessary to make a certificate or order for this purpose, unless required for any special purpose."

*Rowlands*, for the appellant.

*Adams*, for the respondent.

The following cases were cited in the course of the argument: *In re Webster*, 39 W. R. 535, [1891] 2 Ch. 102; *In re Taylor, Sons, & Tarbuck*, 42 W. R 329, [1894] 1 Ch. 503; *Whistler* v. *Hancock*, 26 W. R. 211, 3 Q. B. D. 83; *Wallis* v. *Hepburn*. 3 Q. B. D. 84*n*; *King* v. *Davenport*, 27 W. R. 798, 4 Q. B. D. 402; *Carter* v. *Stubbs*, 29 W. R. 132, 6 Q. B. D. 116; and *Collinson* v. *Jeffery*, 44 W. R. 311, [1896] 1 Ch. 644.

VAUGHAN WILLIAMS, L.J.—In my judgment the question which we have to decide in this case turns upon regulation 57 of rule 27 of order 65, but although in my opinion the decision must turn wholly upon the words of that regulation, I propose very shortly to point out how this question arises. Taxation of bills of costs is dealt with under section 37 of the Solicitors Act, 1843; that section regulates, among other things, the power of solicitors to bring actions to recover the amount of their bills of costs; they cannot bring any action until after the expiration of one month after the delivery of a bill of costs. The section then deals with the reference of those bills of costs for taxation. The second paragraph begins, "And upon the application of the party chargeable by such bill within such month it shall be lawful." Then there are words giving the court or judge power to tax such bills, and the paragraph concludes, "And the court or judge making such reference shall restrain such attorney or solicitor . . . from commencing any action or suit touching such demand pending such reference." The reason for the limitation of one month in such cases as the time within which the party chargeable is to be entitled as of course to this reference is no doubt that the statute contemplates that pending the reference the solicitor shall be debarred from enforcing his demand based on his bill of costs.

The next paragraph provides for cases in which the application is not made within the month. It says: "And in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid either upon the application of the attorney or solicitor . . . or upon the application of the

party chargeable by such bill with such directions and subject to such conditions as the court or judge making such reference shall think proper, and such court or judge may restrain such attorney or solicitor . . . from commencing or prosecuting any action or suit touching such demand pending such reference upon such terms as shall be thought proper." Then follows a proviso that taxation after verdict or after twelve months shall only be allowed in special circumstances. One sees, therefore, throughout these provisions very good reason why these limitations should have been put in this way, because one finds that pending the reference the right of the solicitor to enforce payment of his bill of costs is really suspended. In this particular case the order was not obtained until a long time after the delivery of the bills of costs. The bills were delivered on the 16th of January, 1902; the order was obtained on the 1st of December, 1902—that is to say, when the twelve months had nearly elapsed—and it was not in fact served on the solicitors until the 7th of January, 1903—that is, within a week of the lapse of twelve months from the delivery of the bills, and more than a month after the order had been obtained. In these circumstances, when the matter came before the master, it was objected that his jurisdiction was gone, because the order for taxation concludes with these words "but the said master is to make his certificate in a month (unless the said master shall extend the time to make his certificate) or this order is to be of no effect." It is said that the month having elapsed from the date of the order the master had no longer any jurisdiction—that is, any jurisdiction under the order as it stood, or any jurisdiction to grant any extension of the time. It was said that any jurisdiction or power which the master had under the order was totally gone when the month had run out, and from that time forward the order was dead and of no effect. With one argument put forward by counsel for the respondents I am inclined to agree—that is to say, that if the actual words of the order itself, with nothing else to assist, are taken *primâ facie* the power to extend must be exercised within the limit of the month. The case is analogous to the cases which often arise in respect of submission to arbitration. You constantly find submissions containing a limit of time within which the award is to be made, and then there is a power given to the arbitrator to enlarge the time for making the award, and it has been held again and again that the power of enlargement must be exercised by the arbitrator within the time limited by the words of the submission itself as being the time within which the award is to be made unless the power of enlargement is exercised by the arbitrator. *Primâ facie*, therefore, I should have been inclined to read these words as counsel for the respondents invited us to do. That is, as meaning that the power to extend the time must be exercised within the month limited by the order. But though I should have so read these words apart from anything else, in my opinion we must read this particular order in the light of regulation 57. [His lordship read the regulation and continued.] I wish to say with regard to those words that in my judgment it cannot be said that by the terms of this order the court or judge "has otherwise directed"—that is to say, has directed that the taxing-master shall not have this power of extension. Having said that, I have merely to construe these words. As I read these words they are words which by necessary implication affirm that the power thus given to the taxing-master to extend the time may be exercised even after the time appointed has elapsed. If that is so, there is an end to all question in this case, because this is not an appeal with reference to the discretion of the taxing-master. I am by no means certain that such an appeal ought to be entertained if it was an appeal from his discretion. It is a mere question whether reading the order and regulation 57 together the taxing-master has this power, notwithstanding the expiration of the time. I think he has. But I do not wish to be understood as saying that because I think he has this power it is a power which ought to be exercised as of course or freely. The reason why I referred to the terms of section 37, which expressly provides for the suspension of the rights of the solicitor during the reference, was because I thought that the time limit contained in the common order for taxation obtained by the client under this section after the expiration of one month, but before the expiration of twelve months from the delivery of the bill, was inserted for the express purpose of preventing the reference from being used in a way which would be unjust or oppressive to the solicitor. In these circumstances the time limits should not be lightly regarded or easily dispensed with by the taxing-master or anyone else. I think that in the case of an order obtained, as was the present one, very nearly twelve months after the delivery of the bill, and then not served until more than a month after it had been made, and within a few days of the expiration of the twelve months, it is impossible to suppose that the taxing-master could make an order extending the time without very seriously considering whether the circumstances were such as to justify him in so doing having regard to the obvious intention of the statute that the reference should not be used in a manner oppressive to the solicitor. The appeal must be allowed.

ROMER, L.J.—I have come to the same conclusion. In the first place, I wish to point out that the cases cited before us really have no application to the point which we have to decide. For example, cases which were decided under the provisions now embodied in ord. 64, r. 7, have no application. I mean cases like *Whistler* v. *Hancock*, *Wallis* v. *Hepburn*, and *King* v. *Davenport*. Those cases were of this kind. An order had been made dismissing an action unless the plaintiff took certain steps within a specified time, and it was held on the terms of the order that if these steps were not taken within the time the action stood dismissed inevitably. In those cases there was no power in the court to extend the time. But cases of that kind have no application to cases like the present. In those cases nothing could be done to escape the exigency of the order except by way of appeal, but in the cases before us, and in similar cases, the arguments which were effective in those cases do not apply, because the order for taxation expressly provides for an extension of the time within which the certificate of the taxing-master may be made within which the order is to be effective. As to the meaning of the provision for the extension of time in the order in the case before us, with reference to the question when the extension has to be granted, I shall have something to say presently. But I wish to point out that that order is entirely distinct and different from the orders in the cases under ord. 64, r. 7. Further, I have to point out that the two other authorities cited, *In re Webster* and *In re Taylor, Sons, & Tarbuck*, have no real bearing on the case before us, for in those cases there had been no extension of time by the taxing-master. There is, therefore, no case governing the point which is now before us, and it turns entirely on the wording of regulation 57 of r. 27 of ord. 65. That regulation does provide that the taxing-master may extend the time within which an act has to be done by him after the expiration of the time for doing that act. I quite agree

that without that express power the respondents on this appeal would be clearly right. But there are those words, and I think it would be impossible to say that the rule as a whole does not apply to the order for taxation in this case. That order is a very common form of order. It is the form which is applicable to all orders obtained by the client after the expiration of one month and before the expiration of twelve months from the delivery of the bill. And if this provision in regulation 57 as to extending the time after the expiration of the time appointed does not apply to an order of this kind, it is difficult to see to what order it does apply. For the other orders do not contain any provision such as we have here limiting the time within which the certificate has to be made. In my opinion regulation 57 does apply to this case, and the taxing-master has power to extend the time even though the original time limited by the order has expired. And I may point out that the provision in regulation 57 is a very useful provision. Take, for example, a case in which the whole taxation has been practically completed within the month, but, owing to the exigencies of his duties, the taxing-master has not had time to make his certificate. It would be very hard if the taxing-master could not extend the time. I think, therefore, that the words to which I have referred in regulation 57 are very useful words, and that it would be a great pity if we should be compelled to cut them down in any way. I agree with what was said by my lord that it ought not to be considered by the taxing-master that the extension of the time is to be a mere matter of course. I think that the taxing-master ought to consider carefully in each particular case whether justice does require an extension of time, and upon what terms the extension ought to be granted. Personally, I think it possible that if I had been the taxing-master I should not have extended the time in this case. But that is not now before us. The only point before us is whether there is power in the taxing-master to extend the time as he has done. Let me refer shortly to two arguments which have been used against the view which I am expressing. First it is said that under the very terms of the order it ceases to have any effect after the expiration of the appointed time. The certificate not having been made within the month, and there being no extension of time within the month, it is said that the order was dead and could not be revived. In my opinion that is not the right view to take of this order. I do not think that it was dead in that sense. It is more like a case of suspended animation, if I may be permitted to say so. In my opinion the power to extend the time in this order means power to extend it according to the rules—that is, according to regulation 57. The next argument was that the provision as to extension in regulation 57 is not operative if the court or judge shall otherwise direct. With reference to that argument I would point out that this order contains no direction to the contrary within the meaning of those words. If the order had said unless the said taxing-master shall extend the time to make his certificate within the month, then I agree that the judge would have otherwise directed, but the order does not say that; it may well mean only that the master shall extend the time in accordance with the provisions of regulation 57. That argument also fails. For these reasons I think that this appeal must succeed.

STIRLING, L.J.—I agree, and I have very little to add. In my judgment the main question turns upon the true construction of the concluding words of the order for taxation. That order provides that it is to be of no effect unless the taxing-master makes his certificate within a month or unless he extends the time for making his certificate. In point of fact the taxing-master has purported to extend the time, and the question is whether he has properly extended it. On the one hand it is contended that these words mean, unless he shall extend the time within the month. In that case the master did not grant the extension within the proper time and the order is of no effect. On the other hand it is said that these words ought to be read as meaning that the master may extend the time in due exercise of any authority or jurisdiction which he may possess. In that case, for the reasons which I shall presently mention, I think that the master did extend the time properly. Of these two constructions I prefer the second. Upon the first construction of the order, read with regulation 57, I do not see any reason why we ought to treat this order as limiting the time within which the extension ought to be made. That being so, it seems to me that regulation 57 does confer on the taxing-master power to extend the time appointed by this order for making the certificate, even though the application for extension is not made until after the expiration of the time appointed. Consequently, I think that the master had jurisdiction to make that extension of time which he did grant. I think that none of the cases cited before us govern the present case. As regards the two cases before North, J., this point was not covered by his decision, and although any observations which he made are entitled to great weight, it does not appear that this particular regulation was referred to in either of those cases. *Whistler* v. *Hancock*, and the other cases of that kind, do not apply, because; on the construction which I place upon this order, it is still an effective order, the master only having extended the time. I agree that in this case the court which made the order has not given any direction to the contrary within the meaning of regulation 57. I only wish to add that I agree with everything that has been said by the other members of the court as to the exercise by the taxing-master of his discretion to extend the time in cases of this kind.

Solicitors, *Pritchard, Englefield, & Co.; Bell, Brodrick, & Gray.*

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From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Jan. 16, 17, 20, 21, 24

MCCONNEL *v.* WRIGHT. (*a.*)

*Company—Prospectus—Misrepresentation as to assets—Property subsequently acquired—Measure of damages—Waiver clause—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Directors' Liability Act,* 1890 (53 & 54 *Vict. c.* 64), *s.* 3.

*If the prospectus of a company contains a statement that certain assets have been acquired by the company, though at the date of the prospectus the assets in question are not and possibly might never be acquired by the company, the fact that the assets are subsequently acquired is no defence to an action against the directors of the company based on the misrepresentation contained in the prospectus, and the damages will be assessed on the footing of the difference between the price paid for the shares and their true value, having regard to the actual state of things at the date of the prospectus.*

This was an appeal from a decision of Kekewich, J. The plaintiff was a shareholder in the Standard Exploration Co. (Limited), and the action was

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

brought against Mr. Whitaker Wright, the chairman of the company, for damages for misrepresentations contained in and the omission of material contracts from the prospectus.

The company was promoted by the London and Globe Finance Corporation, of which the defendant was the managing director.

It was registered on the 11th of February, 1898, with a nominal capital of £1,500,000, divided into shares of £1 each.

The primary object of the company was to acquire for the purposes of amalgamation, the interests of several different mining companies.

In May, 1899, the defendant and the other directors of the company issued to the public a prospectus dated the 12th of May, 1899, stating that the London and Globe Corporation were authorized to offer 500,000 shares in the Standard Co. for subscription at par.

This prospectus contained, *inter alia*, the following statement: "Share Department.—The directors have established a share department for the acquisition and disposition of shares and debentures in approved mines and other undertakings. In furtherance of this object the directors have already acquired large holdings in various promising companies, including the following: British America, Le Roi, Columbia Kootenay, East Le Roi, West Le Roi, London and Globe, Lake View Consols, Ivanhoe, Great Boulder, Associated Kalgurli, Victorian Gold Estates, International Copper, and others. Taken at this day's market quotations these shares already show a profit more than sufficient to pay a dividend of 10 per cent. on the total capital of this company for the current year."

The prospectus also stated that the company had agreed to acquire the undertakings of various other companies, which were enumerated, including the Austin Friars Syndicate, and that contracts dated the 12th of May, 1899, had been entered into with reference to each of these undertakings, and the prospectus contained a waiver clause as to the contracts therein referred to.

The plaintiff by his statement of claim alleged that the statement headed "Share Department" was untrue, because the company had not in fact acquired any shares in the companies therein mentioned; and, secondly, because, assuming that the shares had been acquired, they could not be realized so as to pay a dividend at the rate mentioned; he also alleged that several other statements in the prospectus were untrue.

The plaintiff also alleged that, contrary to section 38 of the Companies Act, 1867, the prospectus omitted to disclose certain material contracts, including (among others) a contract dated the 27th of October, 1898, made between the London and Globe Finance Corporation and the Standard Co., whereby the corporation agreed to transfer to the company 5,000 deferred shares held by the corporation in the Austin Friars Syndicate, and the company agreed to allot to the corporation 40,000 fully paid shares in the company in exchange therefor, and that the 5,000 shares in question were practically worthless.

After receiving a copy of this prospectus, the plaintiff, on the 17th of May, 1899, applied for 600 shares in the company.

These shares were allotted to him and he paid £600 therefor.

The company never did any business and on the 16th of January, 1901, an order was made on a creditor's petition that it should be wound up.

There were practically no assets in the winding up available for the shareholders.

The plaintiff alleged that he had subscribed for the shares on the faith of the prospectus, and that he had suffered damage thereby; but he adduced no evidence specially directed to the question of damage.

The defendant denied the allegations in the statement of claim, and attributed the failure of the company to speculations on the Stock Exchange unconnected with any of the matters referred to in the prospectus.

The statement in the prospectus under the heading "Share Department" as to the amount of profit was not shown to be incorrect to any material extent. The bulk of the profit, however, was attributable to 200,000 shares in the London and Globe Corporation, and the balance almost entirely to 200,000 shares in the British America Co. At the date of the prospectus and at the date of the allotment to the plaintiff, the Standard Co. had not acquired the shares in the London and Globe Corporation, and there was no agreement binding on the London and Globe Corporation to transfer the shares to the company, although it was intended in fact that they should be so transferred. They were in fact transferred to the company on the 27th of May, 1899.

Kekewich, J., found that the plaintiff had subscribed for the 600 shares on the faith of the prospectus as a whole; that several of the representations complained of by the plaintiff, including the statement under the heading "Share Department," were false to the knowledge of the defendant; that the contract of the 27th of October, 1898, was material, and ought to have been disclosed; and that the plaintiff had sufficiently proved damage to justify an inquiry for damages. He therefore gave judgment for the plaintiff, and directed an inquiry as to damages in the form in *Arkwright* v. *Newbold*, 28 W. R. 828, 29 W. R. 455, 17 Ch. D. 301.

The defendant appealed.

*Haldane, K.C.*, *Gore-Browne, K.C.*, and *Bonner*, for the defendant.—In an action of this kind the plaintiff is bound to say that he has suffered damage. There is no evidence that the shares at the time of their allotment to the plaintiff were of less value than what he gave for them, and the fact that subsequently owing to circumstances which had no connection with the accuracy or inaccuracy of any statements in the prospectus they became valueless is immaterial.

*Warrington, K.C.*, *Powell, K.C.*, and *Higgins*, for plaintiff.—The statement in the prospectus as to the London and Globe shares having at that time been acquired by the company was untrue in fact. That being so, under the Directors' Liability Act, 1890, the onus is on the defendant to show that he had reasonable ground to believe and did believe the statement to be true. The measure of damages is the difference between the amount paid by the plaintiff for his shares and the actual value of the shares at the time of allotment.

*Haldane, K.C.*, replied.

*Stephen Lynch* watched the case on behalf of another director.

The following cases were referred to in the course of the argument: *Arkwright* v. *Newbold*; *Peek* v. *Derry*, 36 W. R. 899, 37 Ch. D. 541; *Cackett* v. *Keswick*, *ante*, p. 69, [1902] 2 Ch. 456; *Aaron's Reefs (Limited)* v. *Twiss*, [1896] A. C. 273, 44 W. R. Dig. 30; *Sullivan* v. *Mitcalfe*, 29 W. R. 181, 5 C. P. D. 455.

*Cur. adv. vult.*

COLLINS, M.R., after referring to the constitution and objects of the company, continued as follows: Kekewich, J., has described the transaction which the plaintiff embarked on with his eyes open as a gamble, but he has also come to the conclusion,

applying the principle laid down by Lord Halsbury, not for the first time, I think, in *Aaron's Reefs (Limited)* v. *Twiss*, that, though the plaintiff had very great difficulty in fastening upon any particular misrepresentation which he could aver had influenced him in taking shares, nevertheless it was a question whether he was misled by the prospectus as a whole, and I think there is quite enough evidence to justify the learned judge in finding, as he has found after seeing the plaintiff in the box, that he was induced to put his money into this concern by representations in the prospectus. The question remains how far those representations were false: and there is a further question whether damage did or did not result, because, in action for fraud, treating this for the moment as an action of fraud at common law, damage is an essential fact in the right of action, and therefore misrepresentation without damage is not actionable; neither is damage without misrepresentation. [His lordship then examined the evidence with reference to the statement as to the acquisition of the London and Globe shares and came to the conclusion that that statement was false. He then continued:] By section 3 of the Directors' Liability Act, 1890, the burden of proving that the defendant did honestly believe, and on reasonable grounds, that the statement as to the London and Globe shares was true, was thrown upon him because the evidence pointed to the conclusion that those shares had not been acquired at the date of the prospectus. [His lordship then discussed the defendant's evidence on this point and came to the conclusion that he had not discharged the onus which was cast upon him by the statute. He then dealt with the charge based upon section 38 of the Companies Act, 1867, and agreed with the learned judge that the charge was well founded, and continued:] Therefore it comes to this, that the one central misrepresentation is that contained in the paragraph as to the share department. There is also the misrepresentation resting upon the statutory provision of section 38 of the Companies Act, 1867. But still, the plaintiff having established misrepresentation, has to show damage, and therefore I have to go next to the question of whether or not he has shown that he has sustained substantial damage in this case. It was contended very forcibly by the defendant that this is a case in which no substantial damage has been established, because, even conceding that there was any misrepresentation upon which the plaintiff acted, still all such representations were made good within a week or ten days after the issuing of the prospectus, and therefore a man who embarked in a company which in point of fact at the time of the action did not contain all that he had reason to suppose that it would contain in the way of property could not come here and claim damages on the footing that he had lost his money. Of course that raises a very important question. The learned judge has found that there was substantial damage, and if there was evidence upon which he reasonably might find it we should be very reluctant to differ from him. The question, therefore, is whether in the circumstances proved as to the company at the trial there was sufficient evidence of substantial damage to justify the learned judge in coming to his conclusion. In my opinion there was. It was proved that this company went into liquidation and was wound up on the 16th of January, 1901, and practically nothing comes to the plaintiff in the winding up. It was suggested in evidence by Mr. Whitaker Wright that the complete failure of the company and the absence of all assets were due to transactions entirely disconnected with any of the misrepresentations in the case, but it is clear that the learned judge did not give implicit credit to Mr. Whitaker Wright's evidence, and therefore it cannot be treated as established that no part of the complete financial failure of the company was due to any of the matters misrepresented in the prospectus. But apart from that it seems to me that there was evidence of substantial damage sufficient to support the action upon this point which I have called the central point of misrepresentation as to the acquisition of these shares and the profits thereon. Now as to the profit which Mr. Whitaker Wright claimed to have established on the evidence as it now stands, and the result of the learned judge's decision, it was not at at all certain at the time when the prospectus was issued whether the Globe shares would be acquired or not. In point of fact they were not acquired till some time later and therefore at the date when the prospectus was issued there was a misrepresentation, and damages might have been assessed there and then on the date on which this gentleman paid his money on the allotment of shares to him. That is clearly the time at which his damages must be assessed. He had paid his money and he had got in return for it a property which did not contain the 200 000 Globe shares in respect of which a profit of so large an amount is said to have been obtained. Therefore the position is this, and anybody assessing the damages will have to consider it. What is the difference between the value of the property as it was represented and the property without this large asset in it having regard to the possibility, certainly the uncertainty, of that asset ever being in fact acquired. We now know no doubt that it was acquired afterwards, but that is not the material point. The damages have to be ascertained in view of the facts as they were at the time, in view of the central fact that this asset had not been acquired. Whether it could be legally acquired at all might be a question. One would have to consider whether the handing over of such shares from the Globe Corporation by the managing director, Mr. Whitaker Wright, to another company with this profit upon them at a consideration of not the then apparent value of them but the face value of them was a transaction that could have been enforced or not, and whether even if it could be enforced the Globe Corporation had so committed themselves to it as to make it capable of being enforced against them at all; and thirdly, whether if they were not absolutely legally fixed with the obligation of carrying it out they would in point of fact carry it out. All these questions would have to come into consideration, and this might result in a conclusion that it was a matter of so much uncertainty whether these shares would be acquired that the omission to acquire them might be treated as an absolute loss to the assets of the company at the time. At all events it seems to me that there was abundant evidence that the difference between the position of the company with those shares and its position with such prospects as it then had of acquiring them afterwards might be substantial.

That obliges me to say something as to the principle upon which damages are assessed in these cases. There is no doubt about it now. It has been laid down by several judges, and particularly by Cotton, L.J., in *Peek* v. *Derry*; but the common sense and principle of the thing is this. It is not an action for breach of contract, and therefore no damages in respect of prospective gains which the person contracting was entitled by his contract to expect come in, but it is an action of tort, it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket, and therefore, *primâ facie*, the highest limit of his damage is the whole extent of his loss, and that loss is measured by the money which

was in his pocket and is now in the pocket of the company. That is the ultimate final highest standard of his loss. But in so far as he has got an equivalent for that money that loss is diminished, and I think in assessing the damages *primâ facie* the assets as represented are taken to be an equivalent and no more for the money which was paid. So far as the assets are an equivalent he is not damaged, so far as they fall short of being an equivalent in that proportion he is damaged. Here there is strong evidence which the judge has acted on, that there has been a substantial diminution in the equivalent, and therefore that the plaintiff has sustained substantial damage.

Now these things taken together fulfil all the conditions of the action. There must be damage suffered by reason of action taken upon misrepresentation. All these conditions are fulfilled, and therefore, as it seems to me, this judgment must be affirmed, though, as I have pointed out, I do not agree with the learned judge in all his findings of fact. Still, in the result of his decision we agree, and this appeal therefore must be dismissed.

ROMER, L.J.—I also think that this appeal must be dismissed. I will for brevity refer to the London and Globe Finance Corporation (Limited) as the Globe, and to the Standard Exploration Co. (Limited) as the Standard. Now, it appears to me that there was undoubtedly one statement of a substantial kind in the prospectus issued by the defendant which has been shown to be untrue. I refer to the statement in the prospectus under the head of "Share Department," which stated that the directors had already acquired large holdings in various promising companies, which included the Globe; and that, taken that day at the then market quotations, those shares already showed a profit more than sufficient to pay a dividend of 10 per cent. on the total capital of the company for the current year—that is to say, a profit of £150,000. That allegation in the prospectus was clearly of a substantinl kind, and one which, on the evidence, I come to the conclusion was relied upon by the plaintiff. It appears to me that the untruth of that statement can be shown by a consideration of one item only—namely, the item of 200,000 Globe shares—and, for the purpose of my judgment, I need not deal with the other items, for it is common ground—or at any rate it is not in dispute—that the main profit of £150,000 to which I have referred was based upon the profit supposed to be derived from the 200,000 Globe shares that I have mentioned. If at the date of the prospectus or allotment the company had not acquired those 200,000 Globe shares, the statement I have referred to in the prospectus was clearly untrue. Now, the plaintiff has put in evidence the books of the Globe and of the Standard. The books of the Globe show that these shares were not in fact allotted until the 27th of May—that is to say, a substantial time after the allotment of the shares in the Standard. That entry is of a curious kind. It speaks of the allotment as being in confirmation of some previous allotment, but the books show no prior allotment at all—the prior entries in fact rather negative the existence of any prior allotment to the Standard being possible. They certainly point to no authorization to any person to allot to the Standard. No contract or entry as to or affecting these 200,000 shares is shown, either by the books of the Globe or the books of the Standard prior to the date I have mentioned—namely, the 27th of May. There is nothing whatever in the books of either company which could show a right of any kind whatever to any of these shares on the part of the Standard before the 27th of May. The plaintiff, on that evidence put in by him, established, if there was no evidence sufficient to meet it, that these shares were not acquired at the date of the prospectus or allotment of the Standard shares. The onus was clearly therefore on the defendant to prove, if he could, that the Standard had previously acquired these shares. Now, he gave evidence upon the point, and the account given by him in his evidence in chief to show that the Standard had acquired any right to these shares prior to the 27th of May was to my mind vague, unsatisfactory, and contradictory. I have carefully considered the subsequent evidence, and to my mind the subsequent evidence and cross-examination of the defendant only made it more clearly apparent that this defendant could not establish any right of any kind whatever to these shares on the part of the Standard prior to the 27th of May. There was no other evidence; he was not supported in the vague and contradictory statements to which I have referred by the evidence of any other witness; he was not supported by any documentary evidence; on the contrary, as I have pointed out, such documentary evidence as there is is against him. On this evidence it is clearly the duty of the court to hold that it has been established that, prior to the 27th of May, the Standard had not acquired the Globe shares or any of them. The statement in the prospectus, then, was untrue in fact, and then, under the Directors' Liability Act of 1890, s. 3, if the defendant wished to escape liability for the untrue statement, he would have to prove that he had reasonable ground to believe, and did up to the time of the allotment believe, that the statement was true. On the evidence before us I am satisfied he has not discharged the onus that is cast upon him by the Act of 1890. It follows that, if loss or damage has been sustained by the plaintiff by reason of the untrue statement to which I have referred, the defendant is bound to pay compensation to the plaintiff for that loss or damage. Now, the plaintiff, as I have pointed out, took the shares in the Standard on the faith, and because of, that untrue statement, on the faith of the statement being true. If that act of taking these shares caused loss or damage to the plaintiff, then, in the words of the section, in my opinion the defendant is bound to pay compensation for that loss or damage. The question then is, Did the plaintiff suffer loss or damage by reason of his taking the shares in this company by relying upon this statement in the prospectus? In other words, Did he suffer loss or damage because he took these shares? The question then comes to this, having regard to the inquiry directed by the judge, Did the plaintiff, at the trial of this action, sufficiently show some substantial damage in respect of his taking these shares, so as to justify the inquiry directed by the court? On the whole, I think he did. That he had in fact suffered loss or damage at the time he commenced his action is beyond question, in this sense, that the company has been wound up and he has lost his money. But the defendant says, by his evidence, that the winding up of the company and the loss which thereby ensued to the plaintiff was not due to circumstances existing at the date of the allotment of the shares, but solely by reason of circumstances which occurred afterwards—for example, as he says, certain speculation in shares. Again, on that point, his evidence is not corroborated, so far as I am aware, by any other evidence in this case which would justify the court, unless it fully relied upon this gentleman's testimony, in taking his statement as conclusive on the point, and his cross-examination on certain points did not favour-

ably impress me, and I think it appears not to have favourably impressed the judge who tried the case and saw the defendant in the box. But, even assuming in his favour the point he was making by his evidence, and taking it in his favour that the plaintiff has to show from other circumstances beyond the winding up of the company and the loss that thereby ensued, that the shares at the date of the allotment were not worth what he gave for them, I think that the plaintiff on the whole has sufficiently shown this. I take it that when, in a case like this, application is made for shares in a company on a representation stating that company has certain advantages, in the absence of evidence to the contrary it should be taken that the price paid for the shares was equivalent to the value of the shares in the company having the advantages stated in the prospectus. Certainly, as against the plaintiff, although I will assume as against him for this purpose that the money he paid for these shares was met by an equivalent if he had received shares in a company having all the advantages stated in the prospectus, I cannot assume, in the absence of evidence to the contrary, that those shares were worth more than the plaintiff had to pay for them. Then, was there any evidence which would show that at the date of the allotment these shares had, by reason of other advantages beyond those shown in the prospectus, a greater value than the amount the plaintiff had to pay for them? I think not. I certainly, under the circumstances of this case, cannot take the market quotation with regard to these shares for some time after the allotment as showing that the shares had a true value above what was given for them apart from the representations of the company as shown in the prospectus. Nor was there any evidence to show that, apart from deficiency of assets, which would be shown in this company, if the statement as to the £150,000 profit was untrue, it was made good by other advantages in connection with the company not shown by the prospectus or existing in fact. So that, if the £150,000 assets in fact did not exist at the date of this allotment, I take it that, at the date, the shares in this company were not worth what was given for them, because the company had not the £150,000 assets in substance which the prospectus said it had. Now, counsel for the defendant contend that, even if the company had not these shares at the date of the allotment, they acquired them a few days afterwards; and that made the statement perfectly good. I need scarcely point out the fallacy of that contention unless they can establish the risk of not getting these shares which was run by this company—which had not the shares at the date of allotment, and might not have got them—was not substantial. In my opinion that risk was substantial. The question has to be tried by looking at what was the true value of the shares at the date of allotment. To show what was the value of the shares later on, after they had got these 200,000 Globe share, is not the point, nor, indeed, is it relevant to inquire. Because if one went on to inquire what was the condition of the shares some days later, when the 200,000 Globe shares were acquired, one ought also to inquire what were the circumstances in connection with the company at the time, for it would not follow that of necessity, if one could inquire into it, there were not other counterbalancing disadvantages at that latter date. It is irrelevant to inquire into a state of circumstances after the date of allotment—that is to say, to inquire only as to one particular side of the matter. The proper inquiry is: What was the true value of these shares at the date of allotment? As I have pointed out, if the risk run was substantial, as I have said I think it was, then the shares were not worth what they were represented to be worth by the prospectus, which was the price paid for them by the plaintiff. I think, therefore, as the evidence stands, the plaintiff has given evidence sufficient to justify this court in saying that some damage was incurred by him which would justify the court in directing the inquiry as to damages as directed. I should, perhaps, add that there is no evidence before the court that the deficiency of value of the company's property at the date of the allotment in respect of the Globe shares, to which I have referred, was made good or counterbalanced by the value of the other assets at that date of the company. Having regard to the view which I have expressed, it is not necessary for me to deal with the other points which have been argued before us. Some of them have been dealt with by the Master of the Rolls, and I only desire to state that it must not be taken, because I have not dealt with them, that I in any way differ from what the Master of the Rolls has said upon those points.

COZENS-HARDY, L.J.—In this action the plaintiff claims damages against the defendant by reason of statements and omissions in the prospectus of the Standard Exploration Co. (Limited), on the faith of which prospectus the plaintiff applied for 600 shares, which were allotted to him. The defendant was a director of the Standard Co., and was responsible for the issue of the prospectus. The action is not launched as a common law action of deceit, in which fraud would have to be alleged, and proved, although it may be that the facts proved here would support such an action. It is really based upon the Directors' Liability Act of 1890, and upon section 38 of the Companies Act, 1867. Now, the Directors' Liability Act was passed the year after *Peek* v. *Derry* had been decided in the House of Lords, and, as it seems to me, for the express purpose of getting rid of the effect of that decision so far, and so far only, as directors and promoters issuing a prospectus on the one hand, and persons taking shares or debentures on the faith of the prospectus on the other hand, are concerned. In that particular case the plaintiff only has to prove (in addition to damage) that a material statement is untrue, and he can maintain an action unless the defendant can establish that he had reasonable ground to believe, and did believe, the statement to be true. In other words, the onus of proof is shifted. Has the plaintiff here proved a material statement in the prospectus to be untrue? [His lordship held, on the evidence, that the statement as to the Globe shares was untrue, and that the defendant had not discharged the onus which rested upon him of establishing that he had reasonable ground to believe, and did believe, the statement to be true, and that that statement was material, and continued:] As to damage, it seems to me that the loss of the London and Globe shares which were stated to be worth more than £75,000 beyond the par value is *primâ facie* evidence of damage. As a rule of convenience, and indeed almost of necessity, the property which would have been acquired by the company, if all the statements in the prospectus had been correct, must *primâ facie* be taken to be worth the precise sum paid for the property, neither more nor less. This is the *primâ facie* presumption, and it is sufficient for the decision of the present case, for no evidence has been adduced by the defendant to rebut the presumption. The learned judge was therefore right in holding that the plaintiff had proved damage, though the precise amount was not gone into at the trial. The inquiry as to damages is correct in form. It is not to the point, it seems to me, to allege that shortly afterwards the Globe shares were allotted. Subsequent events cannot be looked at for this purpose. There

was a material risk at the date when the plaintiff acquired his shares, that the statement would not be made good. I am not prepared to assume in favour of Mr. Whitaker Wright that he would make an allotment which would be a breach of his duty as director of the London and Globe. With regard to the omission from the prospectus of any reference to the contract of October, 1898, for the purchase of deferred shares in the Austin Friars Syndicate, I agree with Kekewich, J., that it was a material contract, and ought to have been disclosed by the prospectus, and that section 38 of the Companies Act, 1867, applies. In my view, therefore, this appeal should be dismissed.

Solicitors, *Burn & Berridge; Lesser & Danger; Gilbert Robins.*

## High Court of Justice.

Chan. Div. Kekewich, J. } June 9.

*In re* CARTWRIGHT.
CARTWRIGHT *v.* CARTWRIGHT. (*a.*)

*Marriage settlement—Covenant to pay trustees specific sum—Failure to comply—Policies effected under Married Women's Property Act,* 1870, *s.* 10—*Satisfaction.*

*To ascertain the intention as to satisfaction, the position at the time the transaction said to be a satisfaction took place must be looked at, and not merely the actual result.*

Adjourned summons.

The testator, W. A. Cartwright, had first been married in 1849, and by that marriage had had six children. Four of them were still living, among whom were the defendants, Mrs. Pickworth and James Cartwright.

By an indenture of settlement made the 29th of March, 1864, in contemplation of his second marriage, W. A. Cartwright covenanted with his trustees, executors, &c., that in case the second marriage should be solemnized, W. A. Cartwright, in his lifetime, or his executors within six months after his death, should pay to the trustees of the settlement £2,000, and should in the meantime pay interest thereon from the date of the said marriage, and it was declared that the said trustees should stand possessed of the said sum of £2,000 on trust to pay the dividends and income thereof to his wife for her life, and after her death to pay the same to W. A. Cartwright and his assigns during his life, and after the death of the survivor of the said W. A. Cartwright and his said wife in trust as to both capital and income for the children or child of the said intended marriage and the children or child of the said W. A. Cartwright by his former marriage as the said W. A. Cartwright and his said wife should in manner therein mentioned jointly appoint, and in default of such appointment, and so far as such if incomplete should not extend for all and every the children or child of the said W. A. Cartwright by his former marriage who being a son or sons should attain the age of twenty-one years or being a daughter or daughters should attain that age or marry under that age with the consent of her or their parent or guardian, and to be divided between the said children, if more than one, in equal shares as tenants in common.

There was issue of the second marriage three sons, one of whom died in infancy, while the remaining two were still living and of full age.

The testator, who died on the 6th of November, 1902, without having paid to the trustees of the settlement £2,000, or any other sum, had, however, on the 2nd and 30th of January, 1873, respectively taken out two policies on his life, each for £1,000, under the provisions of section 10 of the Married Women's Property Act, 1870*, and upon each policy there was this recital: "And whereas this policy is effected by the said W. A. Cartwright for the benefit of his wife and children for their separate use in terms of the Married Women's Property Act, s. 10."

Upon the death of the testator a sum of £3 200 (including bonuses) became payable in respect of the policies.

By his will, dated the 17th of April, 1902, the testator gave the residue of his personal estate to his trustees in trust, after payment of his debts, to pay the income to his third wife, who survived him, for her life, and after her death upon trust as well the capital as the income for his children, the defendants, Mrs. C. S Pickworth and the two surviving sons of the second marriage.

In the administration of the estate the defendant, James Cartwright, claimed payment of his share of the sum of £2,000 payable under the covenant in the settlement.

The trustees of the will thereupon took out this summons for the determination of the question.

*R. J. Parker*, for the Trustees of the Settlement.

*Leigh Clare*, for persons upholding the Covenant, cited *In re Seyton*, 35 W. R. 373, 34 Ch. D. 511; and *Chichester* v. *Coventry*, 15 W. R. 849, L. R. 2 H. L. 71.

*Rolt*, for the opponents, cited *Jesson* v. *Jesson*, 2 Vern. 255; *Davis* v. *Chambers*, 5 W. R. 245, 7 De G. M. & G. 386; and *Mayd* v. *Field*, 24 W. R. 660, 3 Ch. D. 587.

*Johnston*, for Trustees of Will.

KEKEWICH, J.—The question for decision is entirely new as regards the authorities, but it is by no means new in substance or in principle. Stated shortly it is this, whether a covenant in a marriage settlement to pay £2,000 to the trustees of the settlement has been satisfied by policies for that sum effected by the covenantor. The amount actually payable under the policies is by accretion of bonuses, considerably more than £2,000, but for the present purpose, I disregard that circumstance, and assume that the £2,000 payable under the covenant and the £2,000 payable under the policies are in substance identical sums. In considering the question whether a covenant of this kind has been "satisfied," for that according to the authorities is a proper form of expression, it must be borne in mind that a man who has covenanted to pay £2,000 or any other sum to the trustees of a settlement can satisfy the obligation of that covenant only by paying that sum to those trustees. He must do what he has covenanted to do, and nothing else can be strictly speaking a satisfaction. But a covenantor may, if he pleases, make a provision which is intended by him to satisfy the covenant, and either because he has so expressed himself, or because it is to be so inferred from surrounding circumstances, he may be held to mean that the beneficiaries under the

(*a.*) Reported by ALFRED C. THOMAS, Esq., Barrister-at-Law.

* (1) Section 10.—" . . . A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate. . . ."

covenant shall take what he has provided for them instead of that which they would take under the covenant. The result is that a beneficiary is put to his election between the benefit of the covenant and the benefit of the provision; he cannot take both. It is necessary to bear that in mind, because the whole question is one of intention.

I turn now to the covenant. [His lordship here read the terms of the covenant as above set out, and continued.] The life interest given to the settlor would, of course, not be applicable to money coming in after his death, and it is to be observed that the power of appointment is unusual, being only to the husband and wife jointly, and not to the survivor. The settlor, having entered into this covenant, some time afterwards effected two policies under section 10 of the Married Women's Property Act, 1870, for the benefit of his wife and children. The effect of that is that the wife and children surviving him take as joint tenants. The children would take whether they attained twenty-one or not, and they would take quite irrespectively of any power of appointment. The wife, instead of taking a life interest, takes a share, which might be more or less, in the principal, and a share which might have been much increased by children dying in her lifetime without having severed the joint tenancy. It has been argued that the *onus* is on those who seek to show that such a provision is not a "satisfaction." Be it so. There could hardly be a greater difference between two provisions than that which exists here. In the one case a joint tenancy between wife and children, without any power of appointment; in the other case a life interest to the wife, with a power of appointment amongst children. It seems to me impossible to conceive that when this gentleman effected these policies he really intended that the children taking under his marriage settlement were to accept what he provided for them under the policies in lieu of what was given to them under the settlement. I therefore hold that this is not a case of satisfaction.

Solicitors, *Green, Humphreys, & Son; Field, Emery, Roscoe, & Medley*, for *Joseph Hands*, Loughborough; *Woosnam & Smith.*

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Chan. Div.
Farwell, J. } May 27.

BRITISH ASBESTOS CO. (LIMITED) *v.* BOYD. (*a.*)

*Company — Directors — Disqualification — Clause validating the acts of* de facto *directors.*

*No.* 108 *of the articles of a company provided that all acts done at any meeting of the directors, or by any person acting as such director, should, notwithstanding that it should afterwards be discovered that there was some defect in the appointment of such director or person acting as aforesaid, or that they or any of them were disqualified, be valid, as if every such person had been duly appointed and was qualified to be a director. It was also provided that two directors should form a quorum, and that a director who accepted or held any office under the company, other than that of managing director, was to vacate office as director.*

*B., a director of the company, was elected secretary of the company, but subsequently resigned the office. At board meetings, subsequent to the resignation, at which B. and only one director were present, various business was transacted, such as the election of directors.*

*Held, that the acts done by B. in his capacity of a director were validated by clause* 108 *in the articles of association.*

The British Asbestos Co. was incorporated under the Companies Acts, 1862 to 1893.

By the articles of association it was provided that two directors should form a quorum, that the qualification of every director should be the holding of shares of the company up to the nominal amount of £500, and a director who accepted or held any office under the company other than that of managing director was to vacate office as a director.

By article 108 it was provided that all acts done at any meeting of the directors or by any person acting as such director should, notwithstanding that it should afterwards be discovered that there was some defect in the appointment of such director or person acting as aforesaid, or that they or any of them were disqualified, be valid as if every such person had been duly appointed and was qualified to be a director.

There were at first three directors of the company, all of whom held the necessary share qualification. At a board meeting held on the 23rd of October, 1902, the secretary of the company was removed from his office, and Boyd, one of the directors, elected in his place and at the same salary. Boyd resigned his office on the 2nd of December.

At another board meeting on the 4th of December, at which Boyd and another director were alone present, a letter was read from the third director resigning his office. At the same meeting Boyd was elected chairman and managing director of the company.

On the 5th of January another board meeting of the two directors was held, when a resolution was passed which purported to elect a third person as a director of the company.

At a general meeting of the company on the 3 d of March a fourth director was elected.

Some of the shareholders now brought an action in the name of the company against Boyd and his fellow-directors, claiming a declaration that the defendants were not directors of the company, and moved for an injunction to restrain them from acting as such.

The motion was treated as the trial of the action, and there was a cross-motion by the defendants to strike out the name of the company as plaintiff.

*Upjohn, K.C.*, and *Martelli*, for the plaintiffs, contended that all the actions done by the defendants, or some of them, on the 4th of December, 1902, and the 5th of January, 1903, and subsequently, were invalid.

*Gore-Browne, K.C.*, and *F. Wright*, for the defendants.—The defect, if any, was covered by article 108, and by section 67 of the Companies Act, 1862. The case of *Dawson* v. *African Consolidated Land and Trading Co.*, 46 W. R. 132, [1898] 1 Ch. 6, was indistinguishable.

FARWELL, J.—The only question that I have to determine in the case is as to the meaning of Art. 108, and section 67 of the Companies Act, 1862, and inasmuch as the article is common form it is of some little importance. In my opinion the words in Art. 108, "notwithstanding that it shall afterwards be discovered that there was some defect," do not limit the validating power of the article to instances where the facts giving rise to a defect are subsequently discovered. It is only necessary that the defect arising out of the facts should be subsequently discovered. The facts in a case like the present necessarily appear on the books of the company, but they did so too in the case of *Dawson* v. *African Consolidated Land, &c., Trading Co.*, for the transfers there which caused the disqualification of a director were transfers

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

out of his name. Those transfers were in the company's books. It is not, therefore, necessary that the facts should not be known in the sense of not appearing on the face of the company's books. But the knowledge of the defect must not be present to the mind of any person to whom it is material to know it. As stated in Buckley on the Companies Acts, the object of a clause like this, and of the sixty-seventh section of the General Act, is to make the honest acts of *de facto* directors as good as the honest acts of *de jure* directors; and although, down to the decision in *Dawson* v. *African Consolidated Land, &c., Trading Co.*, it was generally supposed that such an article or section only applied as between members of the company and outsiders, and did not apply as between members of the company *inter se*, or as between members of the company and the company, that decision has stated such a view of the law to be incorrect, and has held the article or section to be of general operation. I think it is decidedly beneficial that it should be so. Therefore, although there may be some slip which has been overlooked if it has been *bonâ fide* overlooked, the act of the *de facto* directors are as good as the acts of the *de jure* directors.

Then the next point is this. It is said that the discovery referred to must be of some defect in the appointment of directors. It is clear that there is no defect in the appointment here. Now the disqualification in the present case is under art. 89 (*a*), which is as follows: "If he, without the sanction of any general meeting, accept or hold any other office under the company except that of managing director, manager, or trustee." Mr. Boyd accepted the office of secretary, and thereby vacated his office. It has been argued that the word "disqualify" has a technical meaning, and that the disqualification referred to is the ceasing to hold qualification shares. To my mind that is not the case. I think "disqualify" refers back to art. 89, and is used in the general colloquial sense that a director becomes disqualified if he ceases to hold his office, or does some act or suffers something to happen which causes him to vacate his office under art. 89. I think "disqualified" is used in the wide sense, and that therefore the article applies. The result is that on the 5th of January, which was the critical moment, there was a *de facto* board of directors as to whom there had been no discovery that there was any defect in their appointment. Consequently I hold that the defendants are right and are properly constituted directors.

There was a cross motion to strike out the company's name as plaintiff, and it was agreed that this should be done because by virtue of the above judgment the company was under the control of the defendants.

Solicitors, for the plaintiffs, *W. A. Crump & Son.*

Solicitors, for the defendants, *E. W. Oliver.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) June 29.

*In re* BURTON AND BLINKHORN.
*Ex parte* THE INCORPORATED LAW SOCIETY. (*a*.)

*Solicitor—Permitting unqualified person to use solicitor's name in actions, &c.—Finding that the statutory offence was proved—No jurisdiction to inflict less than statutory punishment—"Shall and may be" struck off the roll—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 32.

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*By section* 32 *of the Solicitors Act*, 1843, *if any solicitor knowingly permits his name to be used in an action for the profit of any unqualified person, or does any act to enable an unqualified person to practise as a solicitor, the solicitor "shall and may be" struck off the roll.*

*Where a solicitor is charged under the above section, and the charge is established,*

*Held, that the court has no power to inflict a less punishment than striking the solicitor off the roll.*

In re Kelly, 43 *W. R.* 191, [1895] 1 *Q. B.* 180, *considered and followed.*

This was the adjourned hearing of a motion by the Incorporated Law Society calling on the respondent solicitor to show cause why he should not be struck off the rolls for permitting his name to be used by an unqualified person contrary to section 32 of the Solicitors Act, 1843, and calling on the unqualified person to show cause why a writ of attachment should not issue against him.

When the matter was first before the court they ordered it to be referred to Master Mellor for further inquiries.

*Hollams*, for the Incorporated Law Society, read the report, and submitted that the finding of the committee that the respondent solicitor had been guilty of professional misconduct of which he was charged had been proved. Under section 32 the court had no discretion as to the measure of punishment, and if the court decided that the statutory offence had been established it was bound to strike the solicitor off the roll.

*J. R. Randolph*, for the solicitor, urged that the statute did not take away the general jurisdiction inherent in the court, and that, notwithstanding the terms of the section, the court had a discretionary power to inflict punishment short of striking the solicitor off the rolls. In the case of *In re Kelly*, 43 W. R. 191, [1895] 1 Q. B. 180, the decision of the court (Pollock, B., and Grantham, J.) was really open to review, for Pollock, B., said: "The word 'shall' clearly would leave no doubt whatever upon the question; the only doubt which can arise is from the introduction of the words 'and may be.'" In that case the solicitor was struck off the roll, but it would seem that if the court had held that a less punishment, in their opinion, would have met the justice of the case, they might have decided otherwise. At any rate that decision is in conflict with *In re Grayston*, 32 SOLICITORS' JOURNAL, 680; *In re Sykes*, 34 SOLICITORS' JOURNAL, 285; and the decision of the Court of Appeal in *In re Lamb*, 37 W. R. 665, 23 Q. B. D. 477; and the view there expressed by Cotton, J., who dealt with this question, in his judgment at p. 480.

No one appeared for the unqualified person.

Lord ALVERSTONE, L.C.J.—We are of opinion that the solicitor must be struck of the rolls. I think, in reference to the point raised by Mr. Randolph, that *Kelly's case* is an authority binding upon us. It is an authority of the Divisional Court after the *dictum* had been expressed by Lopes, L.J., in the case of *In re Lamb*—the four cases cited by Mr. Randolph being also then before the court. With reference to the two cases in which it had been said the courts did not strike off, but suspended the solicitor, I have considerable doubt whether they were purporting to act under this section, although the section was referred to. I think it is quite possible that the courts were in some of the cases acting under their general jurisdiction to deal with an attorney who is called upon to answer matters of affidavit. In my opinion there is in the present case no discretion; and

if a distinction is to be drawn, it must be drawn by a court superior to us in authority.

I should like to say, also, that I think that this is a bad case, because obviously the solicitor has been for a long time colourably pretending to employ a clerk, but has in fact been allowing the clerk to make use of the solicitors name, and to sign the solicitor's name, to earn profit for himself. Therefore, upon the merits, I think that this solicitor should be struck off the rolls, and therefore I decide that it should be so, as well as on the ground of the statute.

WILLS, J.—If it were not for the fact that a discretion has been exercised in one of the cases mentioned, and that there are expressions in the judgments of the members of the Court of Appeal that there is a discretion possible under the words of this statute, I should have thought there could not be two opinions about the meaning of such an expression as "shall and may." I observe that although the members of the council said that under these words there may be a discretion, or there is a discretion, nobody has given any reason for it or has explained why the word "shall" is not obligatory because it is followed by "and may." In my opinion the language of the statute is quite free from doubt.

CHANNELL, J.—I agree. There has been a report handed up to the court of the case of *In re A. H. S.*, 63 L. T. Rep. 350, one of the cases referred to by Mr. Randolph, in which Denman, J., discusses this point, at p. 351. The court exercised a discretion in that case in this sense, that they inflicted a minor punishment than the striking off the roll; but I do not think, if you read Denman, J.'s, judgment, that the court did it under this section. What he says is "there are *dicta* of very learned judges in the Court of Appeal that even if a case be brought within the provisions of section 32, nevertheless the court may deal with the case merely under its general authority over solicitors and administer a minor punishment if in the judgment of the court the case is not one in which it is necessary in the interests of the public to act under section 32." That seems to say that there may be cases in which the court does not think fit to act under the section, but nevertheless it may administer under its general jurisdiction some other punishment.

That may possibly be correct, but in this case there is no other professional misconduct except that which comes within section 32. Then if you act under that section you must strike off the roll. I see that I was counsel in the particular case referred to. I have some sort of recollection that that was the sort of argument which I tried to bring before the court—that they need not act under that section if there was any other course open to them.

The order was that the solicitor should be struck off the roll, and that a writ of attachment should issue against Mark Blinkhorn, the unqualified person, and that they pay the costs of these proceedings and the costs preceding the execution of the writ.

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

Solicitors for the respondent, *Sims & Syms.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) May 21.

CONSETT URBAN DISTRICT COUNCIL v. CRAWFORD. (a.)

*Public health—Nuisance—Power of local authority to enter premises—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 102, 306.

*It is not competent for the representatives of a district council exercising powers with regard to nuisances under the Public Health Act,* 1875, *to enter upon premises and inspect them without first requesting the leave of the owner. They must apply for admission, and if they are refused, obtain an order to admit from the justices under section* 102 *of the Act.*

Appeal by the Consett Urban District Council from the justices of the county of Durham.

The special case set out the following facts:

On the 10th of July, 1902, a notice was served on the respondent, as owner of certain premises, requiring him to abate a nuisance on those premises.

On the 24th of July seven members of the council and two officers of the council, together with the county medical officer of the borough, visited, in accordance with a resolution passed by the council, a large number of properties in the urban district for the purposes of inspection, and on arriving at the respondent's premises, in respect of which the notice to abate a nuisance had been given, they went into his yard, leaving two of the councillors talking together outside. The respondent and his son having come up, the former asked the two councillors if they were making an inspection, and on hearing that they were, and that the councillors and doctor were inside, he pulled the door to, put a padlock on, and locked them out, and thereby prevented the two councillors who were outside from coming on the premises.

The council submitted, on these facts, that the respondent ought to be convicted, under section 306 of the Public Health Act, 1895, of having wilfully obstructed them in the execution of their duty.

The justices dismissed the summons on the ground that the council were trespassers, as they had not asked any person's permission to enter the premises, and that the respondents had not wilfully obstructed them. The proper course, in their opinion, was for the council to apply for an order admitting them to the premises, on the ground that the respondent had refused admission to the two councillors who remained outside.

The council appealed.

*Russell, K.C.*, and *Glen*, for the appellants.—The evidence distinctly shows that the respondent here obstructed the representatives of the council who, having obtained admission to the premises, were carrying out their duties.

*R. I. Simey*, for the respondent.—The respondent was within his rights in detaining the councillors and preventing them from trespassing on his property.

Lord ALVERSTONE, L.C.J.—I should be sorry to say anything that might be construed as an expression of approval of the respondent's conduct. I regret that anyone should have thought fit to do what this gentleman did out of some feeling that the members of the local board ought not to discharge their duty. But this is a criminal charge, and in order to justify it it must be brought within the words of the statute. I wish therefore to say, speaking for myself, that if we had come to the conclusion, having regard to the

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

words of the statute, that the members of the local authority were duly employed in the execution of their duty, and were wilfully obstructed in the execution of the Act, that different considerations would have arisen. But we have to consider what the rights of the local authority are. They are undoubtedly directed to investigate nuisances, and they ought, in the execution of their duty, to do everything in their power to find out what the nuisances are so as to put a stop to them. The sections of the Act not only impose duties upon the local authority, but give them certain rights when nuisances are discovered. The opening words of section 92 are: "It shall be the duty of the local authority to cause to be made from time to time inspection of their district with a view to ascertain what nuisances exist." It is obvious a great many nuisances might be dealt with without entering on private property, but the necessity of such entry may sometimes occur. Therefore, in addition to the general direction for the inspection of nuisances, the statute gives a right of entry on private property, and by section 102 of the statute it is provided that the local authority shall be permitted to enter premises for the purpose of examining as to the existence of any nuisance. When under this Act a nuisance is ascertained to exist, the local authority or their officers are to be admitted from time to time. Where an order has not been complied with, the local authority are to be admitted from time to time at all reasonable hours into the premises. If admission to the premises for any purpose of this section is refused, any justice may by order require the person having custody of the premises to admit the local authority, and if no person having custody of the premises shall be found, a justice shall, on oath being made to him of that fact, by order under his hand, authorise the local authority to enter. We decided in the *Wimbledon Local Board* v. *Hastings*, 87 L. T. Rep. 118. that the right to enter was not absolute in the sense that the justices must make the order, but they may hear the person against whom the order was demanded, and may exercise a discretion as to whether or not it shall be allowed. That seems to me to show that there is no statutory right of entry given in the sense that they are entitled to go upon persons' premises without further proceedings, and I think, therefore, that Mr. Simey is right in saying that where there is a refusal the local authority must get an order before they can enter. The case finds that the councillors and the county medical officers had not asked any person's permission to enter the respondent's premises. I think that if we are to overrule the justices' decision we must find that the councillors having got in in the course of a general inspection, they must be held to have been in under such circumstances that interfering with them was obstructing them in the execution of their statutory duties. I do not think that follows. The justices have come to the conclusion that, although the local authority were then performing a public duty, it was not a discharge of their duty as contemplated by the Act. I do not see my way to differ from them, however much I may disapprove of the respondent's conduct, and this appeal must be therefore dismissed.

WILLS, J.—I am of the same opinion. I share the reluctance to say anything which would encourage conduct of this kind in the future. What appears to me to be a short abstract of the legislation on this subject is that by section 92 of the Act the general duty to cause an inspection to be made falls on the local board or on the district council. They resolved that the inspection should be carried out by the councillors themselves. Therefore, they are entitled to all the rights and duties as created by section 102, which is intended to contain a complete code as to the manner in which the inspection shall be carried out, and as to the things what are to be done in order to give a right of entry upon the premises. Now the section is not quite complete, because it does not in terms provide for the present case. It provides for the case where admission is not refused, and for the case where admission is refused. Under that part of the section it seems to me the power given to the local authority is very considerable, because, apparently, it does not matter by whom a refusal has been made if there has been a refusal in fact. If there has been anyone on the premises, whether he has had authority to do so or not, who refuses them admission, they would be entitled to make use of their compulsory powers of section 102 and go before the magistrates. But this is a case where there has been no opportunity of refusal, because those who were conducting the inspection got in without seeing anybody or meeting anybody who could refuse to admit, and therefore that case is not specifically provided for, and therefore one has to see what is the reasonable construction of the clause. Now it seems to me that it would be a very strange conclusion to arrive at that if a person on the premises gave a refusal the owner or occupier could not be proceeded against and punished under section 306, but they must proceed under section 102 and obtain an order which according to the decision in the *Wimbledon case* is by no means made as a matter of course, and against whom the person concerned might be able to show very good cause why it should not be made. It would be a strange thing if the occupier, or the person concerned having those rights, where there was an express refusal, should be in a worse position where no opportunity was vouchsafed to him of saying whether he would avail himself of that power or not.

I cannot help thinking that it must have been intended that before any steps could be taken there must be an opportunity of refusal. The case where there is nobody on the premises, or where the person having the custody of the premises cannot be found, is provided for. The argument on behalf of the appellant seems to me to confound the circumstances which are necessary to entitle a person acting in the supposed execution of a duty to notice of action with circumstances which would entitle him to defend any action that has been brought on the ground that he was legally justified in what he did. I think under the circumstances this would have been a case of obstruction if these gentlemen had had a right of entry, and I think it would be very unfortunate if any countenance should be given to the idea that conduct of this kind, when there is a right of entry, would not be obstruction within the meaning of the Act.

CHANNELL, J.—I agree. I think it is clear, when you read section 102 carefully, that the Legislature has deliberately stopped short of giving the local authority the right of entry of their own motion. They may be admitted or they may get an order. The gentlemen were not admitted. They went in of their own motion, and that is not justified by section 102. Consequently they cannot be said to be in in the execution of their duty. The respondent was clearly wrong. He should have requested them to go out, and if they had refused he could have gently put his hand on them under the common law. Instead of that he locked them in. If they had been in in the execution of their duty it would have been clearly obstruction. The difficulty is about their right to go in. As to their right to go out, that is clear.

*Appeal dismissed.*

Solicitors for the appellants, *Pritchard & Sons*, agents for *Welford*, Consett.

Solicitors for the respondent, *Belfrage & Co.*, for *Aynsley*, Consett.

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## House of Lords.

From C. A. (England). } May 11.

CAPITAL AND COUNTIES BANK *v.* GORDON.
LONDON CITY AND MIDLAND BANK *v.* GORDON. (*a.*)

*Banker—Bill of exchange—Cheque—Crossed cheque—Receipt of payment for customer—Agent for collection—Crediting customer in account—Cheque crossed by banker—Draft by branch bank on head office—Conversion—Bills of Exchange Act,* 1882 (45 & 46 *Vict. c.* 61), *s.* 82—*Stamp Act,* 1853 (16 & 17 *Vict. c.* 55), *s.* 19.

*The protection afforded to bankers by section* 82 *of the Bills of Exchange Act,* 1882, *who in good faith and without negligence receive payment for a customer of crossed cheques, is conferred only where the bankers act as mere agents for collection. If they do more than act as such agents as where they forthwith credit the customer with the face value of the cheque, they are collecting the money for themselves, and are not protected by the section. Cheques to be "crossed cheques" within the section must be crossed on receipt by the bankers and not afterwards made so. A draft addressed by a branch manager to the head office is not a bill of exchange within the Act of* 1882, *but the bankers are entitled to the protection of section* 19 *of the Stamp Act,* 1853.

*Decision of the* Court of Appeal (50 *W. R.* 276, [1902] 1 *K. B.* 242) *affirmed, with a variation.*

These two appeals from orders of the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.), reported 50 W. R. 276, [1902] 1 K. B. 242.

The appellant Gordon carried on business in Birmingham as a manufacturer, under the style of Gordon & Munro.

In March, 1899, he discovered that his ledger clerk, Alfred Jones, had, since the beginning of 1895, been in the habit of opening letters addressed to the respondent by his customers, and stealing therefrom cheques made payable to the respondent under his trade name.

Actions for conversion were brought against the appellant banks into which the cheques had been paid by the clerk to his own accounts.

These cheques were taken as divisible into eight classes—(1) Cheques payable to Gordon & Munro or order, not drawn on the appellants, and not crossed when taken by them; (2) one cheque payable to Gordon & Munro or bearer, not drawn on the appellants, and not crossed when taken by them; (3) bankers' drafts, drawn by one of the country branches of the appellants' bank upon the appellants' head office, payable to Gordon & Munro or order, and not crossed when received by the appellants from Jones; (4) crossed cheques drawn on the appellants, and payable to Gordon & Munro or order; (5) crossed cheques marked "Not negotiable," payable to Gordon & Munro or order, and not drawn upon the appellants; (6) crossed cheques payable to Gordon & Munro or order, and not drawn on the appellants (this class comprises the great majority of the cheques); (7) crossed cheques payable to Gordon & Munro or bearer, and not drawn on the appellants; (8) instruments drawn in favour of Gordon & Munro and crossed, payable only upon signature by the payees of a form of receipt at the foot of the instrument, and not drawn upon the appellants.

No question arose on this appeal as to classes 2 and 7, nor as to class 4.

The facts are given at length in the court below, and shortly in the judgments of Lords Macnaghten and Lindley.

*Cohen, K.C.* (*Spencer Bower* with him), for the Capital and Counties Bank; *Haldane, K.C.*, and *Hugo Young, K.C.* (*P. G. Henriques* with them), for the London, City, and Midland Bank.—The banks are entitled to the protection of the Bills of Exchange Act, 1882, s. 82. The banks simply collected the cheques for their customer. The Stamp Act, 1853, s. 19, protected bankers who cashed cheques drawn on themselves with a forged endorsement. *Charles* v. *Blackwell*, 25 W. R. 472, 2 C. P. D. 151. There being no negligence on the part of the banks distinguishes them from *Bissell* v. *Fox*, Cab. & Ell., 395, 33 W. R. Dig. 11. Bankers are not trustees or agents of their customers: *Foley* v. *Hill*, 2 H. L. Cas., 28; *National Bank* v. *Silke*, 39 W. R. 361, [1891] 1 Q. B. 435; *Great Western Railway* v. *London and County Bank*, 50 W. R. 50 [1901] A. C. 414; *Clarke* v. *London and County Bank* 45 W. R. 383, [1897] 1 Q. B. 552, were cited or referred to.

*A. T. Lawrance, K.C.*, and *John Leslie*, for the respondent.—In the case of the crossed cheques the appellant banks did more than collect. The acts done are other than receiving the proceeds. They, in effect, bought them. They gave immediate credit. It was a receiving for the bankers themselves, and they made the usual charges. There was a complete conversion, which I prove.

*Hollins* v. *Fowler*, L. R. 7 H. L. 757, 23 W. R. Dig. 238; *Matthiessen* v. *London and County Bank*, 27 W. R. 838, 5 C. P. D. 7. *Arnold* v. *Cheque Bank*, 24 W. R. 759, 1 C. P. D. 578, and Grant on Banking, p. 58, were referred to.

*Cohen, K.C.*, in reply for the Capital and Counties Bank.

*Haldane, K.C.*, for the London City and Midland Bank.

THE HOUSE took time for consideration.

Lord MACNAGHTEN.—I am sure I need not trouble the House by recounting in detail the facts of these cases or describing the classes into which, for the sake of convenience, the drafts forming the subject of this litigation have been divided. It will be enough, I think, to remind your lordships that all the drafts now in question were stolen from the respondent Gordon, trading in Birmingham under the style of Gordon & Munro, by a man called Jones, who was Gordon's ledger clerk for about ten years. Jones himself lived in Sparkbrook. Unknown to his employer, he carried on a small business of his own as a coffin-furniture maker in Birmingham. In the name of the firm under which he traded he kept an account with the Birmingham branch of the Capital and Counties Bank, and also with the Sparkbrook branch of the London City and Midland Bank. To one or other of these accounts Jones paid all the drafts which he stole from Gordon, forging the necessary indorsement when the draft was payable to order on demand, as was generally the case. When the fraud was discovered, and Jones had been prosecuted and convicted, Gordon brought an action against each of

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the two banks for conversion of such of the stolen drafts as could be traced to its hands, with a count in the alternative for money had and received to his use. The actions came on to be tried before Bucknill, J., and a special jury. The only question left to the jury was the question of negligence. The result of the findings of the jury on this point was in favour of the banks. All other questions were reserved for the judge. On the principal matter in controversy Bucknill, J. gave judgment for the banks. This decision, however, was reversed by the Court of Appeal.

The main question, and the one most important as regards amount, related to crossed cheques payable to order on demand drawn on banks other than the bank which was being sued. It is not disputed now that as regards these cheques there can be no defence, unless protection is afforded by section 82 of the Bills of Exchange Act, 1882, which declares that, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

Now it is admitted that each of the two banks acted in good faith. The suggestion of negligence on their part has been negatived by the findings of the jury. It cannot be denied that Jones was a customer within the meaning of the section. The only question, therefore, is, Did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which, perhaps, might otherwise attach to some preliminary action on their part taken in view and anticipation of receiving payment. The section would be nugatory—it would be worse than nugatory—it would be a mere trap, if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business, and intended to lead up to that result. The character in which a bank receives payment of a cheque is, as has been already said in this House, a question of fact. To my mind it would have been more satisfactory if the jury, under proper directions from the judge, had answered this question themselves. It, was, however, withdrawn from their consideration.

The appeal was argued very fully and very ably by the learned counsel for the appellants, and especially by Mr. Cohen. And I must say that I was a good deal impressed by his argument in opening. At first sight there is not much difference between the case of a bank which at once credits a customer with the face value of a cheque paid in to his account, and allows him to draw against his credit balance thus increased, and the case of a bank which, without crediting the customer with the value of a cheque before collection, allows him to over-draw his account in view of the anticipated credit. In each case, it was said, the credit is only provisional, whether entered in the customer's account or not. In each case, it was said, payment when received is received for the customer. And in a sense that is true. Then it was urged with some force that practically the only result of upholding the decision under appeal will be to compel some bankers to keep a double set of books where now one set only is required, and thus to impose upon bankers a good deal of extra and perhaps unnecessary trouble. But the protection conferred by section 82 is conferred only on a banker who receives payment for a customer—that is, who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents they are not within the protection of the section. It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account, the banker becomes holder for value of the cheque. It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value.

So long as a bank has for its customers only persons of position with whose circumstances the manager is fully acquainted, as is not unfrequently the case in country districts, where one bank by arrangement with its competitors has a monopoly, it matters little whether the bank at once credits a customer with the face value of cheques paid into his account or waits until collection. The bank only looks to its own customers. But Parliament may have thought that in the increase of banking business likely to arise in consequence of the legislation with respect to crossed cheques, and the competition sure to follow, it would not be improbable that small accounts might be opened with banks by persons of little or no credit, and that it might be a dangerous thing to extend protection to bankers dealing with crossed cheques in all cases, whether they acted simply as agents for collection or in a different character; or possibly at the time bankers asked for no further protection than that which section 82 purports to confer. However that may be, your lordships have only to construe the language of section 82 in connection with the language of the other sections of the Act bearing on the point.

It seems to me that the decision of the Court of Appeal on this question, which is the main question involved, is perfectly right. In the judgments of the learned judges of the Court of Appeal, and especially in the judgment of Collins, M.R., I find the subject dealt with so completely, both as regards the history of the legislation and the principles and decisions applicable to the case, that, speaking for myself, I think it would be a waste of time to do more than say that I accept their view. It appears to me that the Master of the Rolls has accurately summed up the whole case. "The protection afforded by section 82 must," he says, "be limited to that which is necessary for the performance of the duty which by the legislation as to crossed cheques was imposed on bankers. If bankers deal with crossed cheques in the ordinary way in which bankers dealt with cheques before the legislation as to crossed cheques and in which they deal with cheques other than crossed cheques at the present time, namely, by treating them as cash, and upon receipt of them at once crediting the customer with the amount of them in the ordinary way instead of making themselves a mere conduit pipe for conveying the cheque to the bank on which it is drawn, and receiving the money from that bank for their customer, I think they are collecting the money, not merely for their customer, but chiefly for themselves, and therefore are not protected by section 82."

On all other questions that have been raised I agree with the Court of Appeal, except as regards the small drafts of which class 3 is composed. On this point I agree with my noble and learned friend Lord Lindley, whose opinion I have had the advantage of reading. It is a very small point, and ought not, I think, to make any difference as regards the costs of the appeal.

Subject, therefore, to a slight variation as regards these drafts, amounting in all to £32 15s. 9d., I move your lordships that the decree be affirmed and the appeal be dismissed with costs.

Lord SHAND.—I agree with the judgments of the Court of Appeal and with the judgments of my noble

and learned friends Lord Macnaghten and Lord Lindley.

Lord DAVEY.—I had prepared notes for a judgment of my own, but I have had an opportunity of reading the very full judgment which is about to be delivered by Lord Lindley. I entirely agree with the views he has expressed on this case, and in particular with the view he has expressed on the Stamp Act. I have, therefore, not prepared a judgment of my own, and content myself with saying I agree.

Lord ROBERTSON.—I also have had the pleasure of reading the judgment of Lord Lindley, and I agree with all parts of it.

CAPITAL AND COUNTIES BANK (LIMITED) v. GORDON.

Lord LINDLEY.—The question raised by this appeal turns entirely on the true construction and effect of section 82 of the Bills of Exchange Act, 1882. The facts are simple, and not in controversy. Gordon, who traded as Gordon & Munro, was the holder for value of thirty-two crossed cheques, drawn by various persons on various banks and payable to Gordon & Munro or order. Gordon had a clerk named Jones, and he forged endorsements in the name of Gordon & Munro on these cheques, and then took or sent them to the Capital and Counties Bank, where he had an account. Jones also indorsed them in his own name, and the bank credited his account with the amounts, and he drew on his account whilst the amounts of the cheques so paid in stood to his credit. The bank manager dealt in this matter with perfect *bona fides*, and without negligence, having no suspicion that anything was wrong. He said he held the cheques until he received payment for Jones, and credited his account with the proceeds, and that he received the cheques in the ordinary course of banking business, and that all the cheques were collected for Jones. The bank manager was not cross-examined on these answers; but there is some ambiguity about them. The documents and accounts, however, show exactly what was done, and it is plain that the bank did not wait until the cheques paid in by Jones had been passed through the clearing house before their amounts were placed to his credit. They were placed to his credit when he paid the cheques in; and he was allowed to draw upon his account increased by them as above stated. None of the cheques were ever returned to the bank; they were all duly honoured, and the appellant bank received their amounts in due course from the banks on which they were respectively drawn. Afterwards Jones's frauds were discovered, and he was prosecuted and convicted. Gordon, who had been robbed of the cheques and wrongfully deprived of the money represented by them, brought an action against the bank to recover that money which the bank had received under the circumstances above described.

If this case had to be determined on general principles of English law, apart from statutory enactment, the bank would have had no defence to Gordon's action. Before the Judicature Acts he could have recovered the value of the cheques, either in an action of trover or in an action for money had and received. A long series of well-established authorities, which cannot, I apprehend, be now questioned, establishes the liability of the bank beyond all dispute; nor was this seriously contested by the counsel for the appellants.

But then reliance is placed on section 82 of the Bills of Exchange Act, 1882. This section has come before the Courts more than once, and before this House in *Great Western Railway* v. *London & County Bank*. Those cases only go to show that a bank is not protected by the section unless—first, the bank acts in good faith, and without negligence; unless, secondly, it receives payment for a customer; and unless, thirdly, the bank only receives such payment. The last paragraph of the section shews that this last condition is as important as the first and second. But the questions in any particular case whether a bank has received payment for a customer, in good faith and without negligence, and whether the bank has only received such payment, are questions of fact depending on the circumstances of each case. The facts of this particular case do not, in my opinion, bring the bank within the operation of the section. What has to be considered is not the cheque, but its payment. Now, when the cheque was paid to the bank, the bank received the payment for itself rather than for Jones. It is no doubt, true that, if the cheque had been dishonoured, Jones would have become liable to reimburse the bank the amount advanced by it to him when it placed the amount to his credit. This he would have had to do whether any cheque, crossed or not, was placed to his credit and was afterwards dishonoured. To this extent and in this sense it may be said that the bank received payment for Jones, because payment of the cheque discharged him from the liability he would have been under to repay the bank the sum placed to his credit if the cheque had not been paid. But what your lordships have to consider is not Jones's liability to the bank if the bank never received payment of the cheque, but for whom did the bank in fact receive such payment. The amount would not be again placed to Jones's credit; it was already there. The bank in its then ignorance of the forgery could not withdraw that credit after it had received payment of the cheque. As between the bank and Jones, the money paid belonged to the bank as soon as the bank received it. The bank had a right to sue for the money and to apply it in any way the bank thought proper, provided only Jones was not treated as owing its amount. It was said by the appellants' counsel, with some confidence, that any jury of business men would find as a fact that the bank received payment of these cheques for Jones, and nothing more. All I can say is that I think it very likely they would do so if left to themselves without proper directions from the judge, but that if proper directions were given them they would not be likely to go wrong. It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right. Nothing occurred in this case which had any such effect to the knowledge of the bank. It appears to me impossible to say that under these circumstances the bank received payment of the cheques in question for their customer Jones.

Whether it is desirable to alter the wording of section 82 is not for your lordships to consider on the present appeal; but so long as that section stands in its present form, bankers who desire its protection will have to be more cautious, and not place crossed cheques paid in for collection to the credit of their customers before such cheques are paid.

This appeal should, in my opinion, be dismissed with costs.

I pass now to the appeal of

LONDON CITY AND MIDLAND BANK v. GORDON.

This appeal raises not only the same question as the last, but also several further questions owing to the forms of the cheques and drafts paid by Jones into the appellant bank. In the respondent's case eight classes of instruments are described; but of these only Nos. 1, 3, 6, and 8 have to be considered by your lordships.

Class 6 is like those which had to be considered in the appeal of the Capital and Counties Bank. It is unnecessary for me to say more about these, for the reasons already given are applicable to them. It may, however, be useful to mention that Jones was required by the London City and Midland Bank to indorse the cheques which he paid into it, and that he frequently availed himself of the credit given him for those cheques by drawing against such credit. The accounts show that this was constantly done, and to a much greater extent than in the case of the Capital and Counties Bank. These additional circumstances cannot in any point of view improve the position of the appellant bank. The decision of the Court of Appeal on this class was, in my opinion, correct.

Class 1 consists of cheques not crossed when taken by the appellant bank. It appears to me that section 82 would be deprived of all meaning if it were held to apply to cheques not crossed when they came to the hands of the bank seeking the protection of that section. Section 77, sub-section 6, does not assist the appellant bank in the present case, although it might be useful if an indorsement were forged after a crossing. As regards this class, I can usefully add nothing to what was said in the court below.

Class 3 presents more difficulty; it consists of four small drafts drawn by a country branch of the appellant bank on its own head office and not crossed. The first question which has to be considered is whether these instruments are bills of exchange as defined in section 3 of the Bills of Exchange Act, 1882. If they are, then, not being crossed, section 82 will have no application to them, even if that section could have applied in this case to such documents if crossed. But if these drafts are bills of exchange within the meaning of section 3 they will come within section 60, and the bank will be protected by it, for these cheques are drawn on the bank sought to be made liable for paying them. But I agree with the Court of Appeal in thinking that the bank, which is both drawer and drawee of these instruments, is not entitled to treat them as bills of exchange as defined in section 3 of the Bills of Exchange Act; although a holder may sue the bank upon them and treat them either as bills of exchange or as promissory notes—see section 5, sub-section 2. An instrument on which no action can be brought by the drawer can hardly be a bill of exchange within section 3 of the Act, whatever it may be called in ordinary talk.

Next it was contended that section 17 of the Revenue Act of 1883 (46 & 47 Vict. c. 55) extended to these documents and brought them within the protecting clauses of the Bills of Exchange Act. But, as pointed out by the Court of Appeal, section 17 of the Revenue Act, 1883, only applies to drafts issued by a customer of a bank, whilst these drafts were issued not by a customer, but by a bank to a customer. I agree, therefore, with the Court of Appeal on this point.

But then reliance was placed on the Stamp Act, 1853 (16 & 17 Vict c. 59), s. 19, which relates to drafts or orders drawn on bankers and payable to order on demand. The section exonerates the bankers drawn upon from liability if they pay such drafts or orders to holders claiming under indorsements which are forged. This statute was passed before crossed cheques were regulated by statute, and it has no special reference to them; nor does it refer to any bankers except those on whom the instruments are drawn.

The history of this section is well known. It was inserted at the instance of Lord Overstone, when cheques to order on demand bearing one penny stamps were first introduced. He saw that these would become common, and would expose bankers to serious risks from forged indorsements; and the section was inserted for their protection. The Stamp Act of 1853, except section 19, has been repealed; but section 19 has been preserved, and in 1872 it was made applicable to documents issued by the Paymaster-General in pursuance of the Court of Chancery Funds Act (see 35 & 36 Vict. c, 44, s. 11). This section, although referred to in the amended points of defence, was apparently overlooked in the court below; at all events, it is not noticed in the judgments delivered by the Court of Appeal. I can, however, find no reason for saying that it does not apply to class 3. In terms it clearly does. Bigham, J., had this point before him in *Brown, Brough, & Co.* v. *National Bank of India*, 18 Times L. R. 669, and he decided that in that case the bank was not protected. He did so on the authority of the decision of the Court of Appeal in the case now before your lordships; but it is manifest that, had it not been for this authority, the learned judge would have decided the other way. The draft he had to deal with was drawn in Madras on London, and Mr. Grant, in his book on Banking, p. 24, says that section 19 only applies to inland bills. It is unnecessary to consider whether he is right in this respect, as the drafts now under consideration are inland drafts.

I invite your lordships' attention to the fact that section 19 of the Act of 1853 is left unrepealed by the Bills of Exchange Act, 1882, although section 60 of that Act is evidently taken from section 19 of the Act of 1853, and made applicable to bills of exchange and to cheques, as defined in sections 3 and 73 in the Bills of Exchange Act of 1882. The only conclusion which I can draw from these enactments is that section 19 of the Act of 1853 was purposely left unrepealed in order that it might apply to drafts or orders which did not fall within the definitions of bills of exchange or cheques in the codifying Act of 1882. These definitions are far more limited and scientific than the sweeping descriptions contained in the Stamp Acts; and section 19 of the Act of 1853 appears to me to be purposely preserved in order to protect bankers cashing drafts or orders on them, and which are not bills of exchange or cheques as defined in the Act of 1882, in the same way as section 60 of that Act protects them from cashing documents drawn on them and which are bills of exchange and cheques as defined in it.

As regards these four drafts, therefore, I think there has been an oversight, and that the decision appealed from is wrong.

There remains only class 8—that is, instruments drawn in favour of Gordon & Munro, and crossed, payable only upon signature by the payees of a form of receipt at the foot of the instrument and not drawn upon the appellants. These documents are clearly not bills of exchange within the meaning of the Bills of Exchange Act. Nor, for reasons already given, are they brought within it by section 17 of the Revenue Act, 1883. Nor do they come within section 19 of the Stamp Act, 1853, which, as I have already observed, applies only to banks which are drawees.

In substance this appeal fails, although, as to a few drafts of comparatively small amounts it succeeds. The result, in my opinion, therefore, is that the decision of the Court of Appeal should be affirmed except so far as it relates to the drafts forming class 3, but that as to them the decision should be reversed. This success is, however, too small to affect the costs of the appeal, which should be borne by the appellants.

*Appeal dismissed, with a variation.*

Solicitors for Capital and Counties Bank, *Cameron, Kemm, & Co.*

Solicitors for London City and Midland Bank, *Keen, Rogers, & Co.*

Solicitors for respondent, *Pepper, Tangye, & Co.*, for *Pepper, Tangye, & Winterton*, Birmingham.

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From C. A. (England). June 15.

SECRETARY OF STATE FOR INDIA *v.* SCOBLE. (*a.*)

*Inland revenue—Income tax—Annuity payable under contract—Option of such payment—Annual sum consisting partly of capital and partly of interest—Income Tax Acts,* 1842 (*5 & 6 Vict. c.* 35), *s.* 102, *and* 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Schedules C and D.*

*Under the provisions of a contract entered into some years ago the Indian Government gave notice of its intention of paying off the purchase-money for a railway by annual instalments called annuities. Part of these instalments represented capital and part interest. Upon payment being made income tax was deducted on the whole instalment.*

*Held, that the tax was not payable on that portion which represented the payment of capital.*

*Decision of the* Court of Appeal (ante, *p.* 580) *affirmed.*

Appeal from a decision in Court of Appeal, *ante*, p. 580 (Vaughan Williams, Stirling, and Mathew, L.JJ.), where the facts are given at length. In outline they are as follows: The Secretary of State, acting in pursuance of a contract of 1849, gave notice of his intention to purchase an Indian railway and works for £30,000,000 odd, and, further, gave notice to pay by way of annuities. These annuities were vested in respondents, who claimed return of income tax on so much of the annuities as represented capital repaid, and the Court of Appeal held that income tax was only payable on that part of the instalments which represented interest.

*Sir R. Finlay, A.G., Sir E. Carson, S.G.*, and *Rowlatt*, for the appellant.

*Cripps, K.C., Danckwerts, K.C.*, and *Tyrrell T. Pain*, for the respondents, were not heard.

Earl of HALSBURY, L.C.—I am not satisfied with the very ingenious arguments which have been addressed to your lordships, and am of opinion that the Crown has failed in the contention that this was an "annuity" within the meaning of the Income Tax Acts. I, however, do not mean that the question was free from difficulty, and the presence of the word "annuity" in those Acts gave plausibility to many of the observations of the Attorney-General. Still, looking at the real nature of the transaction, I come to the conclusion that this was not a case of the purchase of an annuity, but one wherein, under the powers reserved by the contract, one of the parties agreed to buy from the other what was the latter's property; and I have no doubt that what was called an annuity in the contract between the parties was really a mode of making payment for that which, by the hypothesis, had become a debt to be paid by the Government. The Income Tax Acts were not intended to tax capital as income, and your lordships are at liberty to analyse the real character of the transaction and to discuss whether this annual sum was partly capital and partly income. Here, then, was an antecedent debt, and I cannot differ from the views expressed by the three judges of the Court of Appeal. If the whole of these annual sums were taxed, there would be a taxation of capital such as was not contemplated by the Legislature. It was not a question upon which one could dogmatize. There were cases no doubt, in which, in a sense, capital was taxed, as for example in the case of rent derived from coals, which was not strictly speaking rent at all. Other illustrations might be given of the same character. The only answer to be given in the case of such anomalies was that income-tax could not be levied on strictly logical lines. But in this case the word "annuity"—the only word which could be relied on by the appellant—was not used in the sense intended by the Income Tax Acts. For these reasons I move that the appeal be dismissed with costs.

Lords MACNAGHTEN, SHAND, DAVEY, and LINDLEY concurred.

*Appeal dismissed with costs.*

Solicitors, *Solicitor for Inland Revenue; White, Borrett & Co.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

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## Court of Appeal.

From K. B. Div. (In Bkcy.) (Vaughan Williams, Romer and Stirling, L.JJ.) June 20.

*In re* A DEBTOR. (*a.*)

*Bankruptcy—Bankruptcy notice—Company—Winding up—Liquidator—Judgment for unpaid calls—Set-off Application to set aside bankruptcy notice—When set-off must be effective—Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4 (1) (g).

*To enable an application by a debtor to set aside a bankruptcy notice which has been served on him by a judgment creditor to succeed, the debtor must show that he has a counterclaim, set-off, or cross-demand which can be set up by him at the time of the application to set aside the bankruptcy notice, and not merely one which can be subsequently set up in the bankruptcy so as to put an end to any effective claim by the judgment creditor for the amount of his judgment. There is no general principle that a bankruptcy notice should not be issued in respect of a debt if on bankruptcy that debt would be discharged by a set-off.*

This was an appeal by the debtor from a decision of the registrar in bankruptcy dismissing an application to set aside a bankruptcy notice which had been served on him on behalf of the Prospecting and General Developing Co. of West Australia (Limited).

The debtor was a shareholder in the company, which, on the 13th of September, 1900, passed a resolution for voluntary winding up.

On the 9th of May, 1901, the company recovered judgment against the debtor for £121 1s. 10d. for calls on shares and £8 5s. 2d. costs, making together £129 7s.

This sum not having been paid, the company, on the 20th of April, 1903, served the debtor with a bankruptcy notice.

The debtor had a claim against the company for over £4,000, and he applied to the registrar to have the bankruptcy notice set aside on the ground that this claim was, within section 4 (*g*) of the Bankruptcy Act, 1883, "a counterclaim, set-off, or cross-demand, which equals or exceeds the amount of the judgment

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

debt, and which he could not set up in the action in which the judgment was obtained."

The registrar dismissed the application.

The debtor appealed.

*Whinney*, for the appellant.

*Hansell*, for the respondent.

The arguments used appear from the judgments.

VAUGHAN WILLIAMS, L.J.—This is a case of considerable difficulty. We assume for the purpose of this hearing that there is, as between the company, which has a claim for unpaid calls, and the defendant, who is a shareholder in that company, a claim for moneys due from the company to the defendant which in point of amount would overlap the claim for the calls.

Now this company is in liquidation, and the result of this company being in liquidation is that the statutes in relation to companies—the Companies Acts, 1862—make such provision as to what shall be done in the event of liquidation, that after liquidation the cross-claim by a shareholder, such as the defendant against the company, cannot be set up. The real reason for that is that although the action, even after the liquidation, is an action which is brought in the name of the company, in substance it is brought by the liquidator for the amount which the liquidator may find to be due from, amongst others, shareholders and creditors of the company. The moment you arrive at that conclusion the result is that there is, as expressed by Bramwell, B., in *Sankey Brook Coal Co. v. Marsh*, 19 W. R. 1012, L. R. 6 Ex. 185, a want of mutuality. He says: "I think that these debts are in substance not mutual, but that the real plaintiff is the liquidator, and that the debt sued for is really due to the body of creditors. In their behalf he brings the action." The result of that would be this, that assuming the claim of the shareholder against the company to overlap the debt for calls, the shareholder could not set up that defence against the liquidator. It is not that a time might arrive presently on the happening of which the defendant would be able to rely upon this set-off; it is that the want of mutuality will form a complete answer to any claim by the defendant to set up this defence against the claim of the liquidator for calls. In this case there has been obtained by the liquidator a judgment in the King's Bench Division for the amount of calls unpaid by the defendant. Of course, no defence by way of set-off or otherwise could be set up against that claim. In that state of things the liquidator has issued a bankruptcy notice under clause (*g*) of section 4 of the Act of 1883. I had better read that clause. It is amongst the clauses declaring the acts of bankruptcy, and this is one of the acts of bankruptcy which is declared in clause (*g*). "If a creditor has obtained a final judgment against him"—that is against the debtor—"for any amount, and, execution then not having been stayed, has served on him in England, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the joint debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off, or cross demand, which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained."

There can be no doubt here that the creditor has obtained his final judgment, and there can be no doubt that he has served the bankruptcy notice, and I do not understand that it is suggested in any way that the debtor has complied with the terms of that bankruptcy notice. He has not paid the judgment debt in accordance with the terms of the judgment; he has not secured or compounded it to the satisfaction of the creditor or of the court. Under those circumstances the only course which is really open to the debtor, if he wishes to avoid committing this act of bankruptcy, is to get the bankruptcy notice set aside upon grounds which are admissible, having regard to the terms of the section.

Now, what is said by the debtor here is that he has a set-off which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained. Now, it is not disputed—in fact it is common ground—that he could not set up this set-off in the action in which the judgment was obtained. He could not because of the want of mutuality. The debtor says, although he could not do that, yet by virtue of the terms of section 38—a section which takes effect when a receiving order has been obtained, and takes effect from the date of the receiving order—there would be an effective set-off which could be set up against this claim of the judgment debtor, and he says that entitles him to have his bankruptcy notice set aside. He enforces that by saying that the bankruptcy notice is a first step in bankruptcy, and also by saying that by the very terms of the provisions of the 7th section of this Act, when the petition for a receiving order comes on to be heard, the court, in the exercise of its discretion, would not make an order for a receiving order if they found that there really was such a set-off to this debt which could be set up in the administration in bankruptcy, and which would put an end to any effective claim by the judgment creditor for the amount of the judgment. What we have to consider is, whether that claim by the debtor can be well founded. In my judgment the question whether that contention by the debtor can be supported depends upon the terms of the 4th section, clause (*g*), which I have already read. Has the debtor here satisfied us that he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained? And, as to the latter part, there is no doubt he could not set it up. Then, has he a counterclaim, set-off, or cross demand? One must ask oneself at what point of time. It is quite plain—indeed it is common ground—that at the time when the action was brought and the judgment was obtained that he had not a set-off equalling the judgment debt. To what time do these words "he has" refer? It seems to me that those words must refer to the time of the hearing of the application to set aside the bankruptcy notice. Then has he a set-off at that moment? He clearly has not a set-off in respect of which at that moment he could bring an action, for, as is pointed out by Bramwell, B., in the judgment to which I have already referred, it is plain that the defendant could not maintain an action against the company for this cross-claim—that is to say, he has not at that moment, when the application is made to set aside the judgment summons, an effective set-off which he could enforce at that moment. What does this section mean? Does it mean that at that moment he must have an effective set-off which he could enforce by action, or is it sufficient that he has vested in him a right of set-off at that moment which, when the proper time comes in bankruptcy, could be used for the purpose either of reducing or wiping-out this judgment debt?

Now, he has the latter, but he has not the former, and we have to answer the question whether it is sufficient that he has the latter—that is to say, a right of set-off which is existing but can only be effectively used after the making of the receiving order in the administration in bankruptcy or under the receiving order, which is the same thing. Now, not without considerable doubt, I have come to the conclusion that the words here refer to a set-off which can be enforced at the moment of the hearing of the application to set aside the bankruptcy notice. It must be remembered that the persons who are claiming the judgment debt at that moment are the creditors as represented by the liquidator, and nothing has happened since the judgment to prevent them having that character. At the moment of the hearing of the application to dismiss the bankruptcy notice these creditors, as represented by the liquidator, are making no claims upon the basis of the judgment debt in any bankruptcy administration. It is quite possible that there never may be a petition founded on this act of bankruptcy either by the plaintiffs, the judgment creditors, or by anyone else, for this is an act of bankruptcy which any creditor can take advantage of as a basis for a petition for a receiving order, and it is also quite possible that even if there is is a petition there may be no order for a receiving order. It seems to me that the meaning which I have put upon these words is pointed to by the words at the end of the clause—"which he could not set up in the action in which the judgment was obtained."

In this particular case it is true that he cannot set up the set-off because of this want of mutuality, but it is possible that you might find a defendant who, through carelessness, or for some other reason personal to himself, did not care to set up the set off. Now we will take that case, and we will suppose that he had got a set-off and could, if he had chosen, have relied upon it as a defence to the action. Judgment is obtained against him without reference to that set-off. A bankruptcy notice is issued. Could you set aside that bankruptcy notice? Clearly not if you have regard to the words "and which he could not set up in the action in which the judgment was obtained." The Act of Parliament expressly prevents his relying upon a set off as a ground for setting aside the bankruptcy notice in a case in which he could have set it up but did not.

But all these arguments based upon the bankruptcy—based upon the fact that there could be a set-off in the event of the bankruptcy under the 38th section—would apply just as much to the case where the debtor neglected to set up a set-off which he could have set up as they do to a case where there was a set-off which he could not rely upon. It is perfectly plain that the result of failing to set up the set-off which might have been set up does not satisfy the debt upon which the set-off is based; on the contrary, if there is a receiving order made, and there is an action taken under the mutual credit clause in bankruptcy, although the debtor has not chosen to set up the set-off in the action, the creditor would have to give credit for the set-off when it comes to proof of a debt on the action taken under the mutual credit section. And that is quite right, for this reason. If it were not so it would be doing great injustice to the body of creditors, because you have a fund upon which the body of creditors are entitled to come, and you would, by reason of the neglect of the debtor to set up his set-off, enable someone to rank upon that fund who, as against creditors, has no right to rank upon it.

Under those circumstances it seems to me that we ought to construe this section as meaning an effective counter-claim, set-off, or cross-demand at the time of the hearing of the application to dismiss the bankruptcy notice.

The only other matter that I think I need refer to at all is the suggestion that in the event of a receiving order there will be relation back of the title of the trustee, or whoever may be the representative of the creditors, up to the time of committing this act of bankruptcy by non-compliance with the bankruptcy notice. But it seems to me that the answer to that is the same answer that I have just given to the other points which were brought forward in this case—that is to say, that it goes too far. If it is true, it would just as much cover the case where there is neglect to set up the set-off as a case where he could not set up the set-off, and this makes it obvious that he is not to be allowed to set aside the bankruptcy notice where the set-off is one which the debtor could have set up but has neglected to do so.

For these reasons I have come to the conclusion that this appeal fails, and it must be dismissed with costs.

ROMER, L.J.—I also think that the appeal fails. This case cannot be dealt with on the footing that what the creditor has done in issuing the bankruptcy notice was an abuse of the process of the court. There is nothing in this case to show any want of bad faith on the part of the liquidator. Indeed, bad faith has not been suggested, nor has the question as to abuse of the process of the court been gone into at all, or been considered by the registrar. In fact, there appears, as I understand, to be a dispute between the parties as to whether or not the set-off claimed on behalf of the debtor does or does not equal the amount of the judgment debt; and if there was, as there well might be here, a *bonâ fide* opinion on the part of the liqudator that the set-off was not equal to the amount of the judgment debt, he is well entitled to issue his bankruptcy notice and to have that question determined, and, if determined in his favour, to be able to proceed to further bankruptcy proceedings and obtain an adjudication.

It appears to me, therefore, that the grounds of the application by the liquidator being an abuse of the process of the court cannot, under the circumstances of the case, be established or even urged before us. Then I proceed to consider whether the appellant can succeed on any other ground, and I am bound to say I can find no satisfactory ground on which to allow the appeal, although personally I should have been very disposed, if I could have seen my way, to have supported by my judgment the position of the appellant. But at the time when this bankruptcy notice was issued, and at the time when the application to discharge it came before the registrar, it is clear that, the judgment debt being one for calls in the winding up of the company, no set-off could be urged by the debtor in respect of a debt due to him from the company, because, having regard to the provision in the Companies Act, 1862, in substance, unless and until bankruptcy supervenes, the two debts give different rights. The debt due for calls, though nominally due to the company, is really not so much a debt due to the company as being a liability to contribute to the assets. The rights of the creditors of the company have supervened, and they have rights beyond what the company would have had against this debtor if there had been no winding up. It is true that if bankruptcy of the debtor ensued there would be a right of set-off, and the reason is that the right of the creditors of the bankrupt in that case have supervened, and you have to deal with the difficulty that there is a double right—namely, the rights of the creditors of the company and the rights of the creditors of the bankrupt, and

those rights are equal, and the only way of dealing with the difficulty in that case is to treat the mutual rights as if they were the old rights of the debtor in his individual capacity, and the company in its individual capacity, and so the right of set-off must be enforced and accrues. It is said that the principle of there being no right of set-off by a debtor in such a case as this until bankruptcy supervenes would prevent the Court of Bankruptcy from refusing adjudication on a petition presented by the liquidator in respect of the debt due to the company. The answer to that is this: The court has a judicial discretion as to whether it will or will not adjudicate a man bankrupt on a creditor's petition, and I think that in such a case a case of the kind we have to deal with here—in ordinary circumstances the court would, in the exercise of its discretion, refuse to make the man bankrupt on the petition of the liquidator, because the very fact of an order being made adjudicating a man bankrupt at the instance of the liquidator would destroy the cause—the right of set-off to accrue—and so destroy the position of the petitioning creditor. I was trying to see whether it could be said that there is a general principle that a bankruptcy notice should not be issued in respect of a debt if on bankruptcy that would be discharged by a set-off. I should have been glad if I could have found such a principle available for us in this case, but it appears to me that the provisions of the Bankruptcy Act prevent us saying there is any such principle. If you look at the words of section 4 of the Bankruptcy Act this is clear—that it contemplates that a bankruptcy notice may be issued by a person who has obtained judgment against a debtor for a debt even if that debtor has a set-off of equal or greater amount but had not pleaded it in the action in which the judgment was obtained. In that case it is clear that adjudication could not be made at the instance of the creditor who had obtained, the judgment, and that the Act clearly contemplates that, notwithstanding that fact, he could issue a bankruptcy notice in respect of his judgment debt. I cannot therefore find the existence of the principle which would enable the appellant to succeed in this case, and in the absence of some principle, and in the absence of any legitimate ground on which I could enable the appellant to say he is entitled to discharge this bankruptcy notice, I regret to say I think the appeal fails, and must be dismissed with the usual consequences.

STERLING, L.J.—I have felt great difficulty in arriving at the conclusion to which my learned brothers have come, and with which I agree.

The reasons for my conclusion have already been given by both my learned brethren, and I feel I cannot usefully add to them and I do not want therefore to express any further opinion.

Solicitors, *Blair & W. B. Girling; Haslam & Co.*

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From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) May 28.

PREIST AND WIFE *v.* LAST. (*a.*)

*Sale of goods—Implied warranty—Sale of specific chattel—Sale for "particular purpose"—Sale of Goods Act,* 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-section* 1.

*The plaintiff, who was a draper, went to the shop of the defendant, who was a chemist, and asked him for an indiarubber hot-water bottle for the use of his wife, who was suffering from cramp. The defendant, who did not himself manufacture hot-water bottles, showed the plaintiff a bottle, and upon being asked whether it would stand boiling water, he said that it would not, but that it would stand hot water. The plaintiff bought the bottle, and while his wife was using it it burst and scalded her. In an action to recover damages for breach of warranty the jury found that the bottle when sold was not fit for use as a hot-water bottle, and that this was the cause of its bursting.*

*Held, by* Walton, J., *and the* Court of Appeal, *that there was an implied warranty that the bottle was fit for the particular purpose which it was required within section* 14, *sub-section* 1, *of the Sale of Goods Act,* 1893, *the purchaser having in the circumstances made known that purpose to the seller, so as to show that he relied on the seller's skill or judgment.*

Application for judgment or a new trial in an action tried before Walton, J., and a jury at Liverpool.

The plaintiff, Philip Preist, carried on business as a draper and the defendant was a retail chemist. Preist went to the defendant's shop and asked for an indiarubber hot-water bottle for the use of his wife, who was suffering from cramp. The defendant showed him two indiarubber bottles, one being larger than the other, and Preist selected the smaller one. The defendant did not himself manufacture indiarubber hot-water bottles, but bought them from a wholesale dealer. According to the defendant's evidence Preist asked him if it would stand boiling water, and the defendant replied that it would not, but that it would stand hot water. Preist thereupon purchased the bottle and paid the defendant 3s. 6d. for it. His wife used the bottle for a few nights, when it burst and she was severely scalded. Preist and his wife brought this action, Mrs. Preist claiming to recover damages for personal injuries owing to the alleged negligence of the defendant, and Mr. Preist claiming to recover damages for breach of warranty.

Walton, J., left certain questions to the jury which, with their answers, were as follows: (1) Was Mr. Preist, when he brought the bottle, told by the defendant that it was fit for use with boiling water?—No. (2) Was the bottle, when sold, fit for use as a hot-water bottle?—No. (3) If it was not fit for use, was that the cause of the bottle bursting?—Yes. (4) Was there any negligence on the part of the defendant in selling this bottle for the purpose for which it was sold?—The jury were unable to agree upon this question. (5) What damages?—£40 for expenses incurred by Mr. Preist, and £100 compensation for Mrs. Preist's pain and suffering.

It was agreed that any questions of fact bearing on the question whether there was an implied warranty and not covered by the findings of the jury should be decided by the learned judge.

By section 14 of the Sale of Goods Act, 1893—"Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of a seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

no implied condition as to its fitness for any particular purpose."

Walton, J., on further consideration, delivered the following judgment: In this case the plaintiffs, Philip Preist and his wife, sued the defendant for damages for negligence and for breach of warranty. The plaintiff Mrs. Preist is the wife of the plaintiff Philip Preist, and their complaint against the defendant is that the defendant, being a chemist, sold to the plaintiff a hot-water bottle which was not fit for use as a hot-water bottle at the time it was sold, and that in consequence, whilst an attempt was being made to use it as a hot-water bottle, it burst, and Mrs. Preist was very seriously scalded, and considerable expense was incurred in medically treating her, and there is no doubt that she did suffer very seriously and was made very ill for a long time by the effect of the scalding. In answer to questions which I put to the jury they have found that the bottle when sold was not fit for use as a hot-water bottle, and that this was the cause of its bursting. I asked them whether the defendant was guilty of negligence in selling the bottle for use as a hot-water bottle, and the jury have not been able to agree upon an answer to that question. As to the damages, they assessed them at £40 for the expenses incurred, and for the pain and suffering of Mrs. Preist at £100. It was admitted at the trial that the bottle was sold by the defendant to the plaintiff as a hot-water bottle for use as such. Upon that admission and these findings the question is, what judgment ought to be entered. The question as to the £100 which the jury have assessed as damages for pain and suffering is quite a different question from that as to the £40, which the jury have assessed as to the damages in respect of expenses. The £100 was the damage to Mrs. Preist only, and it is said that that cannot be recovered in the absence of the finding of negligence, and, there being no contract between the defendant and Mrs. Preist for the sale of the bottle, that Mrs. Preist cannot recover for a breach of warranty. Mr. Preist bought the bottle, and he may be entitled to recover as on a breach of warranty, but his claim must be limited to the expense to which he has been put—namely, the £40, and he cannot recover damages for what his wife has suffered. There is no finding of negligence, and there is no evidence of any contract between Mrs. Preist and the defendant. The case of *Longmeid* v. *Holliday*, 6 Exch. 671, seems to me to be directly in point. I can find no evidence of any contract between Mrs. Preist and the defendant. It is true that Mr. Preist, using ordinary language, bought the hot-water bottle for his wife, that is to say, he bought the bottle because his wife required one, but still it was he who bought it, and the contract was between him and the defendant, and he was not acting as agent for his wife. He bought it on his own account. Therefore as to the £100 I think that the plaintiffs fail.

Now, as to the £40, a totally different question arises. It is said that there was an implied warranty in the circumstances that the bottle when sold was fit for use as a hot-water bottle. It was agreed at the trial that, if there were any questions of fact which were not exactly covered by the answers of the jury to the questions I put to them, and which it was necessary to determine in order to decide the rights of the parties in respect of the breach of warranty, they were to be dealt with by me. The bottle was bought as a hot-water bottle by that description. It was asked for as a hot-water bottle and supplied as such. It was either expressly or by implication purchased and sold for use as a hot-water bottle.

Now, the law applicable to a question of this kind is to be found in the Sale of Goods Act, 1893. It is not necessary now to look back to the old cases unless the terms of the Act are in some way obscure, and then, in order to understand what the Act means, it may be necessary to look back to the cases. It is extremely difficult to reconcile all the old cases, and I do not think it possible to recognise all the old *dicta*. Lord Herschell said with reference to the Bills of Exchange Act, 1882, which was also a codifying Act, that the proper course is in the first instance to examine the language of the Act, and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start by inquiring how the law previously stood and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. I have myself heard Lord Herschell say the same thing in other cases, and it applies to the Sale of Goods Act, 1893, as well as to the Bills of Exchange Act, 1882. Sections 13 and 14 of the Sale of Goods Act, 1893, are the material sections. By section 13—"where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description, and if the sale be by sample as well as by description it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description." I should say that that is generally more applicable to the sale of goods which are not ascertained rather than to the sale of a specific chattel. I am not saying that it may not apply to the sale of a particular chattel, but I think it applies more naturally to the sale of unascertained goods. Section 14 is as follows: "Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any purpose." It has not been contended that that proviso applies to the present case, but it does show plainly enough this—that the exception applies just as much to the sale of a specified article as an article which is not specified. The second exception is this: "(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of a merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." The important exception is the first. Does the present case fall within section 14, sub-section 1? It is admitted that the buyer did make known to the seller that he wanted the hot-water bottle for use as a hot-water bottle. It is said that this is not a "particular purpose" within the meaning of the section, and that those words apply to something more specific than the use of the article by a particular person. I think that would be limiting the meaning of the sub-section too much. I think that within the meaning of this sub-section a bottle which is required for use as a hot-water bottle is a bottle which is required for a particular purpose, and therefore I think that the case comes within those words in the sub-section. The buyer expressly or by

implication did make known to the seller that the bottle was required for a particular purpose. But it must be "so as to show that the buyer relies on the seller's skill or judgment." Now, if there is a question of fact involved in that I should find that in this case the buyer, who was a draper, had no particular knowledge of hot-water bottles when he went to the shop of the chemist, who made it part of his business to supply the public with hot-water bottles. I have no hesitation in finding as a fact that the buyer told the chemist he required a bottle for use as a hot-water bottle, and that he did it in such a way as to show that he relied on the skill or judgment of the seller. I think that when people go to a shop which deals with these articles they are entitled to expect that some skill or judgment has been exercised by the shopkeeper in selecting these goods, so that when a person buys something which the shopkeeper professes to sell he may expect to get a thing which is of some use for the purpose for which it is sold and not mere rubbish. To that extent it seems to me that when in a case like this the plaintiff asked at the chemist's shop for a bottle for use as a hot-water bottle he did it in such a way as to show that he relied on the seller's skill or judgment. Undoubtedly the bottle was of a description which it was in the course of the seller's business to supply. It seems to me that all the conditions of the sub-section are fulfilled, and therefore there was an implied condition that the goods should be fit for the purpose. It is asked whether anyone could expect such skill or judgment on the part of a shopkeeper as would enable him to be sure that a hot-water bottle was fit for its purpose. That may be true, but one must remember that where a case comes within the sub-section, the warranty which is implied goes a long way beyond the range of any skill or judgment which the buyer can be supposed to rely on, because the warranty is an implied warranty that the goods are reasonably fit for the purpose for which they are acquired, and not merely that the seller has exercised all reasonable skill or judgment that they shall be fit. Therefore the degree to which the buyer relies on the seller's skill or judgment is not the measure of the warranty. If the buyer tells the seller what he wants, and that he wants it for a particular purpose so as to show that he relies on the seller's skill or judgment, and the seller sells the article, then the seller, unless he takes care to protect himself by some express words, warrants that the article is reasonably fit for that purpose. That is made very plain by Lord Esher in *Randall* v. *Newson*, 25 W. R. 313, 2 Q. B. D. 102. I only refer to that case as an illustration. He says, which is practically what the Sale of Goods Act, 1893, says, citing Best, C.J.: "If a man sells generally he undertakes that the article sold is fit for some purpose; if he sells for a particular purpose he undertakes that it shall be fit for that particular purpose. Nothing can be more clear than that the rule is advisedly enunciated as a warranty without limitation." All that applies equally to section 14, sub-section 1, of the Sale of Goods Act, 1893. Then he says later on: "If the article or commodity to be delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable." I think that there was reliance by the buyer on the seller's skill or judgment in this case within the meaning of the sub-section, and that therefore there must be judgment for the plaintiff, Mr. Preist, for £40.

The defendant applied for judgment or a new trial.

*Horridge, K.C.*, and *A. P. Thomas*, for the defendant.—There being no finding of negligence on the part of the defendant, the plaintiff can only succeed if he shows a breach of an implied warranty under section 14, sub-section 1, of the Sale of Goods Act, 1893. That section has not altered the old law upon the subject; it has merely re-stated it: *Brown* v. *Edgington*, 2 Man. & Gr. 279. Where the purchaser buys a specific chattel across the counter, having an opportunity of inspecting it, there is no implied warranty of fitness for any particular purpose: *Parkinson* v. *Lee*, 2 East, 314; *Bluett* v. *Osborne*, 1 Stark. N. P. 384; *Shepherd* v. *Pybus*, 3 Man. & Gr. 868, at p. 881; *Emmerton* v. *Mathews*, 10 W. R. 346, 7 H. & N. 586; *Smith* v. *Baker*, 40 L. T. Rep. 261, 27 W. R. Dig. 228. Where a purchaser buys a specific article there is no warranty implied from the fact that there is a well-known mercantile article of that kind. Asking for a hot-water bottle is merely a mode of describing an article well-known in commerce. The plaintiff got a hot-water bottle, but not one of good quality. In order to imply a warranty in such a case some fact must be proved or some statement shown to have been made to the seller beyond the mere asking for a hot-water bottle: *Barr* v. *Gibson*, 3 M. & W. 390, at p. 399. In *Jones* v. *Just*, 16 W. R. 643, L. R. 3 Q. B. 197, there was no opportunity of inspecting the article before the sale. There was no "particular purpose" made known to the defendant at the time of the sale. The plaintiff merely asked for a hot-water bottle. In *Wallis* v. *Russell*, [1902] 2 Ir. R. 585, the plaintiff asked for "nice fresh crabs for tea," and the Court of Appeal in Ireland held that the crabs were bought for a "particular purpose" made known to the seller, within section 14, sub-section 1. There was, therefore, no implied warranty, and the defendant is entitled to judgment. They also referred to *Josling* v. *Kingsford*, 11 W. R. 377, 13 C. B. N. S. 447; *Smith* v. *Hughes*, 19 W. R. 1059, L. R. 6 Q. B. 597; *Randall* v. *Newson*; *Ward* v. *Hobbs*, 26 W. R. 151, 3 Q. B. D. 150; 27 W. R. 114, 4 App. Cas. 13; *Varley* v. *Whipp*, 48 W. R. 363, [1900] 1 Q. B. 513; *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155; *Wren* v. *Holt*, *ante*, p. 435, [1903] 1 K. B. 610.

*W. F. Taylor, K.C.*, and *F. A. Greer*, for the plaintiffs, were not called upon.

COLLINS, M.R.—I should be content, if there were nothing more, to say that I entirely agree with the judgment of Walton, J. But in deference to an argument which has been addressed to us I think it right to deal with it, so as to show that I have appreciated it. The action is brought by the purchaser of an indiarubber hot-water bottle against the seller, claiming damages upon the ground that while his wife was using it as a hot-water bottle, the bottle burst and his wife was severely scalded; and the purchaser contends that the seller is liable for breach of an implied warranty that the bottle was fit for the particular purpose for which it was bought, in other words, for failure to comply with the contract.

The plaintiff, who is a draper, and who may reasonably be assumed to have no special skill or knowledge in regard to hot-water bottles, went to the shop of the defendant, who is a chemist, and asked for an indiarubber hot-water bottle. The learned judge, who had power to draw inferences of fact, has drawn the inference that the bottle was bought and sold for the particular purpose of use as a hot-water bottle. It is said that in the case of a specified article it cannot be said that the article is sold for a particular purpose so as to show that the buyer relies on the seller's skill or judgment within the meaning of section 14, sub-section 1, of the Sale of Goods Act, 1893, unless some fact is proved beyond the mere purchase and sale of the specified article.

It was argued that, as the purpose for which the bottle was sold was the ordinary purpose for use as a hot-water bottle, it was not sold for a "particular purpose" within the meaning of section 14, sub-section 1, of the Act. In my opinion that contention is not sound. The object of introducing those words into the section, having regard to the existing state of the law, seems to me to have been this: The goods might have in themselves no special efficacy for any one particular purpose, but might be fit for a multitude of purposes, and if goods of that kind are sold, and the purchaser alleges that he purchased them for a particular purpose, he must show that he made known to the seller that the goods were required for that particular purpose. That would make them goods sold for a particular purpose within the meaning of the section. But if the sale is a sale of goods which by their description are *primâ facie* capable of being used for one purpose only, then the sale is *primâ facie* a sale of goods for a particular purpose within the meaning of the section The learned judge, having power to draw inferences of fact, drew the necessary inference of fact here. A draper, who was in these matters an unskilled person, went to the shop of a chemist and asked him for a hot-water bottle. That was a request which when accepted gave rise to a contract to supply a chattel which was capable of being used for the particular purpose for which a hot-water bottle is ordinarily used, that is to say, as a bottle which is capable of containing hot-water for the purpose of being applied to some part of the human body. There was therefore in this case the sale of a specific chattel for a particular purpose, and the circumstances under which the purchase was made showed that the buyer relied on the seller's skill or judgment. That is an inference of fact to be drawn from all the facts of the case, and that inference ought not to be excluded because the article was sold simply as a hot-water bottle. In my opinion the judgment of the learned judge, which is really exhaustive of the case, is correct and should be affirmed. The case comes within section 14, sub-section 1, of the Act, which seems to me merely to express the law as it existed before the Act.

STIRLING, L.J.—I am of the same opinion. I think that the question is ultimately a question of fact, and that the findings of the jury and the inferences of fact drawn by the learned judge are conclusive against the defendant. The jury have found that the bottle when sold was not fit for use as a hot-water bottle, and that this was the cause of its bursting; and the learned judge has found that the plaintiff, who had no particular knowledge of hot-water bottles, went to the shop of the defendant, who was a chemist, and conveyed to his mind that he wanted a hot-water bottle for a particular purpose, so as to show that he relied on the defendant's skill or judgment. The defendant, in his evidence, said that the plaintiff asked for a hot-water bottle, stating that he wanted it for a special purpose, and he asked the defendant if it would hold boiling water. The defendant said it would not, but that it would stand hot water. In my opinion the learned judge had ample ground for finding that the bottle was sold for a particular purpose within the meaning of section 14, sub-section 1, of the Sale of Goods Act, 1893.

MATHEW, L.J.—I am of the same opinion, and I have nothing to add.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Maples, Teesdale, & Co.*, for *Oppenheim & Malkin*, Liverpool.

Solicitors for the defendant, *Donnison & Edwards*, Liverpool.

## High Court of Justice.

Chan. Div. } Byrne, J. } July 9.

*In re* RILEY'S (LIMITED). (*a.*)

*Company — Creditors of company — Debenture-holders —Scheme for composition—Agreement—Registration —Deed of Arrangement Act,* 1887 (50 & 51 *Vict. c.* 57), *ss.* 4, 5, 7, 8, 16.

*The Deed of Arrangement Act,* 1887 (50 & 51 *Vict. c.* 57), *does not apply to limited liability companies, and consequently an agreement by a limited company for composition with its creditors is not void for want of registration. In a case where most of the creditors who had notice had signed or assented to an agreement by a company for a composition, it was held, under the circumstances of the case, that all creditors, who desired so to do, were at liberty to take the benefit of the agreement.*

Summons.

This was a summons to determine what persons were entitled to certain moneys in the hands of the applicant, a trustee under an agreement bearing date the 4th of June, 1902.

The facts of the case were as follows:—

Riley's Co. (Limited), was a company limited by shares under the Companies Act. The company being pressed by certain creditors, a scheme was drawn up by a Mr. Harper, the applicant, for adjusting difficulties, and this scheme was placed by him before certain creditors at a meeting, and heads of agreement were signed to the effect that the company should pay the whole of the claim by three equal instalments, and for this purpose to pay into a banking account to be opened in the name of the applicant a weekly sum of £24, until enough should have been paid to meet all the said claims with interest thereon at the rate thereafter mentioned. At the end of three months Harper was to pay the money to the creditors *pro ratâ*; proceedings by the creditors against the company were to be stayed, and goods supplied were to be paid for in cash; if the company made default in any weekly payment the agreement was to be at an end, and the rights of the creditors were to revive. The company sealed the agreement, which was executed in duplicate. Harper knew at the time of the existence of other creditors whose debts amounted to £933 10s. 4d. in the aggregate, most of whom signed or assented to the agreement. Practically all the creditors who had notice signed or assented, but there were creditors who had no notice. The company paid to Harper £216 by weekly payments.

On the 10th of August, 1902, the company made default in payment of the further instalments due under the said agreement, and nothing further had since been paid.

On the 29th of October, 1902, Mr. Whamond was appointed receiver and manager of the company in a debenture-holder's action.

The claims of the creditors, other than those who signed or assented to the agreement, amounted to £2,500.

The question arose whether the creditors who had signed or assented, the creditors who had not signed or assented, or the receiver for the debenture-holders, were entitled to receive the money paid under the agreement.

The books showed that the company was insolvent at the date of the agreement.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

*Whinney*, for a creditor who had signed the agreement, and Harper.—The amounts paid to Harper would have equalled the debts of the creditors who signed or assented to the agreement, and Harper was their agent. The agreement was not void within the Deeds of Arrangement Act, 1887, for want of registration. The Act does not apply, nor do the Bills of Sale Acts apply, to limited companies: *In re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627.

*A. Whittaker*, for debenture-holders.—The question is whether the agreement is void for want of registration. If it is not void, it enures for the benefit of all creditors: *Latter* v. *White*, L. R. 5 H. L. 578, 21 W. R. Dig. 209; *General Furnishing and Upholstering Co.* v. *Venn*, 11 W. R. 756, 2 H. & C. 153. The debenture-holders have a right to share in it with creditors, but do not insist on their right.

*J. G. Wood*, for creditors who had not signed.—The agreement is good, but it was made for the benefit of all creditors and all ought to share.

*Whinney*, replied.

BYRNE, J.—The first question is whether the agreement is void for want of registration under the Act of 1887, and that turns on whether the Act applies to deeds executed by limited companies. The Deeds of Arrangement Act, 1887, belongs to the class of legislation having reference to the bankruptcy laws. After the passing of the Bankruptcy Act, 1869, which exempts in certain cases authorised composition deeds, statutory composition did not exist, and in that state of circumstances the position became peculiar that composition deeds shou'd only be executed outside the jurisdiction of this court, and a good deal of the winding up of the estates of bankrupts was carried out through private hands without any interference from the legal authorities. Then in 1887 a new Deeds of Arrangement Act was passed. Prior to this, the Companies Act of 1862 had already dealt with the question of deeds of arrangement by companies. By section 164 of that Act it is provided that "any conversion or assignment made by any company formed under the Act of all its estate, and effects for the benefit of all its creditors, shall be void to all intents." When one examines the Act of 1887 he cannot fail to be impressed by this, that the various expressions used seem to be referrable to arrangements by individuals, rather than by arrangements by limited companies. That this document may be a deed of arrangement within the Act is admitted. The definition clause (section 7, sub-section 2) provides that a deed of arrangement shall include instruments made by "a debtor for the benefit of his creditors generally" (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), and "cases where creditors of a debtor obtain any control over his property or business are provided for." By section 5 unregistered deeds of arrangement are avoided. Section 6 provides the mode of registration. It directs that a true copy of the deed shall be filed with the registrar in like manner as in a bill of sale, "together with an affidavit signifying the time of execution and containing a description of residence and occupation of the debtor and of the place or places where his business is carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilites included in the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors." The residence and occupation of the debtor have to be described, and an affidavit must be filed by him that none of these things are applicable to limited liability companies. By section 7 the registrar is to keep a register where shall be entered (1) "The name, address, and description of the debtor, and the place and places where his business is carried on, the title of the company or firm under which the debtor carries on business, and the name and address of the firm, if any, under the deed," and (2) "The amount of property and liabilities included in the deed as estimated by the debtor." By section 8 the registrar of bills of sale is to be registrar for the purposes of the Act. Section 9 speaks of the "name, residence, and description of any person" which would include those of the debtor. Section 16 is as follows: "The third sub-section, paragraph (*g*) of the 28th section of the Bankruptcy Act, 1883, enacts, amongst other things, that one of the facts on proof of which the court shall either refuse an order of discharge to a bankrupt or suspend the operation of the order for a specified time, or grant the bankrupt an order of discharge, subject to the conditions mentioned in the section, is that the bankrupt has on any previous occasion made a statutory composition or arrangement with his creditors shall be read and construed with the word statutory omitted therefrom. That section has the effect of bringing deeds of execution under the Act of 1887 within the scope of the Bankruptcy Act, 1883. Now section 17 says that nothing in the Act is to affect the provisions of the law of bankruptcy, and section 18 gives the power to make rules. The interpretation section of this Act contains no definition of the word "debtor," but it defines persons as including any "body of persons" corporate or incorporate. In the interpretation clause of the rules I find "debtor" is defined as "any person by, for, or in respect of whose affairs a deed of arrangement, as defined by the Act, shall be made or entered into, and includes a firm of persons in "co-partnership." Sub-clause 3 provides that "any terms and expressions defined by the Act shall in these rules have the meaning assigned to them by the Act." Mr. Whittaker says that I must look back to the Act to find out what "person" means; that I shall then find that it means a body of persons corporate or incorporate; that that definition includes a a company, and therefore that by the rules debtor includes a company. That is his strongest point, but I do not think it is sufficient to do away with the inferences I have already referred to. The form given in the appendix to the rules cannot apply to companies, and by rule 10 "The county court registrar shall keep an index alphabetically arranged in which he shall enter under the first letter of the surname of the debtor such surname, with his own name, address, and description." There is another clause of the Act which I need not refer to, section 13, by which, where the place of business of the debtor is situate outside the London bankruptcy district, the registrar is to transmit a copy of the deed to the registrar of the county court in the district in which the place of business is situate, with an affidavit in the form given in the appendix to the rule and that is not suitable to companies. From first to last, looking at these provisions, and bearing in mind that there have been two lines of legislation, one dealing with bankruptcy and the other with companies, and the facts which led to the passing of the Act of 1887, all tending to show that what was dealt with by that Act were deeds executed by those who, under the Act of 1869, came under the bankruptcy law, I am led to the conclusion that the Act of 1887 was not intended to, and does not, apply to deeds of arrangement by limited companies. Coming then to the agreement itself, so far as the debenture-holders are concerned, it was contended that the deed was invalid, and it was admitted that they could not at the same time claim to come in under it; or, rather,

their right to do so was not insisted on. There is the body of creditors whose names were given to Mr. Harper, and also the outside creditors, who claim to take advantage of the agreement. The argument on behalf of the latter was put in this way: It was said that a deed or agreement in this form was meant or adapted to include all creditors who desired to take the benefit of it, and was not confined to those whose names appeared in the schedule to the agreement as having assented to it. One of the arguments addressed to me with the object of restricting the effect of the agreement as much as possible was this, that if the company paid up their instalments of £24 a week for three quarters of a year the sum produced would just about equal the amount required to pay off the creditors whose names were given to Mr. Harper, but to my mind that is an argument against confining the scope of the deed to the creditors actually named in the schedule. *General Furnishing and Upholstering Co.* v. *Venn*, 2 H. & C. 153, was cited, in which the deed was not exactly in this form. It was a deed, and it was held to be for the benefit of all those willing to accept the composition. I cannot see any substantial distinction between the document in this case and that deed for the purpose of confining its benefit to those who chose to come in under it. In my opinion, therefore, all the creditors who like to take advantage of the deed are entitled to share in the £216.

Solicitors, *Lumley & Lumley*; *J. Arscott Bartrum*; *Guscotte & Fowler*.

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K. B. Div. (Wright, J.) April 24; May 9.

KAUFMAN *v.* GERSON AND ANOTHER. (*a*.)

*Conflict of laws—"* Lex loci contractus *"—Contract made according to the laws of the country of the contract, and intended to be performed there—Invalid in England—Right to enforce such contract in England.*

*K., the plaintiff, handed to one Emile Gerson, the husband of the defendant, in France a sum of money to be used in buying skins to be dressed and sold for their joint benefit. Gerson appropriated part of the money to his own use, instead of applying it to buy skins. His conduct was criminal in France, and plaintiff threatened a prosecution. In order to avoid a prosecution the defendant, by an agreement in writing made in France, agreed to pay to the plaintiff by instalments out of her own money the amount of the defalcation on the express terms of the plaintiff abstaining from prosecuting. This agreement was intended to be governed by the French law and to be wholly performed in France. By the French law this agreement was not invalid. The defendant being temporarily resident in England, and having property here, action was brought against her here to recover instalments due and payable under the agreement.*

*Held, that the contract, being valid by the law of the country in which it was made and intended to be performed, though invalid in England as being contrary to public policy, was enforceable here.*

This was a case tried before Wright, J., without a jury.

The plaintiff's claim was against the defendant, Emile Gerson, as principal, and against the defendant, Augusta Gerson, as surety for £152 18s. 8d., the balance of £654 10s. 3d., money lent by the plaintiff to the defendant, Emile Gerson, for the payment of which said sum of £654 10s. 3d. the defendant, Augusta Gerson, became security for the said Emile Gerson.

The plaintiff also claimed against the defendant, Emile Gerson, the further sum of £134 9s. 1d. as a further advance.

Judgment was signed against the defendant Emile Gerson.

The defendant, Augusta Gerson, wife of aforesaid defendant, entered a defence joining issue. For the alternative she alleged that in 1897 Emile Gerson was indebted to the plaintiff in the sum of £2,954 10s. 3d. for monies advanced by the plaintiff to him; that at an interview in Paris in the same year, at which were present the plaintiff and both defendants, the plaintiff represented to her that Emile Gerson had, by failing to apply the moneys lent to him for the specific purpose for which they had been lent, rendered himself liable to a criminal prosecution for embezzlement, and that it was the intention of the plaintiff to prosecute him unless she would pay him £300 in part discharge of the indebtedness, and sign the guarantee now sued upon as surety for Emile Gerson; that at the said interview it was agreed between the plaintiff and herself that in consideration of her paying the said sum of £300 and signing the said guarantee the plaintiff would abandon criminal proceedings against her husband, and she alleged that she made the agreement only under pressure of the said threats and in fear for the safety of her husband and the honour of her family. She further alleged that the above representations were false to the knowledge of the plaintiff, and that they were made by him for the purpose of inducing, and did in fact induce, her to pay the £300 and to sign the guarantee.

By way of counterclaim the defendant claimed repayment of the £300, delivery up of the guarantee, and repayment of all further sums paid by her under the guarantee.

By his reply and defence to the counterclaim the plaintiff alleged that the agreement and guarantee and payment of money were made and done in France, and were governed by the law of such country, and that under such law the transaction was valid, and that the payments made by the defendant could not be recovered back either in England or France.

The further facts, and the arguments of counsel, sufficiently appear in the judgment.

*Israel Davis*, for the plaintiff.

*Montague Shearman, K.C.* (*Eustace G. Hills*, with him) for the defendant.

*Cur. adv. vult.*

May 9.—WRIGHT, J., read the following judgment: The question to be determined in this case, as it stands at present, is whether the courts of this country ought to enforce a contract made and intended to be performed in a foreign country and according to the laws of that country, the contract being valid and enforceable in and according to those laws, but such that, if it were an English contract, the courts of this country would refuse to enforce it on the grounds of public policy or of undue influence. The question is, of course, not novel, but the authorities leave room for argument as to their application in this case. The facts are, in brief, these. The plaintiff, Kaufman, in France, placed in the hands of Gerson, as a friend whom he wished to assist, a sum of money to be used in buying skins to be dressed and sold for their joint benefit. Gerson appropriated part of the money to

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

his own use instead of applying it in buying skins. His conduct was criminal in France and a prosecution was threatened. In order to avoid a prosecution and protect the good name of Gerson's children, his wife, the present defendant, under the influence of Kaufman's threat, and at his instance, agreed in writing to make good by instalments out of her own property the amount of the defalcation on the express terms that there should be no prosecution on the part of Kaufman. This agreement was made in France, and it was intended by the parties to be governed by French law and to be wholly performed in France. The defendant was English by birth, her husband a German by birth; both were at the time of the agreement domiciled in France. According to the uncontradicted evidence of the single witness called as an expert in French law, and to some authorities which he cited, the agreement was not invalidated in France either on the ground of the compromise of a criminal charge or on the ground of oppression or undue influence, or on the ground of want or illegality of consideration. And for the purpose of to-day I must accept that evidence. The wife being now resident in England, and having property here, this action is brought against her to recover instalments due and payable under her agreement. It is contended on her behalf that the consideration for the agreement is, according to English law, illegal, and contrary to public policy, and that the agreement was obtained by means of undue influence and threats, and therefore ought not to be enforced in this court. The fraud of Gerson was not, in my opinion, of such a kind as to have been in this country the subject of an indictment for larceny at the time when it was committed, which was before the commencement of the Larceny Act for amending the law of larceny (1 Edw. 7, c. 10). Gerson did not obtain the money by any trespass or trick. He was bound to account for the money, but he was not a bailee of it. There was plainly not embezzlement. Nor was there such agency or proof of a direction in writing as would have satisfied sections 75-9 of the Larceny Act, 1861. I will, however, assume that the fraud would have been criminal if committed in England, or that the English rule against agreements in compromise of crime may extend to cases of frauds criminal by foreign laws. At any rate, on the evidence, the duress or influence was, I think, such as would by English law have vitiated the agreement.

The contract having been made in France by parties domiciled there, who intended it to be wholly performed in France and according to French law, it must be *primâ facie* taken to be governed by French law, and, it being taken to be valid by that law, the courts of this country will entertain an action upon it and will give such effect as they can give to the rights of the parties, as those rights are ascertained by French law, unless the defendant can show that the case is within one or other of certain exceptions, the general nature of which is well defined and most of which are not applicable in this case. To use the language of Chitty, J., in *In re Missouri Steamship Co.*, 37 W. R. 696, 42 Ch. D. 321, at p. 325, the contract is not impeached on the ground that it is "of a criminal or wicked or immoral nature, or such as ought not to be permitted according to the law of civilized countries." It is not impeached on the ground that the enforcement of the contract would be injurious to any public interest of this country. It is impeached principally on the ground that such a contract for the stifling or compromise of a threatened criminal prosecution is contrary to the views of public policy which the courts of this country hold ought to prevail within the limits of their jurisdiction; and it is argued that a foreign contract can never be enforced here if it be a contract which on any ground could not be validly made here for performance here. There are no doubt expressions in some of the text-books, and *dicta* in some of the cases, which are wide enough to cover such a proposition. But I know of no actual decision which supports it, and it appears to be inconsistent with the decision in several cases, the most important of which is *Santos* v. *Illidge*, 7 W. R. 669, 6 C. B. N. S. 841, and 8 W. R. 705, 8 C. B. N. S. 861, where it was held in the Exchequer Chamber that an action could be maintained in this country upon a contract made and intended to be wholly performed in Brazil, and valid in that country, for the sale of slaves to be employed there, and this although the defendants were British subjects resident and domiciled here, and would have committed a felony if they had made the contract here for performance in the Queen's dominions. The point argued and expressly decided was whether the Slave Trade Acts in force at the date of the contract prohibited British subjects from engaging in slave trade in civilized countries in which the trade was lawful by the local law; but the negative of the general proposition maintained by the defendant is necessarily implied in the judgment. So in *Quarrier* v. *Colston*, 1 Ph. 147, Lord Lyndhurst had held (before 8 & 9 Vict. c. 109) that an action might be maintained here on a contract made even between British subjects in France for the repayment of money lent for gambling, the contract being valid there. And in *Robinson* v. *Bland*, 1 W. Bl. 256, Lord Mansfield seems to have been of the same opinion as regarded contracts intended to be performed in the country where they are made. And in *Biggs* v. *Lawrence*, 3 T. R. 454, *Holman* v. *Johnson*, 1 Cowp. 341, was approved, in which it was held that an action would lie upon a contract made by foreigners in Guernsey for a sale to be completed there of spirits which the parties knew were to be smuggled into England. Lastly, in *In re Missouri Steamship Co.*, in the Court of Appeal, in the converse case of a contract void in the country where it was made, on grounds of public policy as there established, but legal where the performance was to be, the court acted on the principle that it must discover from all the circumstances by what law the parties meant, or must be taken to have meant, the contract to be governed, and must give effect to its provisions accordingly, unless those provisions are contrary to morality or positive law. Against these authorities the defendant relies on *Grell* v. *Levy*, 12 W. R. 378, 16 C. B. N. S. 73, and *Hope* v. *Hope*, 5 W. R. 387, 8 De G. M. & G. 731, to which may be added *Rousillon* v. *Rousillon*, 28 W. R. 623, 14 Ch. D. 351. The doubt expressed by Wilmot, J., in *Robinson* v. *Bland*, appears to refer to contracts of a plainly immoral kind, as for prostitution. *Grell* v. *Levy* is plainly distinguishable on the ground that the contract, which was champertous, was to be performed here; and even so the court thought it important to observe that the plaintiff was an attorney and officer of the court. So in *Rousillon* v. *Rousillon* the actual decision was that the agreement was not open to the objection of its being in undue restraint of trade according to our law, and the *dictum* of Fry, J., that if it had been obnoxious to that objection an action upon it could not have been maintained here, is fairly referable to the fact that it was sought in the action to restrain the defendant from trading in this country, so that the agreement was considered as an agreement to be performed here. The actual decision in *Hope* v. *Hope* may be explained in the same way, since the agreement, specific performance of which was sought, was partly for payments to be made by a husband to his wife in

consideration of her agreeing to facilitate a divorce in this country, and partly for depriving the husband of the control of his infant children. The *dictum*, however, of Turner, L.J., is, perhaps, not fairly capable of this explanation. He is reported to have said: "I think that when the courts of one country are called upon to enforce contracts entered into in another country the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the court of this country cannot, as I conceive, be called upon to enforce it." This opinion, if intended to be understood as applying to contracts intended to be performed in the country where they are made, and are valid as well as to contracts which are to be performed here, appears to be inconsistent with *Santos* v. *Illidge* and *Quarrier* v. *Colston*, and with the principle on which *In re The Missouri Steamship Co.* was decided, and I am bound to follow those decisions on this point. The second ground on which the contract in the present case is impeached is that it was obtained by the undue influence or duress of a threat to prosecute the husband for crime. If this objection is to be regarded as based on considerations of public policy, the same answer applies as in the case of the first objection. It seems, however, to be more in the nature of an objection to the proof of consent of the defendant to the contract, a consent induced by duress or undue influence being by English law treated as no consent. If this be the correct view it would seem that the law of the country in which the contract is made and is to be performed and the parties are domiciled ought to prevail, unless there is such duress as must be considered to avoid the contract under any but unreasonable and uncivilized institutions of law—a description which would be applicable to such a case as that of consent obtained, *e g.*, by physical torture or by the use of drugs, but, which cannot properly be applied to this case. If these views are correct, it follows that the counterclaim for return of moneys already paid under the agreement fails. And, even if the court ought to refuse its aid to the plaintiff, it would not follow that the counterclaim ought to be allowed. When a contract, made and intended to be performed in France, and, according to French law and valid under that law, has been partly performed there, I cannot see any ground upon which a court in this country can undo what has been legally and properly done according to the law of the country in which it had to be done. I have so far dealt with the case on the assumption that the law in France is as stated by the only witness examined on that point, but inasmuch as that evidence was somewhat slender, and the defendants' counsel thought they were safe in relying on the law of this country as laid down in several text-books, and by Turner, L.J., in *Hope* v. *Hope*, and therefore thought the French law immaterial, it is, I think, right to give them an opportunity to show by evidence that the contract was not valid in France. If they desire to do that, they may do so on Friday next on the terms of paying, in any event, the costs of the further hearing, and such other costs (if any) as I may then direct. If notice to that effect is not given by the defendants before Wednesday, I shall, on application, give judgment for the plaintiff on the claim and counterclaim. If notice is so given, there will be no judgment until I have heard the further evidence.

Judgment was subsequently entered for the plaintiff.

Solicitors for plaintiff, *Leggatt, Rubenstein, & Co.*

Solicitors for defendant, *Dixon, Weld, & Dixons.*

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K. B. Div. (Ridley, J.) April 1.

ATTORNEY-GENERAL v. HOLDEN. (*a.*)

*Revenue—Estate duty—Gift of personal property—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c).

*In pursuance of a bargain made between the father of the defendant, who was shortly about to marry, and the father of the intended bride, the latter agreed to settle the sum of £20,000 on his daughter on condition that the former would give his son the sum of £10,000. This sum was accordingly given to the defendant by his father, the marriage settlement was executed, and the marriage was subsequently solemnized. Within twelve months of the date of his gift to his son the father died.*

*Held, that there had been a gift of the £10 000, and that estate duty under section 2, sub-section 1 (c), of the Finance Act, 1894, was payable by the defendant in respect of it.*

Attorney-General v. Worrall, 43 *W. R.* 118, [1895] 1 *Q. B.* 99, *and* Attorney-General v. Johnson, *ante, p.* 487, [1903] 1 *K. B.* 617, *followed.*

Information by the Attorney-General, claiming, on behalf of the Crown, estate duty under section 2, sub-section 1 (c) of the Finance Act, 1894.

The facts as stated in the information were as follows:

By an indenture dated the 27th of January, 1900, and made between the defendant, Wilfred Millington Holden of the first part, Herbert Byng Paget of the second part, Beatrice Mary Byng Paget one of the daughters of the said Herbert Byng Paget of the third part, and Miles Atkinson Sleigh Walter Noel Harris and Arthur Fawcett of the fourth part, reciting (as the fact was) that a marriage was intended shortly to be solemnized between the said Wilfred Millington Holden and Beatrice Mary Byng Paget, and reciting that upon the treaty for the said intended marriage it was agreed that such settlement should be made as was thereinafter expressed, and reciting that the said Herbert Byng Paget had before the execution of the now stating indenture transferred the stocks, funds, shares and securities mentioned in the schedule thereto into the names of the said Miles Atkinson Sleigh, Walter Noel Harris, and Arthur Fawcett, it was by the now stating indenture (expressed to be made in consideration of the said intended marriage) declared that the said parties of the fourth part should stand possessed thereof from and after the solemnization of the said marriage upon the trusts thereinafter contained, being usual trusts of the wife's fortune for the benefit of the intended husband and wife and the issue of the marriage and otherwise as in the said indenture mentioned.

The securities specified in the schedule to the last-mentioned indenture were certain sums of India Stock and Colonial Stocks amounting in value in the whole to upwards of £20,000.

Upon the treaty for the said marriage the bride's father, the said Herbert Byng Paget, agreed to settle the aforesaid personal property on condition that the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

defendant's father, Henry Holden, should give to his son, the defendant, £10,000, and accordingly, on the 2nd of January, 1900, the said Henry Holden's bankers, Samuel Smith & Co., by his directions, transferred £10,000 belonging to him from his account to that of his son, the defendant.

The marriage took place shortly after the execution of the indenture of the 27th of January, 1900.

The said Henry Holden died on the 1st of February, 1900.

Under the circumstances aforesaid, estate duty under the provisions of the Finance Act became payable in respect of the said sum of £10,000, and the executors of the said Henry Holden brought in an account of the £10,000 on which estate duty was assessed by the Commissioners of Inland Revenue on the 20th of August, 1901, at £650 with interest to that date of £30 0s. 5d. The rate of duty payable is 6½ per cent., the £10,000 being aggregable with other property passing on the death of the said Henry Holden.

The defendant, Wilfred Mullington Holden, on being applied to by the executors of the said Henry Holden for the request necessary under the Finance Act, 1894, s. 6 (2) to authorize them to pay the said duty, refused to do so, contending that no such duty was payable.

The information prayed that it might be declared that upon the death of Henry Holden estate duty became payable under the provisions of the Finance Act, 1894, s. 2, sub-section 1 (*c*) upon the said sum of £10,000 given by him to the defendant less than twelve calendar months before his death, as property passing on the death of the said Henry Holden.

*Sir R. B. Finlay, A.G.* (*Vaughan Hawkins*, with him), for the Crown.—Estate duty is payable under section 2, sub-section 1 (*c*) of the Finance Act, 1894. *Attorney-General* v. *Worrall*, 43 W. R. 118, [1895] 1 Q. B. 99, and *Attorney-General* v. *Johnson*, *ante*, p. 487, [1903] 1 K. B. 617, are authorities which support this claim. The whole question here is whether there has been an immediate gift *inter vivos* of the £10,000 to the defendant by his father; and it is submitted on behalf of the Crown there was clearly a gift of this sum by the father to his son on the latter's marriage. If that contention be right, then, as the father died within a year of making such gift, estate duty is payable under the Act of 1894. Section 2, sub-section 1, of that Act enacts that—"Property passing on the death of the deceased shall be deemed to include the property following; that is to say: . . . (*c*) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if these sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily,' and a reference to a 'volunteer' were omitted therefrom." This transaction is none the less a gift because it was made in pursuance of the marriage arrangement. The following cases were also referred to: *Crossman* v. *Reg.* 35 W. R. 303, 18 Q. B. D. 256; *Attorney-General* v. *Ellis*, 44 W. R. 13, [1895] 2 Q. B. 466; and *Wheeler* v. *Humphreys*, 47 W. R. 17, [1898] A. C. 506.

*C. A. Russell, K.C.* (*H. S. Simmons*, with him), for the defendant.—The defendant is not liable to pay duty on this sum. This transaction was not a gift; it lacks the nature of a bounty which is essential to a gift. The money was paid in pursuance of a bargain made with the bride's father that he would make a settlement on his daughter. The cases quoted on behalf of the Crown are distinguishable from the present case.

RIDLEY, J.—The question in this case is whether the £10,000 was a gift within the meaning of section 2, sub-section (1) (*c*) of the Finance Act, 1894. The case of *Attorney-General* v. *Worrall*, which was before the above Act had come into force, was decided upon section 11, sub-section 1 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), which amended section 38, sub-section 2 of the Act of 1881 (44 & 45 Vict. c. 12). The point argued in that case was whether the transaction there amounted to a gift within the meaning of section 11, sub-section 1 of the Act of 1889. In that case certain hereditaments had been mortgaged to the defendant's father to secure a loan. By a subsequent deed made between the defendant's father, the mortgagors, and the defendant himself, in consideration of a sum of money paid by the defendant to the mortgagors, and in further consideration of the defendant covenanting to pay to his father an annuity during his lifetime, the mortgagors and the defendant's father conveyed the hereditaments discharged from the mortgage debt to the defendant. The Court of Appeal held that that transaction was a gift of the mortgage debt to the defendant. Lord Esher, M.R., there said: "I think that it comes within section 11, sub-section 1, of the Amending Statute of 1889. It was, in my opinion, a 'gift' within that enactment. I have already said that what was given was the mortgage debt, which was personal property. Also, I think that the possession of the property was not assumed and retained by the donee 'to the entire exclusion of any benefit to the donor by contract or otherwise.' It appears to me that the covenant by the son to pay an annuity to the father prevented this from being a pure and simple gift, and, therefore, it comes within the Statutes." Yet the transaction in that case was a gift, though it was not a pure and simple gift. That case was followed by *Attorney-General* v. *Johnson*, which was a case of somewhat the same nature, although there was introduced the question of a testamentary disposition.

Counsel for the defendant endeavoured to distinguish both those cases from the present one. Firstly, he says, because the principle of a testamentary disposition appears to have influenced the mind of the court in *Attorney-General* v. *Johnson*, whereas here it does not exist. It is quite true that a testamentary disposition is referred to by Vaughan Williams, L.J., when delivering the judgment of the Court of Appeal, but one cannot help seeing that the real *ratio decidendi* in that case was in support of the reasoning in the case of *Attorney-General* v. *Worrall*. The learned lord justice refers to the object of the statute, and states that in *Attorney-General* v. *Johnson* it was a gift of a testamentary nature. I cannot, however, accept the argument that that was the real decision of the court, which, it seems to me, was based on the principle laid down in *Attorney-General* v. *Worrall*. The other distinction taken by counsel is that here the transaction only comes within that part of the section which deals with gifts not made twelve months before the death of the deceased donor, and that, therefore, the reasoning employed by the court in deciding the question under the latter part of section 11, sub-section 1, of the Act of 1889 does not apply. It is true that it does not in this same direct way apply; but I think that the reasoning does apply in order to see whether this was a gift or not. It does follow, therefore, that the fact that there could be anything given in exchange, or covenanted or agreed to be given in exchange by the donee, does not prevent the

transaction from being a gift if you can see, from the nature of it and from considering the source of the matter and the reason why it was entered into at all, that it was intended as a gift. In *Attorney-General* v. *Worrall* that was the nature of the transaction; so, too, I think it is here. If a man says: "My daughter is going to be married to your son; I will settle so much on her if you will give your son £10,000," and then the father of the intended bridegroom gives the £10,000 to his son, I think that is a gift, and if so, it is within the principle of the decision in *Attorney-General* v. *Worrall*. This transaction is of that nature. There was no obligation which existed under which the father was bound to pay the son the £10,000, but he made a gift of it to him in exchange for which he received nothing. So far this case, compared with that of *Attorney-General* v. *Worrall*, is an *à fortiori* case. Though the father of the bridegroom received nothing, nevertheless his daughter-in-law received a settlement upon her. It appears to me that by parity of reasoning with the case of *Attorney-General* v. *Worrall* that fact must be regarded as not preventing what the father-in-law had done from being a gift.

It might indeed make it not a pure and simple gift; yet in this case I think it was a pure and simple gift because the consideration did not proceed to the defendant's father. However that may be, I am unable to find that there is anything to distinguish this case from the former decisions.

I therefore think the judgment must be for the Crown.

*Judgment for Crown, with costs.*

Solicitor for the Crown, *Solicitor to Inland Revenue.*

Solicitor for defendant, *H. G. Campion & Co.*

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Prob. Div. & Adm. Div. Admiralty. } March 2, 9, 16.

"THE MANAR." (*a.*)

*Ship—Mortgage—Action in foreign country—Staying proceedings in this country for declaration as to priorities—R. S. C.*, 1883, *ord.* 25, *r.* 5.

*On default being made under a mortgage of a British ship, the mortgagees, the plaintiffs, took possession and chartered her to a port in France, where she and her freight were arrested by the defendants, who were British subjects and who claimed for necessaries supplied the ship, and judgment by default being obtained in England was made "executory" in France. The mortgagees intervened in France, and also commenced separate actions against them and against the mortgagors asking for judgment, declaring that they, as mortgagees in possession, were entitled to the ship and her freight in priority to the mortgagors and to the defendant's claiming for necessaries.*

*The Court held that the action against the defendants, who claimed for necessaries, was not vexatious, and ought not to be stayed; but that the action against the mortgagors ought to be stayed.*

Brooking *v.* Maudslay, Son, & Field, 36 *W. R.* 664, 38 *Ch. D.* 636, *followed.*

The plaintiffs were the Northern Trust (Limited).

The first defendants The Manar Steamship Co. (Limited).

The second defendants, Messrs. Strachan Bros.

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

The main issue raised was the question of priorities as between the plaintiffs, as mortgagees of the steamship *The Manar*, and the second defendants Messrs. Strachan Bros., ship chandlers, who had supplied necessaries to the ship.

The immediate question which the court had to consider was raised by both defendants applying by motion under ord. 25, r. 5, to stay actions brought by the plaintiff seeking declaratory judgments as to their rights in *The Manar* and her freight in the circumstances following.

*The Manar* is a steel screw steamship of 2,562 tons gross, built in 1892, and owned by The Manar Steamship Co. (Limited), a corporation dating from the 13th of January, 1900.

On the 26th of June of that year, the company registered a statutory first mortgage of the ship for £17,000, with interest at 7 per cent. to the plaintiffs, as a collateral security, they being the trustees for debenture holders.

The mortgagors made default in payment of principal and interest, and in March, 1902, the plaintiffs took the necessary steps to obtain possession of the vessel, giving notice to the master and the charterers of the ship, and on the expiration of her then charter the plaintiffs chartered her to a Peruvian firm to load a cargo of phosphates from Banfort, in South Carolina, for St. Nazaire, France, and on the 5th of May steps were taken to voluntarily wind up The Manar Steamship Co.

On the ship's arrival at St. Nazaire the consignees took delivery of the cargo and became liable for freight, and on the 10th of June the defendants, Messrs. Strachan Bros., ship chandlers of Newcastle, took proceedings at St. Nazaire as creditors of the owners for necessaries supplied to the vessel while in the United Kingdom and at New York, and they arrested the vessel for 19,500 francs, being the balance due on such account.

The French court directed the plaintiffs through the master of the vessel to give bail for 25,000 francs to answer that claim, and directed Messrs. Strachan Bros., to give bail to the master for 20,000 francs to meet a claim for damages in case it should thereafter transpire that the arrest was wrongful.

On the 21st of June Messrs. Strachan Bros., obtained judgment by default in the King's Bench Division in England for £759 10s. 9d. against the mortgagors, the freight having already been attached by the master of the vessel and by the Barry Graving Dock and Engineering Co. in respect of a claim for repairs to the ship.

The mortgage was afterwards made executory in France and the English judgment, obtained by Messrs. Strachan Bros. also became executory, and their attachment of the freight, and also the plaintiff's mortgage, were declared valid.

On the 2nd of December the plaintiffs commenced proceedings at St. Nazaire for a declaration of the validity of the arrest of freight by Messrs. Strachan Bros. to be set aside, and for a declaration that they had no rights over the vessel and for judgment in the same, and for an order directing the consignees of the cargo to pay the freight to the plaintiffs as mortgagees.

In January of the present year the plaintiffs commenced the present action and claimed a declaration that they were the owners of the vessel in March, 1902, as duly registered first mortgagees, and as mortgagees in possession in April were entitled in priority to the defendants to the freights earned by the vessel while in their possession.

In February *The Manar* was sold to Swedish purchasers. The defendants, Messrs. Strachan Bros. and the liquidator of The Manar Steamship Co.,

applied in chambers (1) that as against Messrs. Strachan Bros. the action might be stayed or dismissed with costs, and (2) that as against The Manar Steamship Co., the action might be stayed until the plaintiffs indemnified the defendant company against all costs.

Ord. 25, r. 5, provides that: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

On behalf of the plaintiffs evidence was given that the French court would apply English law and therefore a declaratory judgment was sought, but the defendants alleged that the French court could apply French law and the judgment of the English court would have no further force than as evidence.

*Robson, K.C.*, and *Adair Roche*, in support of the motion, on behalf of Messrs. Strachan Bros.

*H. E. Wright*, for the liquidator of The Manar Steamship Co., relied on *Brooking* v. *Maudslay, Son, & Field*, 36 W. R. 664, 38 Ch. D. 636.

*Scrutton, K.C.*, and *Balloch*, for the plaintiffs, cited *Hyman* v. *Helm*, 32 W. R. 258, 24 Ch. D. 531; *Simpson* v. *Fogo*, 11 W. R. 418, 1 Hem. & M. 195; *Liverpool Marine Credit Co.* v. *Hunter*, 16 W. R. 1090.

BUCKNILL J., after stating the facts, said it has been argued in the first motion on behalf of the defendants, Strachan Bros., that in the circumstances the proceedings instituted by the plaintiffs, the Northern Trust (Limited), cannot be of practical utility to them. That they amount to an improper interference with the proceedings in another country, and that they are in their nature oppressive and vexatious. With regard, however, to the first objection I cannot rely on the affidavits of French lawyers which have been read in the course of the arguments addressed to me, for they do not make it clear what effect a judgment in this action would have upon the proceedings in France. I must, therefore, treat the matter as open, and on consideration I do not find that it has been made out to my satisfaction that the declarations sought by the plaintiffs will not be of practical utility to them, nor am I able to say that this action is an improper interference with the proceedings in France; and the defendants have failed to satisfy me that the declaration asked for is oppressive or vexatious, or an abuse of the process of this court. The result is that I see no reason for staying the action and therefore dismiss the first motion with costs. The second motion is made on behalf of the liquidator of The Manar Steamship Co. for the purpose of staying an action by the same plaintiffs in which they claim a declaration similar to the action I have just dealt with. The facts, however, in this second case are different. Here the plaintiffs have attacked the steamship company, though the company has not shown any desire to challenge the validity of the mortgage under which the vessel was taken possession of by the plaintiffs, or to challenge the right of the plaintiffs to freight earned under the charter-party. It is true that the liquidator has alleged in his affidavit filed in this action that the mortgage on the ship may be invalid on the ground that "no valid resolution of the company was passed authorizing the borrowing of the sums in question, and that "there are substantial and complicated questions to be inquired into before judgment can be properly given in this action; but there are no funds belonging to the company for the defence of this action, in which no substantial relief is claimed against the company, and which is, I believe, brought against the company solely for the purpose of obtaining a declaration as to English law to be used by the plaintiffs in certain proceedings in the French courts."

From that affidavit I gather that it is possible that the company, apparently without funds, and now in liquidation, and without any desire to litigate, may hereafter choose to claim on behalf of those interested a declaration that the mortgage is invalid; but this is not a case where the contract is alleged to be void. The allegation amounts to no more than this—that within the time limited by law the company may, perhaps, seek to set the mortgage aside. The plaintiffs, however, say that this question must be settled now. The liquidator, on the other hand, says he is not bound to have his hand forced, and, in support of that view a passage has been read from Stirling, J., in *Brooking* v. *Maudslay, Son, & Field*, 38 Ch. Div. 636, at p. 645, which appears to me to be in point.

The plaintiffs at the present time are in a position of having lent a sum of money on mortgage, taken possession of the ship, chartered her, and earned freight, whilst the defendants, The Manar Steamship Co., though aware of these proceedings, have not been antagonistic. The company has not attacked the plaintiffs, and until the plaintiffs were attacked by Strachan Bros. in France matters between the plaintiffs and the defendant company were at rest. After, however, Strachan Bros. had proceeded in France against the defendant company in respect of necessaries supplied to the ship of which the plaintiffs are mortgagees, but in which the defendant company did not appear, the Northern Trust (Limited), as plaintiffs, put the law in motion by the present proceedings against the defendant company for no other reason, so far as I can see, than to obtain a declaration for use in France in litigation to which the defendants, The Manar Steamship Co., have not made themselves parties. It seems to me, therefore, that this proceeding is oppressive and vexatious, and I direct that the plaintiffs' action be stayed—not dismissed—and that the costs be paid by the plaintiffs.

*First motion disallowed with costs; second motion allowed with costs.*

Solicitors for the plaintiffs, *King, Wigg, & Co.*, for *George Armstrong & Sons*, Newcastle-upon-Tyne.

Solicitors for both defendants, *Pritchard & Sons*, for *Wilkinson & Marshall*, Newcastle-upon-Tyne.

## Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — April 29, 30; May 11.

MCQUIRE v. WESTERN MORNING NEWS CO. (a.)

*Libel—Fair comment—Criticism on literary work—Province of jury.*

*Where the defence of fair comment is set up in an action for libel in respect of a criticism on a literary work, the jury ought not to be left to make their own opinion of the literary merits of the work the test of fairness or unfairness. Unless there is in the criticism some element which may support an inference of unfairness in some other sense, such as an attack on the personal character of the plaintiff or an imputation that the plaintiff has written something which he has not in fact written, it is the duty of the judge to withdraw the case from the jury and to hold that there is no libel.*

Application by the defendants for judgment or new trial in an action tried before Ridley, J., and a jury.

The plaintiff was an author, actor, and theatrical manager, and the action was brought to recover damages for an alleged libel published of and concerning the plaintiff as an actor and theatrical manager, and the author of a certain play, in the defendant's newspaper, the *Western Morning News*.

On the 24th of June, 1901, the plaintiff produced at the Theatre Royal, Plymouth, a musical play written and composed by himself, and entitled *The Major*.

The play was performed by a travelling company under the management of the plaintiff, and the plaintiff himself took one of the parts.

The alleged libel was contained in a criticism on the play which appeared in the *Western Morning News* on the 25th of June, 1901, and was as follows: "A three-act musical absurdity, entitled *The Major*, written and composed by Mr. T. C. McQuire, was presented last evening before a full house by the author's company. It cannot be said that many left the building with the satisfaction of having seen anything like the standard of play which is generally to be witnessed at the Theatre Royal. Although it may be described as a play, *The Major* is composed of nothing but nonsense of a not very humorous character, whilst the music is far from attractive. This comedy would be very much improved had it a substantial plot and were a good deal of the sorry stuff taken out of it, which lowers both the players and the play. No doubt the actors and actresses are well suited to the piece, which gives excellent scope for music-hall artistes to display their talent. Among Mr. McQuire's company there is not one good actor or actress, and, with the exception of Mr. Ernest Braime, not one of them can be said to have a voice for singing. The introduction of common, not to say vulgar, songs does not tend to improve the character of the performance, and the dancing, which forms a prominent feature, is carried out with very little gracefulness."

The innuendo set out in the statement of claim was as follows: "By the said words the defendants meant and were understood to mean, and the meaning of the said words, is, that the said play was dull, vulgar, and degrading, that the members of the plaintiff's company were incompetent as actors, singers, and dancers, that they were music-hall artistes, and that the plaintiff was himself incompetent both as an actor and composer as aforesaid."

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The defendants by their defence pleaded that the matter complained of was published by them in the ordinary course of their business as public journalists, and without any malice, and that it was a fair and *bonâ fide* criticism upon the plaintiff's play and its performance, which were matters of public interest, and was therefore no libel.

At the trial evidence was given as to the character of the play and its performance. There was no evidence of any personal malice towards the plaintiff, or of any indirect motive, on the part of the writer of the criticism, or of any one responsible for the management of the defendants' newspaper.

RIDLEY, J., left to the jury the question whether the criticism complained of was or was not a libel. The jury returned a verdict for the plaintiff for £100 damages.

The defendants applied for judgment or a new trial.

*Duke, K.C.*, and *J. A. Hawke*, for the defendants.—The words complained of are merely fair comment and *bonâ fide* criticism, the subject of the comment and criticism being a literary work which has been submitted to the judgment of the public. The right of fair comment and fair criticism on books and other literary productions has been clearly established in a series of authorities—viz., *Carr* v. *Hood*, 1 Camp. 355; *Campbell* v. *Spottiswoode*, 11 W. R. 569, 3 B. & S. 769; and *Merivale* v. *Carson*, 36 W. R. 231, 20 Q. B. D. 275. The expressions "fair comment" and "fair criticism" mean that which may fairly be considered comment or criticism; they do not mean such comment or criticism as a jury may think to be fair or temperate. So long as criticism remains criticism on literary or other work, and does not break away into an attack on private character, then, although in the opinion of a jury it may be excessive or exaggerated, it does not constitute a libel. In this case the learned judge, after hearing the whole of the evidence, ought to have told the jury that there was no evidence of anything beyond fair comment, and to have directed a verdict and judgment for the defendant.

They also cited *Wason* v. *Walter*, 17 W. R. 169, L. R. 4 Q. B. 73; *South Hetton Coal Co.* v. *North Eastern News Association*, 42 W. R. 322, [1894] 1 Q. B. 133; *Henwood* v. *Harrison*, 20 W. R. 1,000, L. R. 7 C. P. 606; *Paris* v. *Levy*, 9 W. R. 71, 9 C. B. N. S. 342; and *Macleod* v. *Wakley*, 3 C. & P. 311.

*Clavell Salter*, for the plaintiff.—The argument for the defendants treats fair comment as being co-extensive with comment, and leaves no room at all for unfair comment. But what the law protects is not all comment, but fair comment as distinguished from unfair comment. The test for distinguishing between the two is whether the expression of the comment is fair or not, and that is a question for the jury. The jury are to say, not whether they agree with the comment, but whether the comment exceeds the bounds of what is fair. There is no ground for setting aside the verdict of the jury in this case.

*Duke, K.C.*, replied.

*Cur. adv. vult.*

May 11.—COLLINS, M.R., read the following judgment: This is an application by the defendants for a new trial or judgment in an action for libel tried before Ridley, J. The plaintiff is an author and actor, and the action is founded upon a notice which appeared in the defendants' newspaper of a musical play written and composed by the plaintiff and produced by a company under his management at the principal theatre in Plymouth. The plaintiff himself acted a part in the play. The notice complained of was as follows: [His lordship read the alleged libel

as set out above.] It appears on the face of the statement of claim that the notice complained of was a dramatic criticism of a play publicly acted; and therefore it could not be, and was not, contended for the plaintiff that there was any libel unless the criticism exceeded the bounds of "fair comment." It was not suggested that there was any evidence of actual malice, there were no personal imputations, nor could any statement of fact be impugned. The innuendo set out in the claim does not charge any misstatement of fact, but confines itself to matters of opinion only. It is as follows: "By the said words the defendants meant and were understood to mean, and the meaning of the said words is, that the said play was dull, vulgar, and degrading, that the members of the plaintiff's company were incompetent as actors, singers, and dancers, that they were music-hall artistes, and that the plaintiff was himself incompetent both as an actor and composer as aforesaid." The plaintiff, however, contended that the notice, though comment, was not "fair comment"; and the jury apparently adopted this view, and found for the plaintiff, with £100 damages. The defendants challenge the verdict on the ground of misdirection, and also as being against the weight of evidence; but they rested their case mainly on the ground that on the facts admitted and proved it was competent for the court itself, notwithstanding the verdict of the jury, to enter judgment for the defendants.

This raises a very important question as to what are the limits of "fair comment" on a literary work, and as to what are the respective provinces of the judge and jury with respect thereto. One thing, however, is perfectly clear, and that is that the jury have no right to substitute their own opinion of the literary merits of the work for that of the critic, or to try the "fairness" of the criticism by any such standard. "Fair," therefore, in this collocation certainly does not mean that which the ordinary, reasonable man, "the man on the Clapham omnibus," as Lord Bowen phrased it, the juryman common or special, would think a correct appreciation of the work; and it is of the highest importance to the community that the critic should be saved from any such possibility. In principle, therefore, there would be nothing to leave to the jury unless there was some element in the criticism which might support an inference of unfairness in some other sense. No doubt this element might be, and has been described in various ways, and different instances of it given; but, broadly, I think Mr. Duke is right in contending that, in the case of a literary work at all events, it is something that passes out of the domain of criticism itself. Criticism cannot be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact. "If," says Lord Ellenborough in *Carr* v. *Hood*, reported in a note to *Tabart* v. *Tipper*, 1 Camp. 350, "the commentator does not step aside from the work or introduce fiction for the purpose of condemnation he exercises a fair and legitimate right. . . . Had the party writing the criticism followed the plaintiff into domestic life for the purposes of slander, that would have been libellous" And, in another passage, "Show me an attack upon the moral character of this plaintiff or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sate here to protect him." In *Merivale* v. *Carson*, Bowen, L.J., says: "In the case of literary criticism it is not easy to conceive what would be outside that region"—*i.e.*, of fair comment—"unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticizing. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. . . . . Still, there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism—I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work." I think "fair" embraces the meaning of honest and also of relevancy. The view expressed must be honest and must be such as can fairly be called criticism, I am aware that the word "moderate" has been used in this connexion—*Wason* v. *Walter*—with reference to comment on the conduct of a public man; but I think it is only used to express the idea that invective is not criticism. It certainly cannot mean moderate in the sense that that which is deemed by a jury, in the case of a literary criticism, extravagant, and the outcome of prejudice on the part of an honest writer, is necessarily beyond the limit of fair comment—see *Merivale* v. *Carson*. No doubt in most cases of this class there are expressions in the impugned document capable of being interpreted as falling outside the limit of honest criticism, and therefore it is proper to leave the question to the jury, and in all cases where there may be a doubt it may be convenient to take the opinion of a jury. But it is always for the judge to say whether the document is capable in law of being a libel. It is, however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to show that it is a libel—*i.e.*, that it travels beyond the limit of fair criticism; and therefore it must be for the judge to say whether it is reasonably capable of being so interpreted. If it is not, there is no question for the jury, and it would be competent for him to give judgment for the defendant. In *Henwood* v. *Harrison* the action was against the Queen's printer, who, under the direction of the Lords of the Admiralty, had printed a blue-book containing a letter defamatory of the plaintiff and had sold copies of the same in ordinary course. The defence was that the letter was a fair comment on a matter of public importance. It was admitted that the defendant acted *bonâ fide* and without malice. Brett, J., nonsuited the plaintiff, and the Court of Common Pleas, Grove, J., dissenting, upheld the nonsuit. Willes, J., who delivered the judgment of the majority, said: "In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the court first to determine whether there is any evidence upon which a rational verdict for the affirmant could be founded." In that case, as in this, actual malice was not suggested, but the plaintiff nevertheless insisted that there was a question for the jury, and the ground of the non-suit, which was upheld, was that the publication was "in the nature of fair criticism of a proposal affecting a matter of great national importance." That case, therefore, in its actual decision is directly in point. The decision, so far as I know, has never been questioned, though exception has been taken to the use of the word "privilege" to describe the public right of fair comment, and some eminent judges have preferred not to use a word which according to its technical etymology, denotes the special right of an individual as extending to cover the common rights of the whole community at large. In *Merivale* v. *Carson*, Bowen, L.J., treats the difference of view as one rather concerned with the "metaphysical exposition" of the origin of the right itself than with the limits of its exercise, and he adds: "But the question is rather academical than practical, for I do not think it would make any substantial difference in the present case which view

was the right one." Indeed, since the time of Lord Ellenborough, there does not seem to have been any difference as to the extent and limits of the right itself in the case of literary criticism, and it was more commonly than not treated as resting on the principle explained by Willes, J., in *Henwood* v. *Harrison*, which was decided in 1872, after *Campbell* v. *Spottiswoode*, decided in 1863, until *Merivale* v. *Carson*, decided in 1887: see, for instance, *Wason* v. *Walter*, decided in 1868. It certainly does not seem that the learned judges who suggested the later exposition of the right intended in any way to abridge the right of the critic as measured by the doctrine of "privileged occasion," or to interfere with the respective provinces of judge and jury in questions of libel. I think these considerations throw some light on the genesis and meaning of the word "fair" in the expression "fair comment," which is not of merely recent origin and co-existed with the view that the doctrine of "privileged occasion" applied to such cases. The comment, in order to be within the protection of the privilege, had to be fair—*i.e.*, not such as to disclose in itself actual malice. It also had to be relevant; otherwise it never was within it, and the judge could hold as a matter of law that the privilege did not extend to it, *Huntley* v. *Ward*, 6 C. B. N. S. 514, 8 W. R. C. L. Dig. 39; *Warren* v. *Warren*, 1 Cr. M. & R 250, and in such case the only defence was truth. These factors were, I think, intended to be covered compendiously by the epithet "fair." In other words, it was intended to exclude those elements which took the comment out of, or prevented it from falling within, the privilege of the occasion. The result is that the question of "fair comment" is no more exclusively for the jury in one view of the nature of the right than in the other. In my opinion, there is in this case, in the language of Willes, J., above cited, no evidence on which a rational verdict for the plaintiff can be founded, and the defendants are therefore entitled to have judgment entered for them. In this view it is not necessary to consider the grounds on which a new trial is asked for; but if there was any evidence fit to be considered by a jury, I am clearly of opinion that the verdict was against the weight of evidence. Further, as to misdirection, I think that, though at the outset of his summing-up the learned judge correctly laid down the law as to the extent of the defendants' right of criticism, the latter part of his summing up may have helped the jury to apply the standard of their own taste to the appreciation of the thing criticized, and to measure the rights of the critic accordingly. We have had excerpts from the play, including the songs and the stage directions, read to us; and I think it right to say that, in my opinion, it would be matter of regret for all well-wishers of the stage if an honest critic were debarred from commenting in the sense of this criticism on such a production.

STIRLING and MATHEW, L.JJ., concurred.

*Judgment for defendants.*

Solicitors for the plaintiffs, *Law & Worssam*, for *Bond & Pearce*, Plymouth.

Solicitors for the defendants, *Crowders, Vizard, & Oldham*, for *Rooker, Matthews, & Co.*, Plymouth.

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From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) April 24.

VAMPLEW AND OTHERS v. PARKGATE IRON AND STEEL CO. (LIMITED). (*a.*)

*Master and servant—Compensation for injury by accident—"Workman"—Independent contractor—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7 (2).

*A contractor, who enters into an agreement to be paid weekly for the amount of work which he and his own workmen can do, and who meets with an accident in the course of his employment with manufacturers at their works, is not himself a "workman" within the meaning of section* 7, *sub-section* 2, *of the Workmen's Compensation Act*, 1897.

This was an appeal from the refusal of the learned judge of the Rotherham County Court to award compensation to the dependents of a deceased workman under the Workmen's Compensation Act, 1897.

The question was whether the deceased man was a workman or an independent contractor, and the evidence upon which the county court judge held that he was an independent contractor, and that the dependents were therefore not entitled to compensation under the Act, was to this effect.

Vamplew had entered into a sub-contract to work for the respondent company at breaking steel and clearing cinders, being paid weekly by the ton. He had five men and two boys working under him, whom he engaged and discharged, and the average amount of his weekly earnings was £4.

*H. W. W. Wilberforce*, for the appellants.—The county court judge apparently intended to decide this case on the authority of *Simmons* v. *Faulds*, 17 Times L. R. 352, where it was held that the applicant, a foreman bricklayer, was a sub-contractor to supply labour, and was therefore not within the Act. In the subsequently decided case of *Evans* v. *Penwyllt Dinas Silica Brick Co.*, 18 Times L. R. 58, in which the facts were more similar to the present case, this court held that there was evidence justifying the county court judge's finding that the applicant was a workman, and not an independent contractor. It is not necessary that the workman should be a mere servant to come within the Act. The words of section 7, sub-section 2, are: "Every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise and is expressed or implied, is oral or in writing."

*Ruegg, K.C.*, and *Arthur Sims*, for the respondents, were not heard.

COLLINS, M.R.—This was an appeal from a decision of the Rotherham county court judge, who has found as a fact that the deceased man was employed as a contractor and not as a workman. If there was any evidence to justify the county court judge arriving at that finding, then this court cannot interfere. The burden is on the applicants to show that there existed between the deceased man and the respondents such a relationship as brings the case within the definition of "workman" in section 7 (2) of the Act of 1897. The words of that section are no doubt very wide, but the cardinal fact in consideration of the question is that the Act on the face of it deals with the relation of employer and employed. This is shown by the title of the Act and by the words in the definition itself—

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

"engaged in an employment to which this Act applies." Where a man undertakes to do work as a contractor, that, *primâ facie* at any rate, negatives the existence of the relation of employer and employed. Here the deceased man worked for the respondents on the terms that he was to be paid so much per ton; and that he was responsible as a contractor for getting the work done and himself employed workmen for that purpose, though, of course, he was not debarred from working himself. In my opinion there is here clearly evidence on which the county court judge might find as he did that his position was that of an independent contractor and not a servant. For these reasons the appeal fails.

Stirling, L.J.—I agree. I should have preferred that more evidence should have been given as to the relationship between the deceased and the respondents. Upon the evidence before the county court judge, who appears to have directed himself in accordance with the decision in *Simmons* v. *Faulds*, I cannot say that he made any mistake in law in arriving at the conclusion of fact to which he came.

Mathew, L.J.—I am of the same opinion. It was urged for the appellants that the attention of the county court judge, who decided this case in accordance with the decision in *Simmons* v. *Faulds*, was not called to the case of *Evans* v. *Penwyllt Dinas Silica Brick Co.*, and that if it had been he must have arrived at a different conclusion. But when that case is examined it will be seen that there is no foundation for that argument. The decision there rested on a special agreement. The applicant there was a quarryman, who was paid so much for every ton he worked, and had men employed by himself working under him, and this court upheld the finding of the county court judge that he was a workman. But in that case there was an understanding between the applicant and the manager of the quarry that he should be compensated in case of accident. Therefore the ground of the decision there was that the applicant by this special agreement should be treated as a workman within the meaning of the Act of 1897.

I cannot say in the case we are now considering that the county court judge has made any mistake in law in arriving at the conclusion of fact that he came to.

*Appeal dismissed.*

Solicitors for the appellants, *H. G. Campion & Co.*, for *Clegg*, Sheffield.

Solicitors for the respondents, *Halse, Trustram, & Co.*, for *A. Muir Wilson*, Sheffield.

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From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) April 24.

Giles v. Belford, Smith, & Co. (a.)

*Master and servant—Workmen's compensation—Dock labourer—"Average weekly earnings"—Irregular employment for over twelve months—Mode of calculation—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *First Schedule* 1 (b).

*A stevedore's labourer claimed compensation for injuries occasioned to him by an accident which happened on the 28th of November,* 1902, *while in the employment of a firm of master stevedores. The county court judge found that he was not engaged by the firm for any definite period, but had been from time to time employed by them, and that during the period between the 2nd and 10th of November he was not working for the firm, but that from the 11th to the 28th he was continuously in their employment. He accordingly awarded him compensation calculated on the average of his weekly earnings during the last-named period.*

*Held, dismissing the appeal, that, notwithstanding the decision of the House of Lords in* Lysons v. Knowles & Sons, 49 *W. R.* 636, [1901] *A. C.* 79, *the basis upon which the county court judge had assessed his award was right, as the period of continuous employment was sufficiently long to establish a basis for striking an average under the schedule.*

Jones v. Ocean Coal Co., 47 *W. R.* 484, [1899] 2 *Q. B.* 124, *approved and followed.*

Appeal from an award of the learned judge sitting at the Bow County Court in an arbitration under the Workmen's Compensation Act, 1897, who had held that the applicant was entitled to compensation. The only question in the case was the proper method of calculating the amount of compensation which the applicant should receive under the award.

By paragraph 1 of the first schedule to the Act, "The amount of compensation under this Act shall be . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed £1."

The respondent was a stevedore's labourer, who met with an accident arising out of and in the course of his employment by the appellants, who were master stevedores. The accident happened on the 28th of November, 1902. The applicant had then been working for the employers, not continuously, but irregularly, for a period of more than twelve months. During the twelve months preceding the accident he had worked in every month except May, June, and July, during the whole of which three months he had been in hospital. In the other months he had worked for part of most weeks. In November, 1902, however, he did not work for the first ten days of the month. He worked on the 11th, and then continued working every day until the 28th, when the accident happened.

The county court judge found as a fact that the nature of the applicant's employment was that of work under a daily contract, and he calculated the average weekly earnings, which were to be the basis of the compensation, by adding together the applicant's actual earnings for the eighteen days from the 11th of November to the 28th of November, and dividing the total by three, the number of weeks into which the eighteen days extended. From an award made on this basis the employers appealed.

*Ruegg, K.C.*, and *Ellis Hill*, for the appellants.—The county court judge here calculated the workman's weekly earnings upon a wrong principle. He ought to have added together the earnings of the applicant during the twelve months preceding the accident, and divided the total either by fifty-two or by the number of weeks in which he actually worked. In *Jones* v. *Ocean Coal Co.*, 47 W. R. 484, [1899] 2 Q. B. 124, there had been a continuous employment for a period, and a break of that employment had taken place, and then the workman was subsequently employed again for a continuous period, and, in estimating his average weekly earnings under the first schedule only the latter period of employment was regarded. But here there was really no continuous employment at any time. The employment

(a.) Reported by Erskine Reid, Esq., Barrister-at-Law.

was casual daily employment, and the man's services were casual. In *Lysons* v. *Knowles & Sons*, 49 W. R. 636, [1901] A. C. 79, it was held that the applicant, although he had been employed less than two weeks, came within the benefit of the Act. Lord Halsbury, L.C., there, in giving his view of the meaning to be attached to the words "average weekly earnings," said: "If a man was only employed at irregular intervals or at irregular amounts you were to get at what the average was by putting them together and striking an average so as to afford a test of the weekly sum to be paid." Therefore, in the Lord Chancellor's view as expressed in that case, the county court judge here should have calculated the respondent's average weekly earnings with reference to the whole year, and not merely to the period from the 11th to the 28th of November.

He also cited *Keast* v. *Barrow Hematite Steel Co.*, 15 Times L. R. 141, and *Ayres* v. *Buckeridge*, 50 W. R. 115, [1902] 1 K. B. 57.

*Shakespeare*, for the workman.—This point was not raised in *Lysons* v. *Knowles & Sons*, and therefore that case does not apply here. All that was decided in that case was that the Act applied to casual labourers, and was not restricted to workmen who had been employed for two whole weeks at least. In *Williams* v. *Poulson*, 16 Times L. R. 42, the applicant for compensation was a casual dock labourer. Between the 5th of March, 1898, and the 25th of January, 1899, he had been working for the respondent during a portion of each week except on four occasions, when he did not work for the respondent for reasons not appearing. The county court judge found that the applicant had been in the employment of the respondent during the period mentioned, and had during that time earned so much. This sum he divided by the number of weeks during which the employment lasted, and he awarded the applicant one-half of the sum so found. That case was heard after *Jones* v. *Ocean Coal Co.* had been decided, and which it followed. The principle adopted by the learned county court judge here was therefore in accordance with the rule laid down in *Jones* v. *Ocean Coal Co.* and *Williams* v. *Poulson*. Both these authorities being in favour of the respondent's contention, this appeal should be dismissed.

*Ruegg, K.C.*, replied.

COLLINS, M.R.—This is an appeal from an award of the judge of the Bow County Court awarding compensation under the Workmen's Compensation Act, 1897, to a stevedore's labourer. The judge has found as a fact that the applicant's employment began on the 11th of November and continued till the 28th of November, when the accident happened, and on that footing he had assessed compensation. It was urged in support of this appeal that the applicant had been employed by the same employers, and had worked for them, at short intervals from time to time, with one interval of three months, during a period of more than twelve months preceding the accident. The answer to that was that the county court judge had found as a fact that there was a complete break in the employment before the 11th of November, and that the employment in question began on that day, and therefore he did not calculate the average amount of the workman's weekly earnings for the purposes of compensation by reference to any preceding period. In those circumstances, it seems to me that there was no difficulty in following the express provisions of paragraph 1 (*b*) of the first schedule to the Act. It might be that, in cases which did not appear to be expressly provided for in the schedule, it would be the duty of the county court judge to do the best he could, with such materials as he had, to determine what a workman's average weekly earnings were. But there was nothing to prevent him from following the terms of the schedule, when he had before him all the materials which enabled him to do as the schedule required. [His lordship read the paragraph of the schedule.] This court decided in *Jones* v. *Ocean Coal Co.* (*Limited*) and other cases that the word "employment" in the expression "in the employment of the same employer" meant a substantially continuous employment. It would be impossible for us now, without overruling those decisions, to say that this workman had been in the employment of the employers for twelve months within the meaning of the schedule. The decision of the House of Lords in *Lysons* v. *Knowles* that this Act applied to casual labourers does not interfere with the previous decisions of this court as to continuous employment. All that was there decided was that a workman is not debarred from compensation because his case cannot be brought within the precise terms of the first schedule to the Act. No dissent was expressed from the view taken by this court in various cases of which I may particularly refer to *Jones* v. *Ocean Coal Co.* In this case the applicant had not been in continuous employment for twelve months, but he had been in employment from the 11th of November for a period long enough to furnish a fair basis for calculating the average weekly earnings in accordance with the schedule. In my opinion the county court judge has adopted the right method of assessing the compensation, and therefore the appeal must be dismissed.

MATHEW and STIRLING, L.JJ., gave judgment to a like effect.

*Appeal dismissed.*

Solicitors for the appellants, *Watson, Sons, & Room.*

Solicitors for the respondent, *Griffith & Gardiner.*

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## High Court of Justice.

Chan. Div.
Swinfen Eady, J. } July 23.

WHEELER v. TOOTELL. (*a*.)

*Settlement—Will—Land purchased by equitable tenant for life, under power, with moneys belonging to personal estate—Lien of trustees on land to secure purchase-moneys—Custody of the title-deeds.*

*A testator gave real and personal property in trust to accumulate rents and profits during the minority of H., who was to be (and in fact was) let into possession on attaining twenty-one as tenant for life. A private Act authorized land to be purchased by the court at the instance of a tenant for life of full age, and to be paid for out of the personalty. The moneys so paid were to be deemed a debt from the real to the personal estate, which debt was to be held by the trustees as part of the personalty and secured by a lien on the purchased land. Subject to such lien the purchased land was to be settled on the trusts of the will.*

*Held, that, as to land so purchased, the trustees, so long as their lien existed, were entitled to the custody of the title-deeds.*

This was a summons taken out by the defendants to have it determined whether they, as trustees of the settlement created by the will hereinafter mentioned,

(*a*.) Reported by R. HILL, Esq., Barrister-at-Law.

were entitled to the possession and custody of certain deeds, documents, and muniments of title, or whether the plaintiffs, one of whom was equitable tenant for life under the settlement, were entitled to such possession and custody. If the former should be the case the applicants asked for an order for delivery to them on oath of all the said deeds, documents, and muniments.

Henry Belward Ray, by his will, dated the 19th of February, 1856, gave his real and personal estate to trustees upon trust to receive the rents and profits and accumulate the same until his nephew, Herbert Wheeler, should attain the age of twenty-one years, when he was to be put into possession of the same for his life, with remainders over.

This suit was commenced on behalf of the said nephew (whose full name was Herbert Reginald Wheeler) when an infant. He attained the age of twenty-one in 1866, when he was let into possession, and assumed the surname of Ray.

In 1877 he was found to be of unsound mind, and his committee was one of the present plaintiffs.

The defendants were the present trustees of the will, and were also trustees of the settlement created thereby for the purposes of the Settled Land Acts, 1882 to 1890.

The above-mentioned will contained no powers of sale or leasing, and a private Act of Parliament was passed to supply the deficiency, under the short title of "The Ray Estate Act, 1858," which received the Royal Assent on the 2nd of August, 1858, and which incorporated the provisions as to leases and sales of the Leases and Sales Act, 19 & 20 Vict. c. 120.

Under section 22 of the Ray Estate Act the Court of Chancery had power (*inter alia*) at any time or times, at the instance (as therein specified) of a tenant for life of full age, to apply any part of the residuary personal estate of the testator in or towards the purchase of messuages, lands, and hereditaments, and all moneys so applied were, as between the residuary personal estate and the residuary real estate, to be deemed a debt due with interest from the real estate to the personal estate. The trustees of the will were to have a lien by way of equitable mortgage on the hereditaments so purchased for the moneys so applied with interest at 4 per cent. per annum, and were to hold the moneys and interest so secured as part of the personal estate of the testator. Subject to such lien, the hereditaments so purchased were to be settled and assured to the same uses and on the same trusts as were by the said will limited and declared of and concerning the residuary real estate devised thereby.

In accordance with these provisions considerable purchases of land had been made and the plaintiffs claimed the right to retain the title-deeds relating thereto.

*Macnaghten, K.C.*, and *R. J. Parker*, for the applicants.—The trustees are equitable mortgagees, and as such are entitled to the possession of the title-deeds.

*Eve, K.C.*, and *Spencer Butler*, for the plaintiffs, cited *In re Newen, Newen* v. *Barnes*, [1894] 2 Ch. 297; *In re Wythes, West* v. *Wythes*, 41 W. R. 375, [1893] 2 Ch. 369; *In re Richardson, Richardson* v. *Richardson*, [1900] 2 Ch. 778, 49 W. R. Dig. 159; and *In re Money-Kyrle's Settlement, Money-Kyrle* v. *Money-Kyrle*, 49 W. R. 44, [1900] 2 Ch. 839.

SWINFEN EADY, J.—By the Ray Estate Act provision is made for keeping separate the real and personal property settled by the will of Henry Belward Ray. Though there is power to apply the personalty in the purchase of land, it is provided by section 22 that all money so applied shall be deemed a debt from the real to the personal estate, bearing interest, and that the trustees shall have a lien on the land so purchased as security by way of equitable mortgage for such debt and interest.

I am of opinion that as to the land purchased with moneys advanced by the trustees out of the personal estate, and on which they have a lien in respect of such advance, the trustees are entitled to the custody of the deeds.

This is not the case of an equitable tenant for life let into possession of the settled land, and asking for the custody of the title-deeds as between himself and the trustees. The applicants, as trustees of the personalty, are in the position of incumbrancers on the realty. A tenant for life of personalty is not entitled to come and ask for the title-deeds of the property. The applicants hold their lien on the purchased land as part of the personal estate of the testator; so that the cases cited do not apply.

I am of opinion, accordingly, that the trustees, so long as their lien exists, have a right to the possession and custody of the deeds and documents of title relating to the purchased land.

Solicitors for the plaintiffs, *Blunt & Co.*

Solicitors for the defendants, *Francis & Crookenden.*

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K. B. Div.
(Wright, J.) July 16.

WEST LANCASHIRE RURAL DISTRICT COUNCIL v THE LANCASHIRE AND YORKSHIRE RAILWAY CO. (a.)

*Highway—Level crossing over railway—Alteration of inclination of road—Liability of local authority to keep in repair raised parts of highway—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 16, 56.

*Where a railway company crosses a highway on a higher level than the road and necessarily has to construct a permanent inclined plane on each side of the railway so as to admit of vehicles using the crossing, section* 16 *of the Railway Clauses Consolidation Act*, 1845, *does not cast the duty of maintaining and repairing the approaches upon the railway company.*

Case stated in an action to determine a question between the plaintiffs and the defendants as to the liability of the defendants, the railway company, to maintain the inclined planes or approaches to a level crossing of the railway. The level crossing had been authorized, but it was found necessary to raise the approaches, and for some time the repairs were carried out by the railway.

On the 4th of December, 1901, the defendants wrote that, having been advised that they were not liable to maintain any portion of the road outside the crossing gates, they gave the plaintiffs notice that they had ceased to repair the same.

The plaintiffs having after the receipt of the notice executed repairs costing £90, brought their action to recover that amount.

*R. Cunningham Glen*, for the plaintiffs.—The determination of the sole question raised by the case turns on the true construction of section 16 of the Railways Clauses Consolidation Act, 1845. The company having elected to do works under that section, the sanction they received carried with it a liability to maintain in proper repair the permanent inclined planes which took the place of a bridge over the line.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

He cited *Lancashire and Yorkshire Railway Co.* v. *Bury Corporation*, 14 App. Cas. 417, 38 W. R. Dig. 172.

*Rowlatt*, for the defendants.—After the approaches were made and the roadway put in an efficient state of repair, all further liability to maintain the approaches ceased. Under section 56 of the Act of 1845 there was no continuing liability cast upon them, and the requirements of that section ended when the road was restored. The case cited by the plaintiffs is distinguishable from the present case. There the railway was crossed by a bridge and the approaches of the bridge were held repairable by the company as being in fact part of the bridge.

WRIGHT, J.—In this case I think I must hold that the words of section 16 of the Act of 1845 cannot be so construed as to cast, as the plaintiffs affirm, the duty of maintenance and repair of these approaches to the level crossing upon the railway company. It was said on behalf of the plaintiffs that there was an obligation to be inferred from that section. I think the obligation of the railway company was fulfilled when they had satisfied section 56 and had restored the road. If I adopted the view of the plaintiffs and held that the words of section 16 implied an obligation to repair, then I should have to alter the word "may" into "shall." My judgment must therefore be for the defendants with costs.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Alfred Dickinson*, Ormskirk; *Woodcock, Ryland, & Parker*, for *C. Moorhouse*, Manchester.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 10.

BUSHELL v. HAMMOND AND OTHERS. (a.)

*Licensing law—Renewal—Control of justices over structure of licensed premises—"Part of the premises where intoxicating liquor is sold"—Passage giving second entrance to bar—Jurisdiction to order passage to be closed—Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 11, *sub-section* 4.

*Held, that the power conferred on licensing justices by section* 11 *of the Licensing Act*, 1902, *to refuse to renew a licence unless "such alterations as they think reasonably necessary to secure the proper conduct of the premises shall be made in that part of the premises where intoxicating liquor is sold or consumed" applied to any part of the licensed premises to which customers had access.*

*Therefore an order closing a passage which led to the bars and formed a second entrance to the licensed premises, the evidence being that although no liquor was sold or consumed at the back entrance or in the passage, it was frequently used by customers entering and leaving the premises, was one that the justices had jurisdiction to make.*

This was an appeal by case stated from a decision of justices sitting at the East Kent Quarter Sessions, who had dismissed the appeal of the appellant against an order made by the respondents, the justices of Ramsgate, under the Licensing Act, 1902, s. 11 (4).

The case stated the following facts: The appellant, G. H. Bushell, was the tenant of a fully-licensed public-house known as the Coach and Horses, Ramsgate, under a licence which would have expired on the 5th of April, 1903. At the annual general licensing meeting for Ramsgate held in February, 1903, the appellant applied for a renewal of his licence. The justices required the production of a plan of the premises, and at the adjourned meeting in March they renewed the licence, but subject to the condition that the appellant should close by means of an iron gate to be kept locked and only opened when necessary for the delivery of beer, coals, or other goods, a passage which ran by the side of the hotel from which access could be obtained to the bars. The words on the lamp and on the wall, to the effect that the passage led to the bars, were also to be obliterated.

On the hearing of the appeal it was proved that intoxicating liquor was sold and consumed in the bar, bar parlour, and club room, but that no intoxicating liquor was sold at or near the back entrance or in the passage leading thereto. No evidence was given to show that liquor was ever consumed in the passage but it was admitted that there was nothing to prevent such consumption, and that the back entrance and passage were in fact used by customers for entering and leaving the premises.

It was proved that it entailed extra work on the police to exercise the supervision necessary to secure the proper conduct of the business so long as the back entrance remained unclosed.

It was contended by the appellant that the respondents had no jurisdiction to make the order on the ground that it was not an alteration in that part of the premises where intoxicating liquor was sold or consumed.

The quarter sessions held that the justices had jurisdiction under the Act to make the order.

*Hohler*, for the appellant.

*Dickens, K.C.*, and *J. W. W. Weigall*, for the respondent justices.

Lord ALVERSTONE, L.C.J.—We have often criticized the language of Acts of Parliament and have complained of having to interpret them, but if we were to agree with the argument as to the true construction of this section put forward by Mr. Hohler we should defeat the usefulness of this enactment, which was clearly intended to give licensing justices control over the structure of licensed premises and to empower them to order such alterations thereto as in their opinion may be reasonably necessary for the proper conduct of the business. Here the police gave evidence that the existence of the passage necessitated greater supervision being exercised by them over the premises, and the justices came to the conclusion that it was desirable that the passage should be closed. The tenant appealed and said that they had no power to close the passage because it was not part of the premises upon which intoxicating liquor was sold by him, or in fact consumed by his customers. That question of jurisdiction depends on the construction of section 11 (4) of the Act of 1902, which enacts that on the renewal of a licence the justices may require that "such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold and consumed." If we were to hold that a club room was within the section, but that the passage outside leading to it was not, because liquor was not sold to be drunk in the passage but in the club room, we should be frittering away a most useful enactment. The finding of the justices was that, although beer was not drunk in the passage, yet that there was nothing in fact to prevent it being consumed there. If one looks at the plan of the premises it is quite obvious that the use of the passage by people who were drinking at the house would not be infrequent. Further, there is an express finding that the back

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

entrance by the passage was used by customers for entering and leaving the bars, and therefore no question arises here as might be raised in another case that the ordered alterations were to part of the premises which, though covered by the licence, were in fact not used by the publican in the conduct of his business as such. For these reasons I think the justices were clearly right in coming to the conclusion that the alterations they desired made related to a part of the premises where intoxicating liquor was sold or consumed, and therefore that under the Act they had jurisdiction to make the order. Nor do I think that it can be said that the order was bad because it was unreasonable. Indeed it seems to me that they exercised their discretion in a very reasonable manner.

WILLS and CHANNELL, JJ., gave judgment to a like effect.

*Hohler* asked for leave to appeal.

Lord ALVERSTONE, L.C.J.—As this is a test case and raises a point, we will give you leave, but the granting of the application for leave must not be taken as suggesting that we have any doubt about the matter.

Solicitors for the appellant, *Speechly, Mumford, Rodgers, & Craig*, for *Edward Wotton*, Ramsgate.

Solicitors for the respondents, *Kingsford, Dorman, & Co.*, for *A. B. Burrows*, Ramsgate.

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K. B. Div.
(Lord Alverstone, L.C.J.) June 12, 22.

OGDENS (LIMITED) v. NELSON.
SAME v. TELFORD. (a.)

*Contract—Agreement to participate in profits of business for a specific period—Sale of business within such period—Implied stipulation not to sell—Breach.*

*The plaintiffs brought an action for the price of goods sold and delivered. The defendants admitted the claim, but counter-claimed for damages in respect of an alleged breach of contract by the plaintiffs under the following circumstance. In March, 1902, the plaintiffs entered into an agreement with the defendants whereby they agreed to participate with the defendants, for the period of four years from that date, in the profits of the plaintiff company's business on the goods sold for them by the defendants. In the course of the same year the plaintiffs sold their goodwill and business to another company. The defendants alleged that the plaintiffs had thereby committed a breach of contract, and they claimed damages in respect of such breach, on the ground that, owing to such sale, they, the defendants, were thereby prevented from participating in the profits promised by the plaintiffs for the remainder of the four years.*

*Held, that the plaintiffs had by the sale of their business committed a breach of contract, as there was an implied stipulation that they would continue to carry on their business for four years.*

*Test in* Hamlyn *v.* Wood, 40 *W. R.* 24, [1891] 2 *Q. B.* 488, *applied.*

These two actions were tried before Lord Alverstone, L.C.J., without a jury. They both raised the same questions.

They were brought by the plaintiffs, a company in liquidation, to recover the price of goods sold and delivered to the defendants Nelson and Telford respectively, who were retail tobacconists.

The defendants admitted the claims, but counterclaimed for damages for breach of an agreement, dated the 22nd of March, 1902, whereby the plaintiffs agreed to participate with the defendants for a period of four years in the profits of the plaintiff company on goods sold for them by the defendants.

On the 27th of September in the same year the plaintiffs sold their undertaking and goodwill for a consideration to another company.

The defendants counterclaimed for damages for breach by the plaintiffs of their contract by selling their business and so preventing the defendants from participating in the profits promised by the plaintiffs for the remainder of the four years.

The point of law, therefore, arose solely on the counterclaims, and was whether the disposal of their business by the plaintiffs within the four years was a breach of their contract with the defendants.

The facts of the case and the arguments of counsel fully appear in the following reserved and written judgment of the Lord Chief Justice.

*Asquith, K.C.* (*Duke, K.C.*, and *F. E. Smith*, with him) for the plaintiffs.

*Eldon Bankes, K.C.* (*Montague Lush, K.C.*, and *J. R. Randolph*, with him) for the defendants.

*Cur. adv. vult.*

June 22.—Lord ALVERSTONE, L.C.J., read the following judgment.—These were two actions brought by Odgens (Limited), a company in liquidation, to recover certain amount due for goods supplied to the defendants Nelson and Telford respectively. No question arises as to the plaintiffs' claims, which were admitted. The point for decision arises solely upon the counterclaims, which were set up under the following circumstances. Prior to the month of March, 1902, there had been considerable agitation in the retail tobacco trade respecting an alleged attempt by the plaintiff company to obtain control of the retail tobacco trade in the United Kingdom. This agitation led to the foundation of a company called the Imperial Tobacco Co. of Great Britain and Ireland (Limited), which had offered to various tobacco dealers, including the defendants, in consideration of their selling their goods of the company and undertaking not to buy any goods of the plaintiffs and certain other companies, a share in a bonus of £50,000 and a share of certain other expected profits of the Imperial Tobacco Co. The offers of the Imperial Tobacco Co. led to a counter-offer by the plaintiff company, which was accepted by the defendants, and the offer and acceptance constitute the agreement in respect of which the counter-claim was made. The offer of the plaintiffs was contained in the following letters: "Liverpool, March, 1902. 'Bonus distribution.' Our entire net profits and £200,000 per year for the next four years, commencing the 2nd of April, 1902. We will for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us our entire net profits on the goods sold by us in the United Kingdom. In addition to the above we will for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us the sum of £200,000 per year. Distribution of net profits will be made as soon after the 2nd of April, 1903, and annually thereafter, as the accounts can be audited, and will be in proportion to the purchases made during the year. Distribution as to the £200,000 per year will be made every three months, the first distribution to take place as soon after the 2nd of July, 1902, as accounts can be audited, and will be in proportion to the purchases during the three months' period. To participate in this offer we do not ask you to boycott the goods of any other manufacturer. Yours faithfully, OGDENS (LIMITED)." "March 22, 1902. Messrs.

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(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Ogdens (Limited), Liverpool. Dear Sirs,—I beg to inform you I have not signed the agreement with the Imperial Tobacco Co. dated March, 1902; and, in consideration of participating in your bonus distribution of the entire net profits on goods sold by you in the United Kingdom, and £200,000 per year for the next four years, as set out in your particulars, I hereby agree not to sign it or any similar agreement with the Imperial Tobacco Co., or any other company or firm, containing any conditions which would prevent me from buying, displaying, selling, or distributing your goods or the goods of any other manufacturer, and I also undertake to continue to buy, display, and to sell your goods. (Signed), E. NELSON, 100, Queen-street, Cardiff." It was agreed that the contract between the plaintiffs and Telford, which forms the subject of the counterclaim in the other action, was the same. Pursuant to the bargain so made, the defendants dealt with the plaintiffs respectively, and in the month of July, 1902, they each received a share of the £50,000, being one-quarter of the £200,000 for the three months ended the 30th of June, 1902. On the 27th of September, 1902, the plaintiffs sold their undertaking, including the goodwill of their business in Great Britain, to the Imperial Tobacco Co.

The agreement was put in at the trial. The consideration was the sum of £1,500,000 in shares and certain stock, plant, and buildings at a valuation. The amount due to the defendants as their share of the second £50,000 bonus in respect of the three months ended the 30th of September was allowed to the defendants by the plaintiffs in account, and no question arises respecting that. It was agreed that no profits had been made by the plaintiffs in the six months ended the 30th of September, 1902, so that no claim was made under that head. The defendants did not ask for any account of profits due to them under the agreement up to the time of the sale of the plaintiffs' business to the Imperial Tobacco company. The defendants' real claim was for damages in respect of the alleged breach by the plaintiffs of the contract contained in the letters hereinbefore set out by reason of their having transferred their trading undertaking to the Imperial Company, thereby preventing themselves from being in a position to earn profits, and preventing the defendants from continuing as their customers, and it was further alleged that the plaintiffs, having received consideration amounting to £1,500,000 for assets, including their goodwill, had in fact sold their business to third parties, and were liable for damages for having deprived themselves of their ability to carry out their agreement. It was argued on behalf of the defendants that either the plaintiffs had wilfully prevented themselves from fulfilling their contract, or that it was an implied condition of the contract that the plaintiffs should continue to carry on their business. The questions of law which arise upon the above facts are, in my opinion, by no means free from difficulty. The case does not appear to me to be governed by any of the authorities which were cited to me. I propose, therefore, to consider in the first instance what are the propositions or principles of law to be deduced from the authorities, and then to endeavour to apply them to the facts of the case. It is, I think, clearly established as a general proposition that when two persons have entered into a contract, the performance of which on one or both sides is to extend over a period of time, each contracting party is bound to abstain from doing anything which will prevent him from fulfilling the obligations which he has undertaken to discharge; further, that where a person has undertaken to carry on a business out of the profits of which he has undertaken to pay certain moneys as a consideration for the contract to the other party to the contract, he must not by his own act or default disable and incapacitate himself from further carrying on such business. These propositions are, I think, established by *M'Intyre* v. *Belcher*, 11 W. R. 889, 14 C. B. N. S. 654; *Inchbald* v. *Western Neilgherry Co.*, 13 W. R. 95, 17 C. B. N. S. 733; *Turner* v. *Goldsmith*, 39 W. R. 547, [1891] 1 Q. B. 544; *Brace* v. *Calder*, [1895] 2 Q. B. 253, 43 W. R. Dig. 113. It is further established that if the parties enter into an agreement to which effect can only be given by the continuance of an existing state of things, there is an implied engagement on the part of each that he will not do anything of his own motion to put an end to that state of circumstances, without the continuance of which effect cannot be given to the arrangement. This is, I think, established by the case of *Stirling* v. *Maitland*, 13 W. R. 76, 5 B. & S. 840; *The Telegraph Despatch Co.* v. *M'Clean*, L. R. 8 Ch. App. 658. It was contended on behalf of the plaintiffs that in many, if not all, of these decisions the consideration on the one side was wholly performed either by the passing of property or by the payment of money. No doubt this was the fact in some of the cases, but there are certainly others to which that argument does not apply, as, for instance, *Turner* v. *Goldsmith* and *Brace* v. *Calder*. Side by side with these cases, if I may use the expression, there is the other line of authorities upon which the plaintiffs rely, which establish that where the parties have made a contract which contains a variety of stipulations, and is silent as to others, no stipulation or agreement which is not expressed ought to be implied, unless it is necessary in order to give to the transaction the effect or efficacy which both parties must have intended it should have: see the language of Bowen, L.J., in *The Moorcock*, 37 W. R. 439, 14 P. D. 64, at p. 68, approved of by Lord Esher in *Hamlyn* v. *Wood*, 40 W. R. 24, [1891] 2 Q. B. 488, at p. 492, and enunciated by the House of Lords in *Rhodes* v. *Forwood*, 24 W. R. 1078, 1 App. Cas. 256. But the real difficulty is not the enunciation of these principles, but their application. In each case the terms of the contract and its object must be considered in order to ascertain whether the conduct complained of does destroy the object of the contract or prevent the performance of its manifest intention. In this case I have come to the conclusion that the view presented by the defendants is correct. Whichever of the tests, as deduced from the authorities to which I have called attention, be applied, the decision must, I think, be in their favour. There was an undoubted change of position on the part of the defendants. By the acceptance of the plaintiffs' offer they relinquished the prospect of any share in the offer made by the Imperial Co. As regards the £200,000 per annum for a period of four years, the offer was definite and distinct, and, to adopt the language of Bowen, L.J., the continuance of business by the plaintiffs for a period of four years must have been in the contemplation of both parties in order to give to the transaction the effect which they intended it to have. I therefore think that, applying the test laid down in *Hamlyn* v. *Wood*, effect cannot be given to this transaction except upon the theory that the plaintiffs continued to carry on business at least for a period of four years. There is, moreover, in my opinion, another ground upon which the defendants are entitled to rely. Several of the authorities to which I have referred show that if one party has wilfully put an end to his ability to perform a contract he has committed a breach in respect of which damages can be awarded. In this case, in September, 1902, the plaintiffs sold the goodwill of their business for a very large price to the Imperial Co. It is common knowledge that in estimating the price that is paid for goodwill the value

of the business is taken into consideration, and a certain number of years' purchase, or in some cases, a fraction of a year's purchase, of the net profits is estimated, having regard to the nature and character of the business. In this case the effect of the transaction is that the plaintiff company sell their goodwill to the Imperial Co., or, in other words, they realize for a consideration their opportunity and expectation of earning profits which they otherwise would have made. It is to be observed, moreover, that the sale renders the performance of the contract impossible so far as the distribution of the £200,000 is concerned, because it makes it impossible for the defendants any longer to be customers of the plaintiffs, or, in other words, destroys the possiblity of the existence of that state of things without which the contract could not be carried into effect. The act of the plaintiffs prevents the defendants from being able to fulfil the condition contemplated by the contract. I express the conclusion at which I have arrived with considerable diffidence and hesitation, and there is much to be urged in favour of the plaintiffs' contention. I was disposed at one time to think that the reasoning of the judgment in *Rhodes* v. *Forwood*, in which case the circumstances in many respects resemble those in the present case, and particularly the passage in the judgment of Lord Cairns, 1 App. Cas., at pp. 265 and 266, which was relied upon by Mr. Asquith, apply to this case, but on further examination I think that that case depended entirely upon the view taken by Lord Cairns as to the limited scope of the agreement as explained at pp. 263, 264 (see also the judgment of Lord Penzance), and I think it well to call attention to the view taken of *Rhodes* v. *Forwood*, in later cases, and among others by Lindley, L.J., in the Court of Appeal in *Turner* v. *Goldsmith* [1891], 1 Q. B., at p. 549. I do not propose at present to deal with the question of damages beyond saying this. It is not, in my opinion, a case for an account; the damages must be general damages estimated, taking all things into consideration, as in the case of *Inchbald* v. *Western Neilgherry Co.*, and I doubt whether any case has been made for claiming anything in respect of the possible share of profits.

Judgment accordingly for the defendants on their counterclaims.

Question as to damages ordered to stand over for further consideration.

Solicitors for plaintiff, *G. Thatcher*, for *Grace, Smith, & Hood*, Liverpool.

Solicitors for defendants, *Bell, Broderick, & Gray*.

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) May 20.

*In re* FRANCIS (No. 2). (*a*.)

*Copyright — Music—Summary jurisdiction — Evidence that pirated copies were being sold at a private house — Magistrate's order for seizure—Musical (Summary Proceedings) Copyright Act*, 1902 (2 *Ed.* 7, *c.* 15), *ss.* 1, 2.

*The words "sold or offered for sale" in section* 1 *of the Musical (Summary Proceedings) Copyright Act*, 1902, *are not confined to a sale in a public place.*

*Therefore, where a court of summary jurisdiction is satisfied that pirated copies of a musical work are being sold at a private house it has jurisdiction to make an order in the terms of the section, authorizing a constable to seize such copies without a warrant.*

Semble, *a court of summary jurisdiction has no power under section* 1 *to issue a search warrant.*

This was an appeal by case stated from the decision of a metropolitan magistrate, sitting at the Clerkenwell police-court, raising a question of law on an information laid by William Francis and others, under section 1 of the Musical (Summary Proceedings) Copyright Act, 1902, that at a private house, No. 102, Compton-passage, Clerkenwell, pirated copies of musical works were being sold privately, and that the appellants were the registered owners of the copyrights, of which some of the pirated copies were infringements, and the magistrate was asked to make an order authorizing a constable to seize the said copies without warrant and to bring them before the court.

The magistrate was satisfied by the evidence before him that there was reasonable ground for believing that pirated copies of musical works were being so sold at the private house; but he refused to make an order, being of opinion that the Act only applied where the pirated copies were exposed for sale in a public place and did not apply to a private house.

The learned magistrate based his decision on the following grounds: (*a*) That the wording of the section seemed directed to stopping the sale of pirated works by hawkers in the streets, for which purpose the obtaining of an injunction would be too cumbersome a proceeding; (*b*) that there were no words in the Act justifying a constable in entering a private house, or a magisteate in making any order which might be so interpreted.

*Scrutton, K.C.*, and *Herman Cohen*, for the appellants.—The magistrate was wrong, because the Act applies to a private dwelling. If he has not power to grant a search warraut he has certainly power to make an order for the seizure of the pirated copies, leaving it for the constable to execute the order if he were able to do so lawfully.

*Daniel Warde*, for the owner of the pirated copies.—The magistrate had no authority to make any such order which would authorize a constable to enter a private house and seize without a warrant. The view he took was that such an order could confer no authority on a constable and would therefore either be inoperative or induce the constable to commit an illegal act.

*H. Sutton*, for the magistrate.—The words "sold or offered for sale" in section 1 are confined to sale in a public place, for the words are: "If satisfied by the evidence that . . . pirated copies . . . are being hawked, carried about, sold, or offered for sale . . ." then the magistrate, on proof that the copies are pirated, may order them to be destroyed or to be delivered up to the owner of the copyright on his application. This appeal should therefore be dismissed, for the view taken by the magistrate is correct.

Lord ALVERSTONE, L.C.J.—I think this appeal must be allowed. There seems to have been some misunderstanding as to what I said in the case of *Ex parte Francis*, *ante*, p. 267, [1903] 1 K. B. 275, which I desire to clear up. I said then that the Act undoubtedly went a very long way in the direction of intertering with the rights of property because by section 2 it permitted a constable to seize this property without a warrant not under an order of a stipendiary magistrate or a court, but at the request in writing of the apparent owner of the copyright or of his authorized agent. It has been erroneously stated, I believe, that the decision in that case has

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

taken away rights which the Act intended to give, because we held that the magistrate had no power under section 2 to order the destruction of copies of pirated music seized by the constable in the street unless the person from whom the copies had been seized was served with a summons under the Summary Jurisdiction Acts, in other words, could not make an order for the destruction of the pirated copies on an *ex parte* application. The decision had certainly not the effect of taking away rights conferred by the Act and it is not right to complain of decisions when the fault arises from the fact that the Act has been drawn up without reference to the established principles of criminal law. Here what we are asked to do is to make an order which would be in effect a search warrant. A search warrant is well known, and powers to grant them are conferred by many statutes, but if persons are minded to get such a warrant they must show clearly that the Act under which they make an application gives jurisdiction to the magistrate to grant the warrant. I do not for a moment suggest that the words "sold or offered for sale" confine the sale to a sale in the street by a hawker; but there is no power given by the statute, on the other hand, to grant a search warrant. In my opinion the case ought to go back to the magistrate with directions to him to issue an order in the terms of the section. I only desire to express a hope that if a new Bill is introduced for the purpose of protecting the owners of musical copyrights that the Bill will be drawn by someone who has a knowledge at least of the elementary elements of criminal law.

WILLS, J., concurred.

CHANNELL, J.—I am of the same opinion. I think that the words "sold or offered for sale" in section 1 are not limited to a sale in a public place. On the other point I do not think that the section authorizes the magistrate to issue a search warrant. I agree that the case should go back to the magistrate with an intimation that he should make an order in the terms of section 1.

*Appeal allowed; no order as to costs.*

Solicitor for the appellant, *Philip J. Rutland.*

Solicitor for the owner of the pirated copies, *W. H. Cowl.*

Solicitor for the magistrate, *Solicitor to the Treasury.*

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K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — May 12.

MOORE, NETTLEFOLD, & CO. v. SINGER & CO (*a.*)

*Distress — Sale — Property in goods distrained — 2 W. & M., Sess. 1, c. 5, s. 2.*

*A landlord distrained upon premises for rent due, and seized, amongst other articles, a sewing machine which had been hired by the tenant. The goods were sold by auction, and at the sale the machine was bought in by the landlord's agent. The owners of the machine then seized it. In an action for conversion,*

*Held, that a sale to be valid must be a sale to third parties, and that the buying in by the landlord did not change the property in the sewing machine.*

King *v.* England, 4 *B. & S.* 782, *followed.*

Appeal by the defendants, Messrs. Singer & Co., from the decision of his Honour Judge Smyly, sitting at the Birmingham County Court.

The facts of the case are as follows:

A man named Anton was employed by the plaintiffs, and lived in a house belonging to them. He had in his possession a sewing machine, the property of the defendants, which had been lent on the hire system.

In July, 1902, a strike occurred on the plaintiffs' works, and they distrained on Anton's goods for rent due to them.

The sewing machine in question was put up to auction, and was bought by the plaintiffs' manager, who acted as agent for them. The machine was then handed back to Anton on the terms of a hiring agreement.

The defendants, on hearing of what had happened, seized the sewing machine, and the plaintiff thereupon brought this action for conversion.

The county court judge gave judgment for the plaintiffs, on the ground that there had been a *bonâ fide* sale by the auctioneer.

*Young, K.C.* (*Lawless* with him), for the defendants.—The property in this machine was never divested out of the defendants. This case is governed by *King* v. *England*, 12 W. R. 308, 4 B. & S. 782. It was there held that a landlord who distrains for rent must sell the goods and cannot retain them at the price mentioned in the inventory. The essence of this contract is a sale, and as the landlord cannot sell to himself the sewing machine still remained the property of the defendants.

*Lincoln Reed*, for the plaintiffs.—The case of *King* v. *England* does not support the proposition of the defendants. Here there was a *bonâ fide* sale by the auctioneer, and the property therefore passed to the landlord's agent.

Lord ALVERSTONE, L.C.J.—In my opinion the principle of *King* v. *England* applies to this case. The statute of 2 W. & M., Sess. 1, c. 5, s. 1, enables the landlord to sell after appraisement. In *King* v. *England* Blackburn, J., said, "I think the sale in pursuance of statute 2 W. & M., Sess. 1, c. 5, s. 2 must be a sale to a third person, otherwise many abuses might arise," and though it is quite correct to say that that expression of opinion is not necessary for the judgment it is a necessary part of the reasoning on which the judgment is based. The statute does not mean that the landlord can go through the form of a sale and take the goods himself. There must be a genuine sale and a transference of the property to a third person. I am of opinion that this appeal must be allowed.

WILLS, J.—I am of the same opinion. The sale was in my view no sale at all. To hold otherwise would be to open the door to obvious abuses. If the landlord was entitled to buy in the goods it would be to his interest to buy them for as small a sum as possible.

CHANNELL, J.—I agree.

*Appeal allowed.*

Solicitor for the plaintiff, *G. Armstrong*, Liverpool.

Solicitor for the defendants, *J. Morley*, Liverpool.

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(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

K. B. Div.
(Wright, J.) April 8.

HAMPSTEAD CORPORATION v. CAUNT. (a.)

*Metropolis—New street—Paving expenses—Liability of owner of premises — Action to recover apportioned amount—Demand—Statute of Limitations* (21 *Jac.* 1, c. 16)—*Metropolis Management Act*, 1855 (18 & 19 *Vict.* c. 120), *s.* 105—*Metropolis Management* (*Amendment*) *Act*, 1862 (25 & 26 *Vict.* c. 102) *s.* 77.

*By the joint operation of section* 105 *of the Metropolis Management Act*, 1855 *and section* 77 *of the Metropolis Management* (*Amendment*) *Act*, 1862, *which should be be read together, successive owners of houses bounding or abutting on new streets are liable on demand to pay the amount of paving expenses apportioned or charged in respect of their houses, and an action lies for the recovery of such apportioned expenses after demand has been made.*

*The Statute of Limitations* (21 *Jac.* 1, *c.* 16), *if applicable, does not begin to run in favour of an owner until payment has been demanded from him.*

This case was tried before Wright, J., without a jury.

The plaintiffs' claim was for £39 3s. 4d., the defendant's contribution as owner of a house towards the actual cost of repairing the road and paving the footways of a new street called Fleet-mews pursuant to a resolution passed at a meeting of the vestry on the 22nd of July, 1886.

It was admitted that the plaintiffs had incurred expenses in repairing the road and paving the footways of the said new street in 1891, and that £39 3s. 4d. was the proper contribution in respect of 76, Upper Park-road, the defendant's premises, and that he became the owner of those premises on the 20th of November, 1896.

In 1891 a demand for payment was made on the then owner of the premises, but the amount was not paid.

A formal demand was made on the defendant on the 19th of December, 1898, under section 105 of the Metropolis Management Act, 1855, as amended by the Metropolis Management (Amendment) Act, 1862.

The action was commenced in February, 1903.

By the Metropolis Local Management Act, 1855, s. 105, it is provided: "In case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same . . . and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board) and in case such estimated expenses exceed the actual expenses of such paving then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses."

By the Metropolis Management (Amendment) Act, 1862, s. 77, which extended the provisions of the above section to vacant plots of land abutting on a new street, it is provided as follows: "Where any vestry or district board shall, under the powers given by the 105th section of the firstly-recited Act, have paved or be about to pave any new street the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property should they deem it just and expedient so to do; and any such costs or expenses, including the cost of paving at the points of intersection of streets and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board."

*H. Courthope-Munroe*, for the plaintiffs.—Section 105 of the Act of 1855 and section 77 of the Act of 1862 must be read together. The effect of so reading them is that the "present or any future owner" of a house or of land forming or abutting on a new street is liable to pay paving expenses upon demand. After demand has been made an action may be brought. Each successive owner becomes liable on becoming owner, and such liability cannot be got rid of. It is a condition precedent to the right to recover that the demand shall be made on the owner or subsequent owner. The Statute of Limitations, if it has any application to this case, does not begin to run until a demand has been made on the owner from whom the amount is claimed, *Grece* v. *Hunt*, 25 W. R. 543, 2 Q. B. D. 389. The plaintiffs made their demand on the defendant as soon as they knew of his possession, and the Statute of Limitations, therefore, if applicable, did not begin to run until the date of such knowledge. The Statute of Limitations, however, does not apply to a case like this: *Wortley* v. *Vestry of St. Mary, Islington*, 51 J. P. 166.

He also cited *Blackburn Corporation* v. *Saunderson*, [1902] 1 K. B. 794, 50 W. R. Dig. 169.

*Chester Jones*, for the defendant.—It is true a demand must be made under section 105, but it need only be made on the first owner, and once having been made, as in this case, the amount is recoverable from him or any succeeding owner. The liability then becomes a charge on the land: *Plumstead Board of Works* v. *Ingoldby*, 21 W. R. 77, L. R. 8 Ex. 63. Each successive owner becomes liable on succeeding to the ownership, and the Statute of Limitations begins to run from such date. In this case the defendant became owner in 1896 and the action was not commenced until more than six years after that date. The remedy against him was therefore already barred when the writ was issued. An action can only be brought under the provisions of section 77 of the Act of 1862, and therefore cannot be brought against the owner of a house who is dealt with by section 105 of the Act of 1855.

*H. Courthope-Munroe*, in reply.—The expenses of

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

paving a new street, apportioned under section 77 of the Act of 1855, are not a charge on the land, but only a personal liability on each successive owner.

*Egg* v. *Blayney*, 36 W. R. 893, 21 Q. B. D. 107.

WRIGHT, J.—This is an action brought against the owner of a house to recover the expenses of paving a new street. One question which arises here is whether an action lies at all under section 77 of the Metropolis Management (Amendment) Act, 1862, against the owner of a house, or whether the right of action is not confined to the owners of the land as being the parties newly made liable by that section. Another question is whether, presuming an action does lie, the remedy in the present case is barred by the Statute of Limitations (21 Jac. 1, c. 16). The latter question depends, apparently, on whether it is necessary that a fresh demand should be made upon a person who is a successive owner.

It appears to me that section 105 of the Act of 1855 and section 77 of the Act of 1862 must be read together. The former section says in effect that the owners of houses in the street shall on demand pay to the vestry the amount of the estimated expenses of providing and laying the pavement. It seems to me to be plain that, as regards the owners of the houses who are liable under that section, no liability exists until the demand has been made, for the reason that the vestry cannot by merely arriving at the result in their own office make an owner liable. The result must be communicated to the owner where it is a matter to be estimated by the vestry's officer. Where the amount has to be estimated by the vestry's officer, it would be ridiculous to suppose that any liability could arise until that estimate had been made and communicated to the owner. Then comes section 77 of the Act of 1862, which says that where paving has been done under section 105 of the Act of 1855, not only the owners of the houses, but "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property should they deem it just and expedient so to do." Now, stopping there for a moment, it seems to me that I ought to give effect to that provision as if it were read into section 105 of the Act of 1855 as an amendment, which would cover the case of owners of land, and that all the provisions of section 105 ought, so far as they are applicable, to be applied to owners of land who are brought in under section 77, and amongst other things, that the provision requiring a demand ought to be considered as read into that section. Then that section proceeds as follows: "And any costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges shall be apportioned by the vestry or board and shall be recoverable either before the work shall be commenced or during its progress or after its completion, and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments," —that seems to me to require that there shall be some demand—"and any such amount shall be recoverable from the present or any future owner of the premises either by action at law or in a summary manner before a justice of the peace." There "such amount" seems to me to mean the amount apportioned or charged in respect of each house or premises, and, if so, the amount apportioned in respect of each house or premises must include amounts apportioned or charged against owners of houses under section 105 as well as amounts apportioned or charged against owners of land under section 77, and, if so, an action can be brought in respect of either amount. I think, therefore, that an action lies, and that, as in my opinion the cause of action was not complete until there was a demand, the Statute of Limitations (21 Jac. 1, c. 16), if it runs at all, does not begin to run until the date of the demand. I think, therefore, there must be judgment for the plaintiffs.

*Judgment for plaintiffs.*

Solicitor for plaintiffs, *A. P. Johnson.*

Solicitors for defendant, *Shaen, Roscoe, Massey, & Co.*

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Prob. Div. & Adm. Div. Probate. } March 5, 7, 13, 16, 31.

EYRE AND SMITH *v.* EYRE.
BOOKER AND EYRE INTERVENING. (*a.*)

*Probate—Lost will—Contents of draft—Codicil.*

*The Court declined to grant probate of a draft will which was alleged to be incorporated in a subsequent codicil, or alternatively to the will itself, on the ground that it was not proved that at the time the codicil was executed there was any will in existence.*

In the Goods of Elizabeth Watkins, *L. R* 1 *P. & D.* 19, 14 *W. R. P. & M. Dig.* 10, *considered.*

The plaintiffs were the executors of the deceased, George Lewis Phipps Eyre, a solicitor, who died on the 23rd of February, 1902, and claimed probate of the contents of a will, which in the course of the proceedings was alleged to have been executed by him in or since 1897, but which was now not forthcoming.

Alternatively the plaintiffs claimed that the draft or copy of the will was incorporated in a codicil of the deceased dated the 20th of February, 1902, and was therefore entitled to probate on that ground.

The defendant, Emily Blanche Eyre, who was a daughter of the deceased, prayed for probate of an earlier will of the deceased dated the 10th of February, 1894, with a codicil of the 29th of January, 1898, with or without the will of the 10th of February, 1894.

The intervener, Charles Lewis Eyre, the deceased's heir-at-law, prayed to have all the documents set aside, and claimed an intestacy.

*Asquith, K.C., Bargrave Deane, K.C.,* and *Priestley, K.C.,* for the plaintiffs.

*Dickens, K.C.,* and *R. H. Pritchard,* for the defendant.

*Powell, K.C.,* and *Barnard,* for the intervener Mrs. Booker.

*Le Bas,* for the intervener Charles Lewis Eyre.

The facts sufficiently appear from the judgment, but in the course of the case the following authorities were cited by counsel: *Allen* v. *Maddock,* 6 W. R. 825, 11 Moo. P. C. 427; *In the Goods of Mercer,* 18 W. R. 1,040, L. R. 2 P. & D. 91; *Gould* v. *Lakes,* 29 W. R. 155, 6 P. D. 1; *In the Goods of Heathcote,* 29 W. R. 356, 6 P. D. 30; *Singlton* v. *Tomlinson,* 26 W. R. 722, 3 App. Cas. 404; *Atkinson* v. *Morris,* 45 W. R. 293, [1897] P. 40; *Coppin* v. *Dillon* 4 Hagg. Ecc. 361; *Grimwood* v. *Cozens,* 2 Sw. & Tr. 364; *Sugden* v. *Lord St. Leonards,* 24 W. R. 209, 860 1 P. D. 154; *In the Goods of Greig,* 14 W. R. 349,

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

L. R. 1 P. & D. 72; *Black* v. *Jobling*, 11 W. R. 1.108, L. R. 1 P. & D. 685; *In the Goods of Tanner*, L. R. 2 P. & D. 403, 20 W. R P. & M. Dig. 3; *In the Goods of Bleckley*, 8 P. D. 169, 31 W. R. Dig. 227; *Gardiner* v. *Courthope*, 35 W. R. 352, 12 P. D. 14.

BUCKNILL, J., in delivering judgment, said: In this case the plaintiffs, who sue as executors of George Lewis Phipps Eyre, deceased, claimed to have admitted to probate two documents, being respectively a draft will of 1897, described as document "A," in the pleadings, and a codicil dated the 20th of February, 1902, described as document "B." The claim of the plaintiffs is put alternatively. First, that the document referred to in the codicil of the 20th of February, 1902, as the last will of the deceased was in existence at the time when the deceased executed the codicil, and was never revoked by him, but has been lost, and that its contents appear in the document "A." Secondly, and alternatively, that the document "A" was itself the document referred to in the said codicil and was thereby incorporated and confirmed, and that the two together are the last will of the deceased. The defendant, Emily Blanche Graham Eyre, by her counterclaim sets up a will of the deceased of the 10th of February, 1894, and a codicil thereto of the 29th of January, 1898, and the said codicil of the 20th of February, 1902. Constance Emma Sophia Booker, one of the testator's married daughters, an intervener, also claims to set up the will of 1894, and the codicil of 1898, but not the codicil of the 20th of February, 1902; and another intervener, Charles Lewis Eyre, the heir-at-law of the deceased, claims a declaration that he died intestate. The facts, so far as they are material to the issues raised in this litigation, are as follows: The deceased person, George Lewis Phipps Eyre, made a will dated the 10th of February, 1894, which was duly executed and attested, and on the 29th of January, 1898, he made a codicil to that will, which was also duly executed and attested. The codicil was quite short, and consisted of an appointment of two persons as executors and trustees of his will in the place of those whom he had previously appointed. That codicil was entirely in the handwriting of the deceased. The will of 1894 had been settled by his conveyancing counsel, Mr. Peck, whom the deceased had known for many years, and who had done much of his private business for him. The first draft of that will was resettled by Mr. Peck after consultation with the deceased, and was afterwards finally settled, and engrossed in due course, and executed and attested. On the 4th of February, 1897, the deceased having drawn instructions for another will, Mr. Peck, to whom the draft was submitted, settled a will based on those instructions, and subscribed it thus: "I have settled this draft, and do approve thereof subject to the marginal notes." Although Mr. Peck met the deceased on many subsequent occasions on professional matters, this draft was never again referred to, nor did the deceased mention to him again the subject of his testamentary dispositions. That draft Mr. Peck never saw again until February, 1902, a few days before the testator's death, when it was brought to him by a witness, to whose evidence I shall now refer. On the 3rd of February, 1902, James McGuire, the managing conveyancing clerk to the firm of solicitors of which the deceased was the senior partner, and the confidential clerk of the deceased, was called to his employer's private residence, and was told by him that he wished to consult him about his will. This was the first time he had taken McGuire into his confidence on the subject, although he had often consulted him about other private matters. When McGuire called, the deceased was in bed, with several documents by his side. He then handed to McGuire the papers known in this case as script "A" or the draft will dated 1897, and said, "This is the draft of my will; I want to know whether I have executed my powers under my marriage settlement to the fullest extent." He then asked McGuire to take the draft and consider it. At that time his daughter Constance was married, and it is said that her marriage was against her father's wish. The date of her marriage was in August, 1898, that is, after the codicil of the 29th of January, 1898, and on the 3rd of February, 1902, the deceased told McGuire of his anxiety that her husband should take no benefit in his wife's share under the will of him, the deceased. Another married daughter, Mrs. Tanner, had died between the date of the codicil of 1898, and the 3rd of February, 1902, but her name was not then mentioned. McGuire took away the draft will, and, having carefully considered it, went on the 13th of February to see the deceased to discuss it with him; but he was too unwell to attend to business, and an appointment was made for the next day. On McGuire's inspection of the draft between the 3rd and the 13th of February, he saw that it was a very incomplete document. It bore no date except the year 1897; the attestation clause was incomplete It had a number of marginal notes, some by Mr. Peck, and some in the handwriting of the deceased. His daughter Constance was still referred to by her maiden name, and Mrs. Tanner was still mentioned as if she were alive; the age of a child called Millicent Aileen Moore had been altered in the deceased's hand in such a way as to show that he had done it so late as in 1900. There were blank places where sums of money should have been inserted. The word "out" in the handwriting of the deceased was found in the margin in several places, referring beyond doubt to parts of the draft that he at some time intended to alter, and reference was made by him in the draft to some notes which he had made on another paper. In fact, the document was in such a condition when McGuire first went through it alone that he concluded at once it was no more than an incomplete draft; and on the 14th of February he told the deceased so, whose reply was that he had executed a will, by which McGuire understood that a will duly executed was then or had been in existence of which the draft in question was the basis, so, to use his own expression, he dropped the subject, as the deceased was a very masterful man, and he accepted his statement that there was such a will, and that the deceased wished by a codicil to alter some of its provisions if so advised. The draft of 1897 was then discussed, not point by point exactly, but on those parts of it about which the deceased wished to speak, and he then asked McGuire to see Mr. Peck and take his opinion on any points on which he, McGuire, was doubtful, and the interview ended. Mr. Peck was consulted on the 18th, and he wrote an opinion on the 19th, which McGuire took at once to the deceased and read to him, and asked him if he wished to act on it, and he said he did. The same draft was then gone through again and each point of importance discussed, McGuire taking notes on the back of Mr. Peck's opinion. Some of the points discussed were not settled and remained open. On the 28th of February McGuire called again, but the deceased was too ill to attend to the matter; and from a statement made by the nurse who was in attendance on him, McGuire went to his own house and then and there drew a codicil to what he believed to be the last will of the deceased—that is, he drew a codicil to a document, the existence of which the deceased had vouched and which McGuire assumed was a will based

on the draft which he and the deceased had examined and discussed on the 3rd and 19th of February. If such a will ever existed, it is almost impossible to suppose that the draft which McGuire saw, in the condition in which he saw it, could have been a copy of it. About ten o'clock of that night Mr. McGuire saw the testator again, and told him he had prepared a codicil to his will and read it through to him, and the testator then said that it expressed his wishes. Mr. McGuire then suggested that the deceased should execute the draft forthwith, and that when he had made up his mind on those points about which he was still undecided, he could have it re-engrossed and executed as a complete codicil. The deceased asked why he should execute it then, saying that there was no hurry; but McGuire made some remark about the shortness of life, when the old man drew himself on to his elbow and executed the codicil, saying, "This is a codicil to my last will." McGuire and the nurse executed it. I have already said that the codicil was drawn up and executed in peculiar circumstances, and I have my own view as to the wisdom of McGuire's action on that day. I must say that I should not, in the circumstances, have acted exactly as he did. After the codicil was executed and attested the testator put it under his pillow, and McGuire left and went home and wrote out a short statement of what had occurred. On the 23rd of February the testator died. At the trial it was admitted that he was of sound mind at the time of the execution of the codicil. Of the language of the codicil it is only necessary to make one remark. Not knowing the date of the will of which the draft of 1897 was taken by McGuire to be the basis, because the draft itself had no precise date, the codicil made reference only to a last will of the testator, and wherever reference is made in it to a will, the only will referred to was that which McGuire believed to be in existence and of which he had accepted the draft of 1897 as the basis. He stated in answer to a question of the learned counsel for the defendants that the codicil which he drew was intended to be a codicil to a will he had not seen, and he added that it was so intended by the testator beyond a doubt. It was also admitted by McGuire that it was never the intention of the testator that a fresh will should be drawn; also that so far as he was able to gather from the conversations he had with the testator, he had no intention of the draft of 1897 being set up as a will by the codicil. Both of them had in their minds another document. Two questions and answers in the cross-examination of McGuire make this clear. "Q.—So far as you could gather from your conversation with him, he had no intention of setting up this draft as a will, because there was already a will according to him? Ans.—Yes. Q.—That being so, you did not trouble about all the doubts and queries there were expressed upon this draft, neither did he? Ans.—That is just it. I considered there was a will, certainly." On the facts of this case, so far as I am able to judge, I find myself obliged to come to the conclusion that there never existed either a valid or an invalid will based on the draft of 1897. Except the statement made by the deceased on 14th of February, all the facts go to disprove its existence. The fact that Mr. Peck only settled the one incomplete draft, and that his queries on it were never answered, and that he never had the subject mentioned to him again by the testator, although he saw him afterwards on many occasions on professional business; the condition of the draft of the 3rd of February, 1902; the absence of any evidence of the engrossment of such a will and the failure to find it—all these matters go to satisfy me that the testator never went further than (using an expression of counsel) to tinker at this draft from time to time and over a long period. He had evidently an idea in 1897 of making such a will, but in 1898 he made a codicil in his own hand, which is some evidence that he had either changed his mind about a new will or that he had the subject still under consideration. It is most probable that when he told McGuire on the 14th of February that he had executed such a will he believed it, but the conclusion to which I come is that his memory played him false. He was of a great age, and his bodily health was failing, and perhaps to a certain extent his memory also; although, for the purposes of a testamentary disposition, it is not denied that his intellect was clear and good. This draft had been in existence for nearly five years; and it bears on its face, as I have already said, traces of having been considered and altered so late as in 1900. It is, of course, possible that the deceased had made a valid will subsequently to the codicil of 1898, and based on the draft of 1897, and that some of the alterations now appearing on that draft of 1897 were made at a still later period than the will itself; but there is no evidence on the point. It is all in the dark. I cannot accept the statement of the deceased to McGuire that there ever was a duly executed will such as that of which he spoke. In the case of *Atkinson* v. *Morris*, [1897] P., at p. 48, Lord Russell of Killowen stated the rule very clearly. He said: "There is no case to be found which goes the length of saying that statements made by a testator to the effect that he has executed a will are admissible evidence in substitution for the proper and regular evidence of the fact of the execution of the will conformably to and with the formalities enjoined by the Wills Act." As I cannot accept the statement of the deceased to McGuire that he had executed such a will because it is not evidence, I cannot accept the draft of 1897 as a copy of a supposed will that is said, but not proved, to have been lost. I now proceed to consider the codicil of the 19th of February, 1902, drafted by McGuire in somewhat exceptional circumstances, and duly signed by the testator, and attested by McGuire and the nurse late at night on the same day and within a few hours of its preparation, and when the deceased was extremely ill. It recites the death of the testator's daughter, Lucy Tanner, and the marriage of his daughter, Constance, since the date of his last will. The deceased then proceeds to exercise a power of appointment under his first marriage settlement in favour of the children of his said deceased daughter, taking care to provide that in the event of any part of the provision so made for the children of Mrs. Tanner coming eventually to his daughters, Constance Booker or Emily Blanche Graham Eyre, it should be held upon the trusts under the will of the testator to which the codicil was supposed to make reference—that is, the will based on the draft of 1897. The words in the codicil, "upon the trusts under my will," are inapplicable to the will of 1894. They referred to a will supposed to be based on the draft of 1897, because Mr. McGuire, who drafted the codicil, had not heard of any other will. The testator then revoked a legacy of £100 and a bequest of a carriage clock given by his said will to his daughter, Constance, and in lieu thereof left her a legacy of £25; and he then proceeded to deal with the share of his residuary estate by his said will given to or in trust for his daughter, Constance, in language which it is said could not refer to the will of 1894, but which did refer to the supposed will of which the draft of 1897 is said to be the basis. If this is so, can this codicil stand as a valid testamentary paper? The question must be answered

before the alternative claim of the plaintiffs can be established. In my judgment it is not for me to say now that, because I cannot read the whole codicil with the will of 1894, this codicil may not have an independent existence. As Lord Penzance said, in *In the Goods of Turner*, 2 P. & D. 403, at p. 405, "It is said there is a difficulty in this case because by reason of the will having been destroyed the codicil in great part is unintelligible. It seems to me that difficulty has no bearing upon the question whether this codicil shall be admitted to probate. The same difficulty applies in every case where some other document is mentioned in a will in such manner that the directions of the will cannot be carried out without a reference to such document and that document is not forthcoming. It is a question of construction which another court can only decide." I am of opinion that this codicil of the 20th of February, 1902, which has been made in every way comformably to the statutory requirements, must be admitted to probate. Being a valid testamentary document, the next question is whether the draft of 1897, Script A., can be read into that codicil so as to give effect to what is said to have been the intention of the testator. In my opinion it is not competent to me to do so. As I have already said, the evidence compels me to find that both McGuire and the deceased referred to a will, not to a draft will, and certainly not to an incomplete draft such as this so-called draft of 1897. The testator looked on the codicil of the 20th of February, 1902, as a codicil to an existing will; but I have no doubt that if McGuire had known then what I hold now to be the real state of the facts—that is, that there was no proof that the testator had executed such a will, or that there was never any other testamentary paper than the draft of 1897 except the will of 1894 and the codicil of 1898—he would have taken care that the codicil was properly worded so that the draft of 1897 should have been incorporated, provided, of course, that he satisfied himself that such was the wish of the deceased. It is said on the plaintiff's behalf that *In the Goods of Mercer* is in point. There the deceased had executed a will dated the 7th of November, 1865, which he left deposited in a bank in India. On the 21st of August, 1869, being in this country, he executed a codicil to his "last will, dated the 7th of November, 1865," and which he confirmed except in so far as altered by the codicil. He told one of his executors that his will was deposited at the bank in India, and he gave him a copy of it which he said was correct, and at the foot of that copy he wrote, "This is a copy of my last will and testament referred to in the codicil signed by me this 19th day of August, 1869." In fact no codicil was executed by the deceased on that date, and the copy of the will was not duly executed. The court (Lord Penzance) found there was such a will in India and that there was a copy of it, although not duly executed; but he also found that the codicil referred to and confirmed the copy of the will; and he granted, therefore, probate of it as incorporated in the codicil. That case is not like this. There the court found that there was a will in existence when the codicil was made, and it also found that the alleged copy of the will was in fact a copy; but here I find that there was no will, and I also find that this draft is not even proved to be a copy of what the testator said was a will based upon it. In *In the Goods of Elizabeth Watkins*, 1 P. & D., at p. 20, Sir J. P Wilde said: "Before this motion can be granted two propositions must be established, neither of which can be established in this case. First, it must be made manifest that the testatrix in the executed paper referred to some papers then in existence; and, next, that the papers in question are beyond all doubt the papers referred to." In my judgment the plaintiff's claim fails. I now come to the counter-claim of the defendant, who seeks by it to set up the will of the 10th of February, 1894, the codicil thereto of the 29th of January, 1898, and the codicil of the 20th of February, 1902. That will and those codicils were duly executed and attested and were never revoked. There is no doubt that the testator never intended to revoke the last codicil, and as to the codicil of 1898 and the will of 1894, there is no evidence of revocation except as appears in the draft of 1897, with which I have already dealt, and the statement by the testator that he had executed a will based on that draft, which point I have also dealt with. The result of this litigation is that I declare in favour of the will of 1894, the codicil of 1898, and the fresh codicil of 1902. Costs of all parties allowed out of the estate.

Solicitors for the plaintiffs, *Hollams & Co.*

Solicitors for the defendants, *Ingle & Co.*

Solicitors for the interveners, *T. Durant.*

[THE END.]

THE

# WEEKLY REPORTER DIGEST

OF ALL THE

## CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

FROM THE 24TH OF OCTOBER, 1902, TO THE 12TH OF AUGUST, 1903.

VOL. LI.

LONDON: 27, CHANCERY LANE, W.C.

1903.

# A DIGEST

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FROM

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AS REPORTED IN

## VOL. LI. OF THE WEEKLY REPORTER, 1902-1903;

AND IN

## CERTAIN OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; K.B.D., the King's Bench Division; BKCY., the King's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1903, *as well in this Volume* (51) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports are given in this Digest.*

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ACCUMULATIONS.—See Will, 2.

ACT OF PARLIAMENT:—

*Taxing Act—Meaning—Effect of continuous user.*—No amount of subsequent user will control the plain meaning of an Act of Parliament; but, where the meaning is not plain, a continuous user, extending over many years, may be called in aid to show what the true meaning is.—CORPORATION OF DUBLIN *v.* TRINITY COLLEGE, *H.L.*; 88 L. T. 305.

See also Power, 6.

ADEMPTION:—

1. *Double portions—Presumption—Advances to sons*—Inter vivos—*Gifts for temporary purposes.*—A gift to a child by a parent, who has already by his will provided for such child, of a large sum in the interval between the date of his will and the date of his death *primâ facie* raises a presumption that the gift is to be taken by way of partial ademption, as coming within the rule against double portion. But all the circumstances of the case must be looked at, and the presumption is rebutted if it appears that the gift was made with the intention of affording mere temporary assistance to the child and not of permanently establishing him in life, according to the rule laid down by Jessel, M.R., in *Taylor* v. *Taylor*, 23 W. R. 719, L. R. 20 Eq. 155.

So far as *Taylor* v. *Taylor* conflicts with *Boyd* v. *Boyd*, 15 W. R. 1071, L. R. 4 Eq. 305, and *Blockley* v. *Blockley*, 33 W. R. 777, 29 Ch. D. 240, *Taylor* v. *Taylor* is to be preferred.—SCOTT, RE, LANGTON *v.* SCOTT, *C.A.*, 182; [1903] 1 Ch. 1; 72 L. J. Ch. 20; 87 L. T. 574.

2. *Will—General legacy—Particular purpose*—By his will, made in 1898, a testator gave "to the trustees of the endowment fund of the C. Hospital, S., £10,000." He subsequently—namely, in 1900—sent a cheque for this amount accompanied by a letter to these trustees, and died shortly after.

Held, that parol evidence was admissible to show

that the particular purpose of the legacy had been satisfied by the gift, and that the legacy was thereby adeemed.—CORBETT, RE, CORBETT *v.* COBHAM, *Ch.D. Farwell, J.*; [1903] 2 Ch. 326; 88 L. T. 591.

3. *Will—Purchase of house and land for legatee by testator in his lifetime—Codicil directing advances or moneys lent to be brought into hotchpot—Construction — Presumption against double portions.* — A testator by his will gave one-third of his residuary estate to a daughter, who afterwards married. By a codicil, made after the marriage, the testator directed the amount of all "advances or moneys lent" by him to the daughter or her husband, or either of them, to be brought into hotchpot. Shortly after making the codicil the testator purchased a house and some land, which were conveyed by his direction to the daughter and her husband respectively.

Held, that these did not constitute "advances" within the meaning of the codicil. The law relating to the presumption against double portions based on *Holmes* v. *Holmes*, 1 Bro. Ch. C. 555, has not been changed by *In re Lawes*, 30 W. R. 33, 20 Ch. D. 81.

Observations of North, J., in *In re Vickers*, 36 W. R. 545, 37 Ch. D. 525, on the judgment of Jessel, M.R., in *In re Lawes* disapproved.

Decision of Buckley, J., affirmed.—JACQUES, RE, HODGSON *v.* BRAISBY, *C.A.*, 229; [1903] 1 Ch. 267; 72 L. J. Ch. 197; 88 L. T. 210.

See Will, 34.

ADMINISTRATION:

1. *Annuities—Insufficient income—Direction in will for payment out of* corpus—*Abatement—Hotchpot—Distribution.*— A testator charged his estate with the payment of annuities to certain persons for life, with remainders over to other persons, and directed that if the income derived from his estate was insufficient to pay the annuities in full, money should be raised for the purpose on mortgage of his real estate. It was ascertained some time after the testator's death that the income was insufficient, and money was consequently raised as directed.

Held, on the distribution, that the annuitants in possession who had received sums of money out of *corpus* were not liable to bring these sums into hotchpot.

*Potts* v. *Smith*, 17 W. R. 1083, L. R. 8 Eq 683, followed.—METCALF, RE, METCALF *v.* BLENCOWE, *Ch.D.Farwell, J.*, 650; 88 L. T. 727.

2. *Debts—Marshalling assets—Real estate charged with debts—Pecuniary legatees and specific devisees* — Where a testator directs his debts to be paid and so charges them on his real estate, and also gives pecuniary legacies, the pecuniary legatees are entitled to have the assets marshalled as against the specific devisees of the realty.

*In re Bate, Bate v. Bate*, 43 Ch. D. 600, 38 W. R. Dig. 6, disapproved.

*In re Stokes*, 67 L. T. Rep. 223 41 W. R Dig. 3, and *In re Salt*, 43 W. R. 500, [1895] 2 Ch. 293, followed.— ROBERTS, RE, ROBERTS *v.* ROBERTS, *Ch.D. Kekewich, J.*, 89; [1902] 2 Ch. 834; 72 L. J. Ch. 38; 87 L. T. 523.

3. *Grant—Next-of-kin lunatic - Grant to committee —Official solicitor committee—Sureties dispensed with.* —The court will dispense with sureties altogether on a grant of letters of administration, taking only the bond of the principal, upon sufficient ground being shown.—EMILY JANE UNWIN, IN THE GOODS OF, *P.D. & Ad.D.*; 87 L. T. 749.

4. *Intestacy — Administrator's oath — Applicant's belief as to being sole next-of-kin—Practice.*—It is not the practice of the court to presume death under any circumstances. It merely gives the applicant for letters of administration, or other applicant, leave to swear the death, and the applicant has to swear to the fact.—SARAH JANE JACKSON, IN THE GOODS OF, *P.D. & Ad.D.*; 87 L. T. 747.

5. *Intestacy—Pedigree—No official record—Evidence.*—In the absence of any official record of the marriage of the parents of an intestate the court accepted, as *primâ facie* evidence of such marriage, a statement which was contained in an extract from a Scottish marriage register, dated in 1868, on the marriage of a brother of the intestate. The names and description of both the parents of the bridegroom appeared in the register under the heading "Name, surname, and rank or profession of father." —WIGLEY *v.* SOLICITOR TO THE TREASURY, *P.D. & Ad.D.*; [1902] P. 233; 71 L. J. P. 115; 87 L. T. 745.

See Distributions, Statute of, 1; Probate 1, 3, 8.

ADULTERATION—

1. *Brandy—Sufficiency of analyst's certificate.*— Brandy having been analyzed, the certificate stated: "I am of opinion that the said sample contained parts as under, or the percentages of foreign ingredients as under: It has been reduced from 25 degrees under proof to 27·6 degrees under proof."

Held, that the certificate was sufficient.—FINDLEY *v.* HAAS, *K.B.D.*; 88 L. T. 465.

2. *Compounded drug—Analyst's certificate—Decomposition.*—Vinegar of squills prepared according to the British Pharmacopœia has as one of its constituents a certain proportion of acetic acid, but the British Pharmacopœia does not prescribe how much acetic acid should be present in the compounded drug. Even if properly kept, a change or decomposition takes places in the drug which reduces the quantity of acetic acid. The justices were of opinion that there is a standard for the quantity of acetic acid which should be present in vinegar of squills resulting from its preparation as directed by the British Pharmacopœia, and that, having regard to the deficiency in acetic acid, howsoever arising, the drug sold was not composed of the ingredients in such proportions as that demanded by the purchaser, and was to his prejudice.

Held, that the justices were wrong, as there was no evidence that the purchaser in asking for vinegar of squills demanded the proportion of acetic acid that would be present in new vinegar of squills, and that the hypothetical standard set up by them could not be supported.

*Semble*, that vinegar of squills being liable to decomposition, the analyst ought to append a note to his certificate in the statutory form, stating whether any change had taken place in the constitution of the article that would interfere with the analysis.

*Quære*, whether this omission could be cured by the *vivâ voce* evidence of the analyst.—HUDSON *v.* BRIDGE, *K.B.D.*; 88 L. T. 550.

3. *Evidence—Article sold not in accordance with prescription in British Pharmacopœia—Evidence of commercial standard different from Pharmacopœia—Admissibility of evidence* —In a prosecution under section 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser an article which is not of the nature, substance, and quality of the article demanded, upon the ground that the article, being one mentioned in the British Pharmacopœia, is not in accordance with the prescription in the Pharmacopœia. Evidence tendered for the defendant is admissible to show that there

is a commercial standard of the article different from that prescribed by the British Pharmacopœia. —BOOTS CASH CHEMISTS (LIMITED) *v.* COWLING, *K.B.D.*; 88 L. T. 539.

4. *Food—Butter—Margarine—Substance with more than 10 per cent. of butter fat.*—Butter blended with milk so that it contains an excess of water does not become margarine. Therefore a vendor of such milk-blended butter cannot be convicted under section 8 of the Sale of Food and Drugs Act, 1899, for selling margarine containing more than 10 per cent. of butter fat. The sale of butter blended with milk is lawful if sold as such.—BAYLEY *v.* PEARKS, GUNSTON, & TEE, *K.B.D.*; 87 L. T. 67.

5. *Food—Butter—Notice in shop—Notice on wrapper—Label—Protection of seller by notice on wrapper delivered with article.*—To a purchaser who went into a shop and asked for half a pound of best fresh butter the seller sold butter which was found to be adulterated by the addition of water, and which was in fact milk-blended butter containing an excess of water. There was hung in a conspicuous place in the shop a notice that all butter sold in the shop was milk-blended butter, and the butter when handed to the purchaser was wrapped up in a paper wrapper on which was printed a notice that the butter was choicest butter blended with milk, whereby the percentage of water in it was increased. Upon an information against the seller under section 6 of the Sale of Food and Drugs Act, 1875, for selling butter which was not of the nature, substance, and quality of the butter demanded, the justices found that the sale was to the prejudice of the purchaser, but that the seller was protected by section 8 of the Act by reason of the notice in the shop, and by reason that the butter was wrapped in a printed notice disclosing the fact that the article was a mixture, but there was no finding by them as to whether the notice on the wrapper could or could not be seen by an ordinary purchaser.

Held, that the notice on the wrapper was a sufficient notice by label within section 8, and was a good defence under that section, and that the justices were right in dismissing the information.—HAYES *v.* RULE, *K.B.D.*; 87 L. T. 133.

6. *Food—Milk—Inspector—Sample taken by inspector at a place outside his district—Certificate given by analyst of inspector's district—Sale of Food and Drugs Acts*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 13, 21; *and* 1879 (42 & 43 *Vict. c.* 30), *s.* 3.—By the provisions of the Sale of Food and Drugs Act, 1875, it was necessary that there should have been a sale or a contemplated sale of the milk of which samples were taken by an inspector under the Act within his district, and he was only authorized to take samples at the place of sale.

By section 3 of the subsequent Act of 1879 an inspector was authorized "to procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk."

Held, that the magistrate was right in refusing to convict the respondent of selling milk found on analysis to contain 21 per cent. of added water, on the ground that the sample had been taken compulsorily by the inspector at a place outside his district, and that in doing so he had acted beyond his powers.—MCNAIR *v.* CAVE, *K.B.D.*, 112; [1903] 1 K. B. 24; 72 L. J. K. B. 26; 87 L. T. 680.

7. *Food—Warranty—Contract by letters—Label—Verbal contract—Notice.*—The C. P. D. Co. (Limited), by a contract in writing, agreed to buy pure new milk with all its cream, each churn to bear a written warranty. To each churn was attached a label: "Warranted pure new milk with all its cream delivered under contract." The company also verbally agreed to buy milk, and that a written warranty should be given with each consignment in the form of a label. To a churn delivered under that agreement was attached a label: "Warranted pure new milk with all its cream." Prosecutions having been instituted against the company under section 6 of the Sale of Food and Drugs Act, 1875, notice was given on their behalf under section 20 (1) of the Sale of Food and Drugs Act, 1899, and copies of the labels were inclosed. It was found by the magistrate that all the requirements of section 25 of the Sale of Food and Drugs Act, 1875, had been complied with, and he discharged the company from the prosecutions for selling milk not of the nature, substance, and quality demanded by the purchaser, such milk being delivered in pursuance of these contracts.

Held, that the magistrate was right.

*Semble*, that a contract to give a written warranty need not be in writing.—IRVING *v.* CALLOW PARK DAIRY CO., *K.B.D.*; 87 L. T. 70.

8. *Food—Warranty—Terms of agreement—"Without accepting any responsibility after delivery"—Validity.*—The addition of the words "but without accepting any responsibility after delivery" do not affect a warranty so as to make it unavailable as a defence under section 25 of the Sale of Food and Drugs Act, 1875.—WILSON *v.* PLAYLE, *K.B.D.*; 88 L. T. 554.

9. *Practice—Time for return of summons—Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-section* 2.—By section 19, sub-section 2, of the Sale of Food and Drugs Act, 1899, it is provided that "In any prosecution under the Sale of Food and Drugs Acts the summons . . . shall not be made returnable in less time than fourteen days from the day on which it is served."

Held, that fourteen clear days must elapse between the date of service and that of return.—MCQUEEN *v.* JACKSON, *K.B.D.*; [1903] 2 K. B. 163; 72 L. J. K B. 606; 88 L. T. 871.

AGREEMENT.—See Contract.

ANIMAL:—

*Shooting at dog trespassing—No intention to kill—Illtreating and abusing—Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.—Shooting at a dog that is trespassing without intending to kill it, but with the intention of injuring it if necessary to frighten it away, is not of necessity cruelly illtreating it. Each case is a question of degree and is for the justices.—ARMSTRONG *v.* MITCHELL, *K.B.D.*; 88 L. T. 870.

See Criminal Law, 6.

APPEAL:—

1. *Costs, Appeal against—Competency of appeal.*—The House of Lords will not entertain an appeal against costs only.

Appeal against a judgment of the First Division of the Court of Sessions, Scotland (1902) 40 S. L. R. 50. dismissed.—CALEDONIAN RAILWAY CO. *v.* BARRIE, *H.L.*; [1903] A. C. 126.

2. *Security for costs—Appeal under Workmen's Compensation Act—Execution stayed by county court judge.*—An order for security for the costs of an appeal under the Workmen's Compensation Act, 1897, will be ordered in a proper case even if the county court judge has stayed execution with a

view to an appeal.—SHEA *v.* DROLENVAUX, *C.A.*; 88 L. T. 679.

See also Interpleader, 1; Master and Servant, 1, 3; Practice, 1, 4.

APPOINTMENT.—See Power, 1-4.

APPORTIONMENT.—See Settled Land, 1.

APPROPRIATION.—See Will, 4.

ARBITRATION:—

1. *Staying proceedings — Engineer of council referee to determine mode of performance of contract—Power to dismiss contractors and their workmen—Implication of law that these powers should not be put in force until the arbitrators had affirmed the judgment of the engineer—Injunction.*—On a motion to restrain the defendants from acting on a notice given by them or their engineer pursuant to a contract between plaintiffs and defendants from entering on or taking possession of works in course of execution under such contract and for damages, it appeared that the defendants were carrying out a scheme for a water supply, and had contracted with the plaintiffs to sink certain wells. The work was to be performed to the satisfaction of the defendants' engineer, and any dispute was to go to arbitration, and if, in the judgment of the engineer, sufficient despatch was not used the council or their engineer might dismiss the contractors and their workmen. Difficulties having arisen in carrying out the work, and delay being thereby occasioned, the council gave notice dismissing the contractors and their men.

Held, that the terms of the contract were consistent as a whole, and that the reference to arbitration was engrafted upon them, and that the contractors were not bound to give up to the engineer the decision of every question. That the court ought to imply that the defendants would not act upon the summary clauses until the arbitrators had affirmed the judgment of the engineer. Injunction granted accordingly to preserve the *status quo* until trial or an award should be made. — FOSTER *v.* BOROUGH OF HASTINGS, *Ch.D. Farwell, J.*; 87 L. T. 736.

2. *Staying proceedings—Submission of disputes under contract to jurisdiction of foreign courts—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 27. —A policy of life insurance, effected on the life of a foreigner with an English company, contained a condition that for all disputes which might arise out of the contract of insurance, all the parties interested expressly agreed to submit to the jurisdiction of the courts of Budapest having jurisdiction in such matters.

Held, that this was a submission of all disputes under the contract to the courts at Budapest within sections 4 and 27 of the Arbitration Act, 1889, and that an action on the policy in England would be stayed.—AUSTRIAN LLOYD STEAMSHIP CO. *v.* GRESHAM LIFE ASSURANCE SOCIETY, *C.A.*, 402; [1903] 1 K. B. 249; 72 L. J. K. B. 211; 88 L. T. 6.

3. *Summons for directions—Agreement to refer to arbitration—Legal proceedings—Application for stay —Step in proceedings—Practice—Arbitration Act,* 1899 (52 & 53 *Vict. c.* 49), *s.* 4—*R S. C.*, 1883, *ord.* 30, *r.* 4.—Attendance by a defendant before the master on a summons for directions, taken out by the plaintiff, and acquiescence, without protest, in a common form order for delivery of pleadings, is taking a step in the proceedings within the meaning of section 4 of the Arbitration Act (52 & 53 Vict. c. 49), and the defendant is thereby precluded from moving to stay proceedings under that section.

*County Theatres and Hotels (Limited)* v. *Knowles,* [1902] 1 K. B. 480, must be taken to lay down a general rule.—RICHARDSON *v.* LE MAITRE, *Ch.D. Swinfen Eady, J.*; [1903] 2 Ch. 222; 88 L. T. 626.

ASSIGNMENT:—

1. Chose in action—*Contract to sell reversionary interest—Assignment by purchaser of benefit of contract—Right of assignee to sue vendor for breach—"Legal chose in action"—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66) *s.* 25, *sub-section* 6.—The defendant contracted to sell his reversionary interest in property to R., who by deed assigned his interest under the contract to the plaintiff, and notice in writing of the assignment was duly given to the defendant. The defendant after the assignment to the plaintiff refused to perform his contract.

Held, that the assignment was an assignment of a "legal *chose in action*" within section 25, subsection 6, of the Judicature Act, 1873, and that the plaintiff was entitled to sue the defendant for damages for the breach of contract.—TORRINGTON *v.* MAGEE, *K.B.D.*; [1902] 2 K. B. 427; 71 L. J. K. B. 712; 87 L. T. 304.

Reversed on the facts: [1903] 1 K. B. 644.

2. *Equitable assignment—Reversionary interest—Stop order—Notice—Priority.*—A Jewish lady who was entitled to a reversionary interest in a fund in court after the death of her mother, married a Moorish Jew in Morocco, and signed a marriage contract under which it was alleged that according to Jewish custom her children became entitled to the fund on her death, to the exclusion of the husband. The children obtained no stop order on the fund. The wife died before her mother; and after her death her husband as her administrator assigned the fund to assignees, who obtained a stop order on the fund in court with notice of the marriage, but without notice of the title of the children. After the mother's death the assignees claimed the fund.

Held, that by obtaining a stop order on the fund from the lady's legal personal representative the assignees became entitled to the fund in priority to the children.

*In re Freshfield's Trust,* 11 Ch. D. 198, considered and followed.—MONTEFIORE *v.* GUKDALLA, *C.A.*; [1903] 2 Ch. 27; 72 L. J. Ch. 442; 88 L. T. 496.

3. *Letter assigning proceeds of sale of goods—Notice to creditor — Bankruptcy of assignor — Revocation by trustee in bankruptcy — Validity of assignment.*—A firm, being indebted to the plaintiffs for the price of goods sold, shipped a quantity of copper ores to the defendants for sale, and wrote instructing them, after payment of a certain account out of the proceeds, to pay the balance to the plaintiffs. On the same day the firm wrote to the plaintiffs advising them of the shipment of the ores to the defendants, and stating that they had instructed them to pay such balance to the plaintiffs. The firm having become bankrupt, their trustee revoked the instructions contained in their letter to the defendants.

Held, that, notwithstanding such revocation, the letters constituted a good equitable assignment to the plaintiffs of the balance of the proceeds of the goods.—ALEXANDER *v.* STEINHARDT, WALKER, & CO, *K.B.D.*; [1903] 2 K. B. 208; 72 L. J. K. B. 490.

ATTACHMENT:—

*Debtor—Committal for default to obey an order for*

*the payment of money—Release of debtor by mistake—Second order for attachment—Re-arrest—One year's imprisonment—Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *s.* 4.—A debtor had, under section 4, sub-section 3, of the Debtors Act, 1869, been sentenced to imprisonment under a writ of attachment for default in payment of a sum of money in his hands which he had been ordered by the court to pay. Before the expiration of one year—the period limited for imprisonment by the section—he was released owing to a mistake by the governor of the prison.

Held, that attachment under section 4 of the Debtors Act, 1869, was in its nature punishment for an "offence," and, consequently, that there was no jurisdiction to issue a second writ of attachment against the debtor in respect of the same default.

*Semble*, an order for re-arrest might have been made under the original writ of attachment, but in that case the time during which the debtor had been at large should be included in the period of the twelve months' imprisonment limited by the section.—CHURCH'S TRUSTEE *v.* HIBBARD, *C.A.*, 293; [1902] 2 Ch. 784; 72 L. J. Ch. 46; 87 L. T. 412.

See Solicitor, 1.

BAILMENT:—

*Carriage lent to bailee—Damage to carriage by servant of bailee not in course of his employment—Liability of bailee for damage.*—The plaintiff, a coach-builder, lent the defendant a dog-cart whilst he repaired the defendant's trap. The bailee's servant, not acting in the course of his employment, negligently injured the lent dog-cart by driving it into a tram-car.

Held, that the bailor could recover damages from the bailee for the injury to the dog-cart.

*Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413, 40 W. R. Dig. 11, followed.—SAUNDERSON *v.* COLLINS, *K.B.D.*, 558.

See Contract, 4.

BANKER:—

1. *Bill of exchange—Cheque—Crossed cheque—Receipt of payment for customer—Agent for collection—Crediting customer in account—Cheque crossed by banker—Draft by branch bank on head office—Conversion—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 82—*Stamp Act*, 1853 (16 & 17 *Vict. c.* 55), *s.* 19.—The protection afforded to bankers by section 82 of the Bills of Exchange Act, 1882, who in good faith and without negligence receive payment for a customer of crossed cheques, is conferred only where the bankers act as mere agents for collection. If they do more than act as such agents as where they forthwith credit the customer with the face value of the cheque, they are collecting the money for themselves, and are not protected by the section. Cheques to be "crossed cheques" within the section must be crossed on receipt by the bankers and not afterwards made so. A draft addressed by a branch manager to the head office is not a bill of exchange within the Act of 1882, but the bankers are entitled to the protection of section 19 of the Stamp Act, 1853.

Decision of the Court of Appeal (50 W. R. 276, [1902] 1 K. B. 242) affirmed, with a variation.—CAPITAL AND COUNTIES BANK *v.* GORDON, *H.L.*, 671; [1903] A. C. 240; 72 L. J. K. B. 451; 88 L. T. 574.

2. *Cheque—Certification—Fraudulent alteration of amount—Negligence—Notice to bank giving credit—Mistake of facts—Actual knowledge.*—A cheque for a specified sum drawn upon the Bank of H. was certified by that bank, but was afterwards fraudulently altered by the drawer to a larger amount than that for which originally drawn and certified, and was paid by him into his account at another bank, which gave him credit for the larger amount and passed the cheque so altered through the clearing house in the usual way, and obtained payment thereof from the Bank of H. The Bank of H. were not actually aware of the fraud at the time of payment, but ascertained it from their books next day, when they required repayment of the increase from the other bank.

Held, that as the money was honestly paid by the Bank of H. under a mistake of facts, it could be recovered back, there being no negligence or want of notice to prejudice this right.—IMPERIAL BANK OF CANADA *v.* BANK OF HAMILTON, *P.C.*, 289; [1903] A. C. 49; 72 L. J. P. C. 1; 87 L. T. 457.

3. *Customer—Mistake—Money paid under mistake of fact.*—The defendants, who were foreign bankers, were in the habit of making advances to K., who then purchased goods which the defendants held as security; when K. found a purchaser he assigned the right to receive the purchase-money to the defendants, who accordingly released the goods. K. also carried on the same system with B. & Co. The plaintiffs bought from K. two parcels, the one released by the defendants and the other by B. & Co. K. instructed the plaintiffs to pay the defendants and B. & Co. respectively for the goods so purchased. By mistake the plaintiffs paid both sums to the defendants, who credited K.'s account, notifying K of their having done so. The defendants acting *bonâ fide* continued to make advances to K., who knew of the mistake, but did not disclose it, and afterwards became bankrupt. The plaintiffs sought to recover from the defendants the sum which should have been paid to B. & Co. as money paid under mistake of fact.

Held, that the defendants were holding the money to the use of the plaintiffs, and that as the defendants were not prejudiced by such payment the sum was recoverable as money paid under mistake of fact.—CONTINENTAL CAOUTCHOUC, &c., Co. *v.* KLEINTWORT, *K.B.D.*, 541.

4. *Customer—Transfer from one account to another—Trust—Notice—Inquiry—Suspicion.*—In the absence of circumstances which disclose a trust a banker is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons.

A managing director of a company who was the holder of all the shares of the company carried on a similar business to that of the company on his own account, and the bankers were the same. It was known that his intention was to work the two businesses together. On three occasions he transferred large sums by cheque from the company's account to his own, and this was done in breach of his duty as a director.

Held, that, as under the circumstances there was no notice to the bank of any irregularity, or anything which should lead to an investigation or inquiry, the bank were not liable to refund to the company the sums transferred.—BANK OF NEW SOUTH WALES *v.* GOULBURN VALLEY CO., *P.C.*, 367; [1902] A. C. 543; 71 L. J. P. C. 112; 87 L. T. 88.

See also Inland Revenue, 11.

BANKRUPTCY:—

1. *Bankruptcy notice—Company—Winding up—Liquidator—Judgment for unpaid calls—Set-off—Application to set aside bankruptcy notice—When set-*

*off must be effective—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (g).—To enable an application by a debtor to set aside a bankruptcy notice which has been served on him by a judgment creditor to succeed, the debtor must show that he has a counterclaim, set-off, or cross-demand which can be set up by him at the time of the application to set aside the bankruptcy notice, and not merely one which can be subsequently set up in the bankruptcy so as to put an end to any effective claim by the judgment creditor for the amount of his judgment. There is no general principle that a bankruptcy notice should not be issued in respect of a debt if on bankruptcy that debt would be discharged by a set-off.—A DEBTOR, RE, *C.A.*, 675.

2. *Bond—Arrest of debtor—Bond to enforce debtor's attendance for examination — Default of debtor—Forfeiture of bond—Whether Crown or creditors entitled to proceeds of bond—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 25—*Form of bond.*—Where a debtor, who has been arrested under section 25 of the Bankruptcy Act, 1883, for failing to attend his examination, gives a bond with sureties to obtain his release from prison, the proceeds of the bond, if it is subsequently forfeited, will go as a general rule, not to the Crown, but to the creditors, subject to any order the court may make in any special case.

In future the bond is to be given to the senior registrar in bankruptcy for the time being.—GORDON, RE, SALMOND, RE, *Bkcy.*; [1903] 2 K. B. 164; 72 L. J. K. B. 587.

3. *Costs of prosecution—Fraudulent debtor—Prosecution by trustee—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-section* 3; *ss.* 16, 17—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 57, *sub-section* 3; *s.* 166.—A trustee who prosecutes a debtor for offences committed against the bankruptcy laws without first obtaining an order of the court for that purpose under section 16 of the Debtors Act, 1869, will not, as a general rule, be allowed the costs of the prosecution out of the estate, even although the prosecution was expressly sanctioned by the committee of inspection.—HOWES, RE, WHITE, EX PARTE, *Bkcy.*; [1902] 2 K. B. 290; 71 L. J. K. B. 705.

4. *Costs of solicitors to trustee—"Realizing assets"—"Costs of petitioner"—Re-hearing and appeal—Priorities.*—The "taxed costs of the petitioner" payable under rule 125 of the Bankruptcy Rules, 1886, will include the costs of a re-hearing of the petition and an appeal therefrom, and will be payable according to the rule in priority to the general disbursements of a trustee, other than those actually incurred in realizing the assets of the debtor.—BRIGHT, RE, WINGFIELD & BLEW, EX PARTE, *Bkcy.*; [1903] 1 K. B. 735; 72 L. J. K. B. 287.

5. *Discharge—Subsequent scheme of composition involving annulment of bankruptcy—Discretion of court as to annulment — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 23, 32—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *ss.* 8, 9.—The court, in exercising its discretion as to the annulment of a bankruptcy, will take into consideration not only the interest of creditors but also and primarily the interests of the public and commercial morality.

A bankrupt who had obtained a discharge entered into a scheme of composition with his creditors one of the conditions of which was that the bankruptcy should be annulled. The bankrupt had been guilty of certain offences under the Bankruptcy Act, 1890, s. 8.

Held, that in the interests of public and commercial morality the court was precluded from ordering the bankruptcy to be annulled.—BEER, RE, BEER, EX PARTE, *C.A.*, 422; [1903] 1 K. B. 628; 72 L. J. K. B. 366; 88 L. T. 334.

6. *Execution—Payment to creditor—Withdrawal of sheriff—Bankruptcy of debtor—Completion of execution—Title of trustee.*—An execution is not completed by payment direct to an execution creditor.—POLLOCK AND PENDLE, RE, WILSON, EX PARTE, *Bkcy.*; 87 L. T. 238.

7. *Execution—Sheriff's fees—Possession of goods by sheriff with consent of judgment debtor and creditor—Receiving order — Right against official receiver to possession money after twenty-one days.*—A sheriff levied execution on the 13th of March, and, instead of selling, remained in possession for seventy-eight days at the joint request of the creditor and the debtor. On the 16th of May a receiving order was made against the debtor, and on the 28th of May the official receiver required the sheriff to withdraw.

Held, that, as possession by the sheriff for twenty-one days constituted an act of bankruptcy to which the title of the trustee related back, the sheriff was only entitled, as against the trustee, to possession money for twenty-one days. — ENGLISH AND AYLING, RE, *Bkcy.*; [1903] 1 K. B. 680; 72 L. J. K. B. 248; 88 L. T. 127.

8. *Extradition—Property found on bankrupt at date of arrest—Retention by police—Claim by trustee in bankruptcy—Evidence of crime—Order for delivery up of property—"Competent authority" to make order—Belgian Extradition Treaty*, 1876, *art.* 12—*Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *ss.* 9, 10.—The police magistrate who orders the extradition of a prisoner to Belgium is "the competent authority" to order the delivery of the property found upon the prisoner to the Belgian authorities under article 12 of the Belgian Extradition Treaty, 1876 (Hertslet's Treaties, vol. 14, p. 172). — BOROVSKY & WEINBAUM, RE, SALAMAN, EX PARTE, *Bkcy.*; 48; [1902] 2 K. B. 312; 71 L. J. K. B. 992; 87 L. T. 184.

9. *Jurisdiction—Foreigner "ordinarily resident"—Hotel—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-section* 1 (d).—A foreigner who, for purposes of litigation, has stayed in England at hotels during nine months of the year immediately preceding the date of the presentation of a bankruptcy petition, has "ordinarily resided" within the meaning of the Bankruptcy Act, 1883, s. 6, sub-section 1 (*d*).—BRIGHT (CHARLES), RE, BRIGHT, EX PARTE, *C.A.*, 342.

10. *Mortgage—Life policy—Assignment of life policies by way of mortgage—Notice of assignment—Priority of claims of mortgagees.*—The bankrupt before his bankruptcy executed a mortgage of life policies in favour of a client whose money he had misappropriated, but never disclosed the fact. He subsequently gave another mortgage on the same policies to a person who gave notice thereof to the insurance companies prior to the bankruptcy. After the bankruptcy the first mortgage was discovered, and the mortgagee at once gave notice of it to the insurance companies.

Held, that the second mortgagee was entitled to priority, having been the first to give notice, although the first mortgagee had not been guilty of *laches*.

*Foster* v. *Cockerell*, 9 Bligh N. S. 332, followed.—LAKE, RE, CAVENDISH, EX PARTE, *Bkcy.*, 319; [1903] 1 K. B. 151; 72 L. J. K. B. 117; 87 L. T. 655.

11. *Mortgage reserving right of consolidation—Subsequent mortgages of same property—Third mortgage including other property—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 17.—The provisions of section 17 of the Conveyancing Act, 1881, enabling a mortgagor to redeem one mortgage without redeeming other mortgages made by him, only applies where there are several mortgages on different properties of the same mortgagor.

Where a first mortgage contains a proviso excluding the operation of section 17, that proviso is to be applied to subsequent mortgages by the same mortgagor, though they may not contain similar provisions.—SALMON, RE. THE TRUSTEE, EX PARTE, *Bkcy.*, 288; [1903] 1 K. B. 147; 72 L. J. K. B. 125; 87 L. T. 654.

12. *Notice—Judgment creditor—Security given to satisfaction of creditor—Right to issue second bankruptcy notice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (g).—A creditor having obtained a judgment against a debtor issued a bankruptcy notice on it, but subsequently entered into an agreement with the debtor by which the latter gave certain property by way of security, part of which property he was to be at liberty for a year from the date of the agreement to repurchase. Six months after the agreement the creditor issued a second bankruptcy notice in respect of the debt against the debtor, on which a receiving order was made.

Held, that the creditor had no right to issue the second notice while the option to repurchase existed.—SMITH, RE, DURBAN, EX PARTE, *C.A.*, 118; [1903] 1 K. B. 33; 72 L. J. K. B. 30; 87 L. T. 586.

13. *Proceedings taken in name of official receiver—Taxation—Remission to allow official receiver to be represented.*—A litigant was allowed to take proceedings in the name of the official receiver. They were unsuccessful, and costs were given against the official receiver. The indemnity given by the litigant proved to be insufficient. No notice of taxation was given to the official receiver, and he was unrepresented except by the solicitor for the litigant.

Held, that the bill ought to be remitted for retaxation.—DILLON, RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*; 88 L. T. 127.

14. *Proof—Security—Breach of trust—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Schedule II.*—Where a trustee of a settlement has invested funds of the settlement upon an unauthorized security and subsequently becomes bankrupt, a proof against his estate for the amount of the funds so invested will not be admitted, unless the creditor proving is in a position to hand over the security on which they were invested to the trustee.

*In re Salmon, Priest* v. *Uppleby*, 38 W. R. 150, 42 Ch. D. 351, followed and applied.

*Semble*, a proof for damages for breach of trust may be admitted.—LAKE, RE, HOWE, EX PARTE, *Bkcy.*, 496; [1903] 1 K. B. 439; 72 L. J. K. B. 213; 88 L. T. 31.

15. *Proof—Substitution of proof by assignee of proving creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 63.—The assignee of a proof who desires to take the benefit thereof, after satisfying the official receiver or trustee of the validity of the assignment, should apply to the court to give leave to the official receiver to place a proof by him (the assignee) on the file in place of the proof of the assignor.—ILIFF, RE, *Bkcy.*, 80.

16. *Property of bankrupt—After-acquired property—Contract of employment—Dismissal after bankruptcy—Action by bankrupt for wrongful dismissal—Right of action vesting in trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—The plaintiff entered the employment of the defendants for a term of years as a traveller at a salary. During the period of employment he was adjudicated bankrupt, and subsequently the defendants dismissed him. In an action for wrongful dismissal, he being at the time an undischarged bankrupt,

Held, that, the breach of the contract of employment having occurred after the bankruptcy, the cause of action did not vest in the plaintiff's trustee in bankruptcy, who had not intervened in any way, and the plaintiff was therefore entitled to sue in his own name.

Judgment of Phillimore, J. ([1902] 2 *K. B.* 397), affirmed.—BAILEY v. THURSTON, *C.A.*, 162; [1903] 1 K. B. 137; 72 L. J. K. B. 36; 87 L. T. 364.

17. *Receiving order—Scheme of arrangement—Release of debts by majority of creditors on condition of court's approval of the scheme—Approval of scheme—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3.—A debtor, who is anxious to obtain the court's approval of a scheme of composition, must lay before the court all the terms and arrangements of that scheme. It is not sufficient for the debtor by himself to carry out part of the scheme, and then to come to the court to get its sanction as to the balance of the scheme.

*In re E. A. B.*, 50 W. R. 229, [1902] 1 K. B. 457, and *In re Baines*, 86 L. T. Rep. 691, 50 W. R. Dig. 17, discussed.—PILLING, RE, BOARD OF TRADE, EX PARTE, *C.A.*, 465; [1903] 2 K. B. 50; 72 L. J. K. B. 392; 88 L. T. 667.

18. *Scheme of arrangement—Proof—Debt carrying interest exceeding 5 per cent.—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-section* 9; *s.* 23.—Under a scheme of arrangement which provides for a dividend on all debts provable in bankruptcy, a proof including interest at a rate exceeding 5 per cent. should be admitted in full, and no part thereof rejected or postponed for the purpose of dividend until all the other creditors have been paid in full.—NEPEAN, RE, RAMCHUND, EX PARTE, *Bkcy.*, 559; [1903] 1 K. B. 794; 72 L. J. K. B. 407; 88 L. T. 477.

19. *Sequestration—Administration action—Order on executor to pay money into court—Non-compliance—Writ of sequestration—Bankruptcy of executor—Title of trustee in bankruptcy to property sequestered—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45, 54.—An order of sequestration directing certain moneys to be paid into court to the credit of the sequestrator's account does not create a charge on the property sequestered, and the trustee in bankruptcy of the person against whom the sequestration order was made has, accordingly, a good title to such property.

Judgment of Wright, J. (*ante*, p. 432), affirmed.—POLLARD, RE, *C.A.*, 483; [1903] 2 K. B. 41; 72 L. J. K. B. 509; 88 L. T. 652.

20. *Undischarged bankrupt—Title of trustee in bankruptcy to after-acquired real property of bankrupt—Bonâ fide purchaser for value—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54.—The principle laid down in *Cohen* v. *Mitchell*, 38 W. R. 551, 25 Q. B. D. 262 (*i.e.*, that until the trustee in bankruptcy intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after-acquired property, and whether with or without knowledge of the bankruptcy, are valid as against the trustee), does not apply to real estate.

*In re New Land Development Association and Gray*, 40 W. R. 295, 551, [1892] 2 Ch. 138, followed. —LONDON AND COUNTY CONTRACTS (LIMITED) *v.* TALLACK, *Ch.D. Kekewich, J.*, 408.

BASTARDY—

1. *Evidence of mother — Corroborated in some material particular.*—In corroboration of the evidence of the mother, who was a servant to the appellant's grandfather, in an application for an order against the appellant under section 4 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), evidence was given that the appellant and respondent were seen "out together evenings in the lanes," and that after the birth of the child the appellant asked if the respondent "was going to swear the child."

Held (*dissentiente* Wills, J.), that this was corroboration in some material particular to satisfy section 4 of the Bastardy Laws Amendment Act, 1872.—HARVEY *v.* ANNING, *K.B.D.*; 87 L. T. 687.

2 *Poor law—Illegitimate child becoming chargeable —Marriage of mother—Power of guardians to obtain order against putative father—Bastardy Laws Amendment Act*, 1873 (36 & 37 *Vict. c.* 9), *s.* 5.—It is competent for the magistrates, at the instance of the poor law guardians, to make an order against the putative father of an illegitimate child who has become chargeable to the union, ordering him to contribute to its support, notwithstanding that the mother of the child has a husband who is able to support it.—PLYMOUTH UNION *v.* GIBBS, *K.B.D.*, 157; [1903] 1 K. B. 177; 72 L. J. K. B. 33; 87 L. T. 685.

BILL OF EXCHANGE:—

*Promissory note—Payment by instalments—Clause giving time—Condition as to rights of holder—Stamp duty—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 3, *sub-sections* 1, 3,; *s.* 9, *sub-section* 1; *s.* 16; *s.* 83, *sub-sections* 1, 3; *s.* 97, *sub-section* 2—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 4, 10, 33. —The plaintiff sued as holder for value of a document in the form of a joint and several promissory note, which provided for payment of certain money by instalments, and that in case default was made in payment of any one of the instalments the whole amount remaining unpaid should become due and payable forthwith. The document also contained, at the end of it, the following clause: "No time given to or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party."

Held, that the document was a good promissory note within the Bills of Exchange Act, 1882, and was not invalidated by reason of the clause at the end of it.

*Yates* v. *Evans*, 61 L. J. Q. B. 446, 40 W. R. Dig. 219, approved.

*Kirkwood* v. *Smith*, 44 W. R. 480, [1896] 1 Q. B. 582, overruled.—KIRKWOOD *v.* CARROLL, *C.A.*, 374; [1903] 1 K. B. 531; 72 L. J. K. B. 208; 88 L. T. 52.

BILL OF SALE:—

1. *Hiring and purchase agreement—Intention of parties to agreement—Inference to be drawn from facts —Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 9.—The owner of an hotel contracted with a purchaser for the sale of the hotel, and the chattels therein, for a lump sum. The purchaser, being short of a portion of the purchase-money, applied to the defendants for a loan on mortgage, which was refused; but it was arranged that the defendants should offer to purchase the chattels, and their offer was accepted and the money paid to the vendor. The defendants then entered into an agreement with the purchaser of the hotel for the hiring and purchase by instalments by him of the chattels, and this agreement contained a license to seize the chattels on certain defaults being made. The purchase of the hotel was then completed, and the purchaser entered and carried on the business. Subsequently the defendants seized the chattels on a default being made. The purchaser became bankrupt, and his trustee claimed the chattels, and brought this action to recover them. The learned judge before whom the case came decided that the true inference from the facts was that the money paid by the defendants was a loan to the purchaser of the hotel to enable him to complete the purchase, and that the hire-purchase agreement was a security for that loan, and was void for want of registration under the Bills of Sale Acts, and gave judgment for the plaintiff. On appeal,

Held, that there was evidence to support the conclusion that the defendants had advanced the money by way of a loan upon the security of the hire-purchase agreement, and that, as the only claim of the defendants to the chattels arose under that agreement, which was void for want of registration as a bill of sale, the plaintiff was entitled to recover.—MELLOR'S TRUSTEE *v* MAAS, *C.A.*; [1903] 1 K. B. 226; 72 L. J. K. B. 82; 88 L. T. 50.

2. *Registration—Omissions in copy—Signature of grantor and attesting witness—Affidavit—Form—Covenant to replace worn-out articles—Term for maintenance of security—Bills of Sale Act*, 1878 (41 & 42 *Vict c.* 31), *s* 10, *sub-section* 2—*Bills of Sale Act*, 1882 (45 & 46 *Vict c.* 43) *s.* 9, *Schedule—Practice—Court of Appeal—Jurisdiction—Appeal from Liverpool Court of Passage—Application for new trial of interpleader issue—Liverpool Court of Passage Act*, 1893 (56 & 57 *Vict. c.* 37), *s.* 10.—The copy of a bill of sale filed on registration in pursuance of section 10, sub-section 2, of the Bills of Sale Act, 1878, omitted the signature of the grantor and the signature, address, and description of the attesting witness. The affidavit filed with the copy stated that the bill of sale was duly executed by the grantor, and that the execution thereof was witnessed by the attesting witness, and gave the name, address, and description of the attesting witness.

Held (affirming *Thomas* v. *Roberts*, [1898] 1 Q. B. 657, 46 W. R. Dig. 19), that the bill of sale was not rendered invalid by the omissions in the filed copy, as they might be supplied by reference to the affidavit.

A bill of sale contained a covenant by the grantor that he would not, without the consent of the grantee, assign or underlet any of the chattels thereby assigned, or remove them except for necessary repairs, and would replace such of them as should be worn out by other articles of equal value.

Held (following *Seed* v. *Bradley*, 42 W. R. 257, [1894] 1 Q. B. 319), that this covenant was merely for the maintenance of the security, and did not constitute a deviation from the form in the schedule to the Bills of Sale Act, 1882.

The Court of Appeal has jurisdiction to entertain an application for a new trial of an interpleader issue tried in the Liverpool Court of Passage.—COATES *v.* MOORE, *C.A.*, 648; [1903] 2 K. B. 140; 72 L. J. K. B. 539.

3. *Sums repayable by instalments—Denomination of money in monthly payments omitted—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in*

*schedule, Deviation from—Validity.*—A bill of sale, given to secure the repayment of an advance of £70 and interest at the rate of 1s. per month, stated that the grantor agreed to pay to the grantee "the principal sum aforesaid, together with the interest then due, by monthly instalments of seven (*sic*) on the 25th day of every month succeeding the date of these presents."

The Court was of opinion that an irresistible inference arose from the language of the instrument that the missing word was "pounds."

Held, therefore, that the bill of sale was valid as being substantially in accordance with the form in the schedule to the Act.—MOURMAND *v.* LE CLAIR, *K.B.D.*, 589; [1903] 2 K. B. 216; 72 L. J. K. B. 496; 88 L. T. 738.

BUILDING SOCIETY.—See Infant, 1.

CANADA, LAW of:—

1. *Action, Cause of—Insolvency of debtor—Civil Code of Lower Canada, art.* 1092.—Under art. 1092 of the Civil Code of Lower Canada an action to recover the balance of purchase-money of land may be brought although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security. —KENSINGTON LAND CO. *v.* CANADA INDUSTRIAL CO., *P.C.*; [1903] A. C. 213; 72 L. J. P. C. 66; 88 L. T. 711.

2. *Adjacent owners—Injury by works on land—Damages—Right of action.*—The appellant and the respondents were owners of adjacent pieces of land. The respondents demised their land to B. under an agreement to sell, and B. took possession of the land and executed some works on it for his own benefit as an intending purchaser, and not for or by the direction of the respondents. The effect of such works was injurious to the appellant's land.

Held, that the appellant had no right of action against the respondents for damages for the nuisance to his land, and could not compel them to abate such nuisance.—KIEFFER *v.* LE SEMINAIRE DE QUEBEC, *P.C.*; [1903] A. C. 85; 72 L. J. P. C. 18; 87 L. T. 484.

3. *Common School Fund—Arbitration—Jurisdiction of arbitrators.*—Questions between the Provinces of Ontario and Quebec as to the distribution of money in the hands of the Government, Ontario belonging to the "Common School Fund" of the two Provinces, were referred to arbitrators appointed under statute.

Held, that the arbitrators had no jurisdiction to entertain a claim of the nature of damages against the Ontario Government in respect of money belonging to the fund which it was alleged that they had wilfully neglected or omitted to collect.—ATTORNEY-GENERAL FOR ONTARIO *v.* ATTORNEY-GENERAL FOR QUEBEC, *P.C.*; [1903] A. C. 39; 72 L. J. P. C. 9; 87 L. T. 453.

4. *Company—Liquidator—Canadian Winding-up Act,* 1886, *ss.* 15 *and* 31—*Restricted power of liquidators of bank to sue in their own names—Civil Procedure Code, ss.* 516 *and* 521—*Power to amend by adding bank as plaintiffs.*—Under the Canadian Winding-up Act, 1886, ss. 15 and 31, a company in liquidation retains its corporate powers including the power to sue, although such powers must be exercised through the liquidator under the authority of the court. The liquidator must sue in his own name or in that of the company, according to the nature of the action; in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debts or its property.

Where liquidators sued in their own name to recover a debt due to the company,

Held, that the error was one of form, which the court had power to give leave to amend under sections 516 and 521 of the Code of Civil Procedure. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion.—KENT *v.* LA COMMUNAUTE DES SŒURS DE CHARITE DE LA PROVIDENCE, *P.C.*; [1903] A. C. 220; 72 L. J. P. C. 61; 88 L. T. 275.

5. *Indian reserves—Proprietary right of province—Acquiescence by officers.*—By section 91, sub-section 24, of the British North America Act, 1867, the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for Indians."

Held, that this did not vest in the Dominion Government any proprietary rights in such lands in infringement of the proprietary rights of the Province in which such lands are situated under section 109 of the Act, and therefore in the case of lands which had been reserved for Indians and subsequently surrendered by them to the Crown, the title of grantees claiming under the Provincial Government must prevail over that of grantees claiming under the Dominion Government. A Provincial Government cannot be bound by alleged acts of acquiescence on the part of their officers not authorized or adopted by the Government.—ONTARIO MINING CO. *v.* SEYBOLD, *P.C.*; [1903] A. C. 73; 72 L. J. P. C. 5; 87 L. T. 449.

6. *Patent—Expiry of patent—British patent a foreign patent—Canadian Patent Act* (*R. S. O., c.* 61, *s.* 8)—*55 & 56 Vict. c.* 24, *s.* 1—*Construction.*—By the true construction of section 8 of the Canadian Patent Act, c. 61 of the Revised Statutes of Canada, as amended by Canadian Act 55 & 56 Vict. c. 24, s. 1, a Canadian patent expires as soon as any foreign patent for the same invention existing at any time during the continuance of the Canadian patent expires. A British patent is a foreign patent within the meaning of the Canadian Patent Act.—DOMINION COTTON MILLS CO. *v.* GENERAL ENGINEERING CO. OF ONTARIO, *P.C.*; [1902] A. C. 570; 71 L. J. P. C. 119; 87 L. T. 186.

7. *Practice as to concurrent findings—Avoidance of gifts made by testator—Civil Code, art.* 762.—Where there are concurrent findings of fact as to a testator's competence and freedom from undue influence,

Held, that they will not be disturbed unless it be made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered:

Held, also, that gifts made by the testator to the respondent during his lifetime would not be avoided under art. 762 of the Civil Code where there was neither allegation nor evidence that they were made in expectation of death. The proviso in the article "unless circumstances tend to render them valid," requires that those circumstances should be investigated. — ARCHAMBAULT *v.* ARCHAMBAULT, *P.C.*; [1902] A. C. 575; 71 L. J. P. C. 131; 87 L. T. 404.

8. *Rights of Dominion and Province—Right of naturalized alien to franchise.*—The British North America Act, 1867, s. 91, sub-section 25, places the subject of "naturalization and aliens" under the exclusive jurisdiction of the Parliament of Canada. By section 92 the Provincial Legislature

have the exclusive right of dealing with the constitutions of the Provinces. By the Naturalization Act (Rev. Stat. Can. c. 113), s. 15, naturalized aliens are "entitled to political and other rights, powers, and privileges" to which natural-born British subjects are entitled. By the Provincial Elections Act of 1897 the Legislature of the Province of British Columbia enacted that aliens of certain races, whether naturalized or not, should not be entitled to be registered as voters.

Held, that naturalization did not necessarily give an inherent right to vote, and that the Provincial Elections Act, being an Act dealing with the Constitution of the Province, was not *ultra vires.*—CUNNINGHAM *v.* TOMEY HOMMA, *P.C.*; [1903] A. C. 151; 72 L. J. P. C. 23; 87 L. T. 572.

9. *Quebec, law of—Assignment of debt—Civil Code, arts.* 1570, 1571—*Notarial act—Signification of act of sale.*—By the law of Quebec the signification to a debtor of the assignment of the debt need not be made by a notarial act in authentic form. It is not necessary that a signification of the assignment and delivery of a copy of it should be made to the debtor before commencing an action to enforce the claim.—BANK OF TORONTO *v.* ST. LAWRENCE FIRE INSURANCE CO., *P.C.*; [1903] A. C. 59; 72 L. J. P. C. 14; 87 L. T. 462.

10. *Quebec, law of—Testator domiciled in Ontario owning property in Quebec.*—The Quebec Succession Duty Acts only impose a tax on property claimed under or by virtue of Quebec law, and not upon movable property locally situated in Quebec, but forming part of a succession devolving under the law of Ontario.—LAMBE *v.* MANUEL, *P.C.*; [1903] A. C. 68; 72 L. J. P. C. 17; 87 L. T. 460.

See Banker, 2.

CAPE OF GOOD HOPE, LAW of:—

1. *Act IX. of* 1858, *s.* 11—*Construction—Claim to take land for railway—Compensation.*—It is a sound canon of construction that an intention to take away property without compensation should not be imputed to a Legislature unless it be expressed in unequivocal terms. Section 11 of Act IX. of 1858 must receive a strict construction.—PUBLIC WORKS COMMISSIONER *v.* LOGAN, *P.C.*; [1903] A. C. 355; 88 L. T. 779.

2. *Real property—Prohibition of alienation—Mortgage—Validity.*—By the Roman-Dutch law of the Cape of Good Hope, where real property is vested in any person subject to a prohibition against its alienation, either by act *inter vivos* or by will, to any person not a member of the family of the settlor:

Held, that a mortgage, being a mere charge not passing the *dominium*, is not a breach of the prohibition, and is therefore not invalid.—JOSEF *v.* MULDER, *P.C.*; [1903] A. C. 190; 72 L. J. P. C. 50; 88 L. T. 72.

CARRIER:—

1. *Common carrier—Inherent unfitness of thing to be carried—Damage arising from—Liability of carriers.*—The defendants, as common carriers, contracted with the plaintiff to carry for him an engine from his yard to a neighbouring town on the defendants' railway. The engine was on wheels and fitted with shafts to allow of its being drawn by horses. While the defendants were drawing the engine with their horses to the railway station one of the shafts, owing to its being rotten, broke; the horses took fright and upset the engine, which was damaged. The defective condition of the shaft was not known to either the plaintiff or the defendants, and could not have been discovered by any ordinary examination.

Held, that as the engine was not in fact fit to be carried in the way in which it was intended to be carried, and the damage resulted in consequence of that unfitness, the defendants were excused.—LISTER *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO., *K.B.D.*; [1903] 1 K. B. 878; 72 L. J. K. B. 385; 88 L. T. 561.

2. *Lighterage—Negligence of lighterman—Barring clause—Duty of exercising reasonable skill and care—Loss or damage coverable by insurance.*—A contract by the defendants to lighter a cargo contained the following clause: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman. We will not be responsible for any consequences arising from strikes or other labour disturbances."

A barge which was being used in carrying out the said contract was left moored to a jetty, and, owing to the negligence of the lighterman, became jammed under a projecting part of the jetty, resulting in a sinking of the barge and a loss of the plaintiffs' cargo.

Held, that although a carrier could by contract exempt himself and his servants from liability for negligence, yet he must use some express, plain, and unambiguous terms to express that intention, and that mere general words will not exempt a carrier from using reasonable skill and care.

Held, further, that the above clause meant that the defendants undertook no liability as insurers, but did not exempt them from the obligation of using reasonable care and skill; and consequently that the defendants were liable to the plaintiffs for the loss of the cargo.—PRICE & CO. *v.* UNION LIGHTERAGE CO., *K.B.D.*, 477; [1903] 1 K. B. 750; 72 L. J. K. B. 374; 88 L. T. 428.

*CERTIORARI:*—

*Justices — Appointment of clerk — Judicial or ministerial act.*—An appointment by justices of a clerk is not an act of justices which is subject to a writ of *certiorari.*—REX *v.* DRUMMOND, *K.B.D.*; 88 L. T. 833.

See Practice, 3.

CEYLON, LAW of:—

1. *Arbitration—Right of party to withdraw—Misconduct of arbitrator.*—Under the Civil Procedure Code of Ceylon an arbitration in an action is a judicial proceeding in which the court acts by an arbitrator; and where a judicial order of reference in a pending action has been granted on the joint application of the parties neither party is entitled to withdraw from it. Where a party to such an order of reference gave notice to the arbitrator, before his first sitting, that he withdrew from the arbitration, and the arbitrator, after notice to the party withdrawing, proceeded with the reference, and made his award:

Held, that proceeding with the reference *ex parte* was not "misconduct of the arbitrator" within section 691 of the Civil Procedure Code, and that the award could not be set aside on that ground.—AITKEN *v.* FERNANDO, *P.C.*; [1903] A. C. 200; 72 L. J. P. C. 63; 88 L. T. 179.

2. *Practice — Special leave — Appeal* in forma pauperis.—Where a Colonial Code made no pro-

vision for appeals *in formâ pauperis*, and it was contended that the case was as regards amount, value, and nature fit to be taken in appeal, special leave was, under the circumstances of the case, granted.—PONAMMA *v.* ARUMOGAM, *P.C.*; [1902] A. C. 561; 71 L. J. P. C. 121.

CHANNEL ISLANDS, LAW of:—

*Guernsey—Title to right of way by the public—Grant—Effect of delay in suing after attaining majority.*—In the Channel Islands, where the doctrine of dedication to the public is unknown (1) title to a right of way must be made out by the public as by a private individual, by either grant or prescription; (2) a grant must be matter of record; and, *quære*, whether prescription will avail without proof of title:

Held, in an action by the appellant to have it determined that the public had no right of way over his property, that a registered minute of a resolution of the Seigneur and resident tenants of the Island of Sark, where it was situated, which did not duly record a completed transaction of grant, being rather a note of an unaccepted offer, was neither in form nor effect sufficient to create a title in the public.

Held, also, that a minor is not required to bring an action of title within a year of his majority.—GODFRAY *v.* CONSTABLES OF SARK, *P.C.*; [1902] A. C. 534; 71 L. J. P. C. 116; 87 L. T. 3.

CHARGING ORDER:—

*Practice—Shares—Power to order sale—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 14—*Ord.* 46, *r* 1—*Service of writ out of jurisdiction—Action to enforce charging order—Ord.* 11, *r.* 1 (e).—Where a judgment creditor has obtained a charging order under section 14 of the Judgments Act, 1838, upon shares in a company standing in the name of the judgment debtor, the court has no power to make an order for the sale of the shares in the original action, but a separate action must be brought for that purpose.

*Leggott* v. *Western*, 32 W. R. 460, 12 Q. B. D. 287, approved.

Ord. 11, r. 1 (*e*) does not apply to the case of an action to enforce a charging order obtained under section 14 of the Judgments Act, 1838, and consequently leave cannot be granted to issue a writ for service out of the jurisdiction in such an action.

*Moritz* v. *Stephan*, 36 W. R. 779, approved.—KOLCHMAN *v.* MEURICE, *C.A.*, 356; [1903] 1 K. B. 534; 72 L. J. K. B. 289; 88 L. T. 369.

CHARITY:—

1. *Bequest to be applied "in charity or works of public utility"—Uncertainty—Bequest "for the benefit or hospitality" of a company.*—A testator bequeathed to the company of C. and the company of A. the sum of £5,000 each, to be invested in such securities as the master and court of assistants of such companies might select, the revenue to be expended at the option of the master and court of such companies, as to two-thirds in "charity or works of public utility," and as to the remaining one-third for "the benefit or hospitality of the respective companies."

Held, that "or" was used disjunctively, and that the whole of the two-thirds might be applied for purposes which were not charitable, and therefore that the gift failed as to two-thirds.

But, held, the gift of one-third was a gift of income for the absolute benefit of the companies, and that they were absolutely entitled to one-third.—LANGHAM *v.* PETERSON, *Ch D. Swinfen Eady, J.*; 87 L. T 744.

2. *Disposition—Trustees—Scheme by court or sign-manual.*—Where a testator gives property to trustees on general charitable trusts, but indicates no definite objects, the proper mode of carrying out the objects of the testator is by a scheme of court and not by sign-manual.—PYNE, RE, LILLEY *v.* ATTORNEY-GENERAL, *Ch.D. Byrne, J.*, 283; [1903] 1 Ch. 83; 72 L. J. Ch. 72; 87 L. T. 730.

3. *Gift for charitable purposes—Failure of particular application—Cy-près doctrine—Practice—Impeachment of settlement by defendant.*—Where there is an immediate gift for charitable purposes, such gift is not rendered invalid by the fact that the particular application directed cannot immediately, or will not of necessity, take effect within any definite limit of time, and may never take effect at all. In 1848 certain natives of New Zealand gave land to the then bishop as a site for a college, and in 1850 the gift was confirmed by a Crown grant. The land was afterwards conveyed to trustees, but no college was built on it, and it was let for grazing purposes, and the rents and profits were accumulated and invested. In 1897, it appearing that from changes in the population the site was no longer a suitable one for such college as was originally contemplated, the trustees applied to the court for a scheme for the administration of the trust.

Held, that, there being a general purpose of charity, the funds and lands were subject to administration by or under the direction of the court *cy-près*, and had not reverted to the Crown. It is not consistent with the practice of the court in such matters that the defendant in an action for the administration of the trusts of a settlement, not void upon the face of it, should be permitted to impeach the settlement in his defence to the action. Such course must be taken directly either by action or counter claim.—WALLIS *v.* SOLICITOR-GENERAL FOR NEW ZEALAND, *P.C.*; [1903] A. C. 173; 72 L J. P. C. 37; 88 L. T. 65.

4. *Mortmain—Gift to charity of interest and remainder in impure personalty—Change of investment to pure personalty before falling into possession—Failure of gift.*—By his will, made in 1889, a testator gave to a charity property, including his interest in remainder, expectant on the determination of his parents' life interests, in the trust funds comprised in their marriage settlement. He died in 1890. At the date both of his will and of his death £500, part of the trust funds, was properly invested on mortgage of real estate; but in 1902, when the life interests determined, the £500 had been called in, and was represented by a sum of Consols.

Held, that as regards the £500, the testator was disposing of an interest in land, although his interest was in remainder, and that the gift to the charity therefore failed as regards this sum.—PRICHARD'S SETTLEMENT, RE, PLAYNE *v.* TWISDEN, *Ch.D. Joyce, J.*; 88 L. T. 197.

5. *Mortmain—Will—Terminable interest of real estate—Tenant for life—Consent—Mortmain—Vesting—Official trustee of charity lands—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5, 6.—A testator gave his real and personal estate to trustees upon trust for sale, but directed that no part of his freeholds and leaseholds should be sold during the life of his widow without her consent; and, subject to certain legacies and annuities, he gave one-fourth of the income of his estate to his widow and the remaining three-fourths to certain charities. The widow was alive and had

not consented to a sale, and more than a year had elapsed since the testator's death.

Held, that the will gave two interests to the charities: (1) a reversionary interest expectant on the widow's death in the proceeds of sale of land, and this was not land within the meaning of the Mortmain and Charitable Uses Act, 1891; (2) a terminable interest in the income of land, which the trustees were expressly forbidden to sell during the lifetime of the widow without her consent in writing, and this was land which, not having been sold within the year, had vested in the Official Trustee of Charity Lands.—RYLAND, RE, ROPER v. RYLAND, *Ch.D. Byrne, J.*, 345; [1903] 1 Ch. 467; 72 L. J. Ch. 277; 88 L. T. 456.

6. *Roman Catholic school—Sale with the consent of "bishop for the time being"—Persons "absolutely entitled"—Charity Commissioners—Lands Clauses Consolidation Act*, 1845, *s.* 69—*Charitable Trusts Act*, 1853.—Trustees of buildings used as a Roman Catholic school who have power, with the consent of the Roman Catholic bishop of the diocese for the time being, to sell the premises and give receipt for purchase-money, are persons "absolutely entitled" under the Land Clauses Consolidation Act, 1845, s. 69, to receive payment out, of the purchase-money for such premises paid into court under the said Act; and the consent of the Charity Commissioners to such payment out is not required. —SHEFFIELD CORPORATION AND ST. WILLIAM'S ROMAN CATHOLIC CHAPEL, RE, *Ch.D. Byrne, J.*, 380; [1903] 1 Ch. 208; 72 L. J. Ch. 71; 88 L. T. 157.

See Will, 5, 6, 7.

CLUB—

1. *Absence of express power to alter rules—Power of majority to bind minority—"General purposes" of club—Power to increase subscription.*—In the absence of an express power to alter its rules, a club has no inherent authority to increase the annual subscription provided for by the rules, against the wishes of a dissentient minority of its members.—HARRINGTON v. SENDALL, *Ch.D. Joyce, J.*, 463; [1903] 1 Ch. 921; 72 L. J. Ch. 396; 88 L. T. 323.

2. *Trustee—Indemnity—Position of members of club.*—It is an implied, but fundamental, condition in the constitution of every ordinary club that the members thereof incur, as such, no liability to pay anything beyond their subscriptions as members, either to the club funds or to anyone else.

Consequently, in the absence of any express provision to the contrary in the rules of the club, the members of an ordinary club are not personally liable as such, to indemnify the trustees of the club against liabilities incurred by the latter as such trustees.

*Hardoon* v. *Belilios*, 49 W. R. 209, [1901] A. C. 118, distinguished.—WISE v. PERPETUAL TRUSTEE CO., *P.C.*, 241; [1903] A. C. 139; 72 L. J. P. C. 31; 87 L. T. 569.

COMMITTAL:—

*Practice—Motion to commit—Exhibits to affidavits —Service of copies upon respondent.—R. S. C.*, 1883, *ord.* 52, *r.* 4.—An exhibit to an affidavit is not part of the affidavit within the terms of ord. 52, r. 4, and that rule does not require copies of exhibits to be served upon the respondent to a motion for committal. But the respondent ought to have notice of the evidence intended to be used against him, and if the party moving omits to furnish him with copies of such exhibits as are necessary to enable him to know fairly the nature of this evidence, the applicant will be liable to have the motion dismissed.—CARTER v. ROBERTS, *Ch.D. Byrne, J.*, 520; [1903] 2 Ch. 312; 72 L. J. Ch. 655.

See County Court, 5.

COMMON:—

*Compensation for commonable rights—Apportionment.*—RICHARDS v. DE WINTON, RICHARDS v. EVANS, *C.A.*; [1903] 1 Ch. 507; 72 L. J. Ch. 269; 88 L. T. 333.

COMPANY:—

1. *Borrowing powers—Company incorporated by statute—Power to mortgage surplus lands—Security for existing debt—Transfer of mortgage*—Ultra vires. —A company incorporated by special Act, though possessing no express powers of borrowing except on the security of its undertaking, has power to charge its surplus lands for the purpose of further securing a valid debt already incurred.

*Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. App. 201, and *Ex parte Grissell*, 15 W. R. 324, L. R. 2 Ch. App. 385, discussed and applied.

Decision of Swinfen Eady, J. (50 W. R. 446), affirmed.—STAGG v. MEDWAY NAVIGATION CO., *C.A.*, 329; [1903] 1 Ch. 169; 72 L. J. Ch. 177; 87 L. T. 705.

2. *Creditors of company—Debenture-holders—Scheme for composition—Agreement—Registration—Deed of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *ss.* 4, 5, 7, 8, 16.—The Deed of Arrangement Act, 1887 (50 & 51 Vict. c. 57), does not apply to limited companies, and consequently an agreement by a limited company for composition with its creditors is not void for want of registration. In a case where most of the creditors who had notice had signed or assented to an agreement by a company for a composition, it was held, under the circumstances of the case, that all creditors, who desired so to do, were at liberty to take the benefit of the agreement.—RILEY'S (LIMITED), RE, *Ch.D. Byrne, J.*, 681.

3. *Debentures—Covering deed before* 1900—*Specifically mortgaged property—Property acquired after* 1900 *upon trusts of covering deed—Assignment to company—Sub-demise to the trustees—Registration of charge—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.—Trustees for the debenture-holders of a limited company were empowered by their trust deed, which was executed in 1897, to sell certain property therein specifically mortgaged, and were to hold the proceeds of sale upon trust (amongst other things) at the request of the company to purchase or acquire leasehold hereditaments, which were to be held upon the trusts of the specifically mortgaged property. The trustees having £2,700 in their hands upon the above trusts, and the company desiring to acquire a certain public-house, obtained themselves in March, 1902, a demise of the house for £2,700 for 1,001½ years; and then, in consideration of £2,700 received from the trustees in August, 1902, the company sub-demised the house to them for the whole term except the last day.

Held, that the sub-demise of August, 1902, was a specific mortgage or charge upon the public-house under section 14, sub-section 1, of the Companies Act, 1900, and must be registered under its provisions.—CORNBROOK BREWERY v. LAW DEBENTURE CORPORATION, *Ch.D. Byrne, J.*, 508; 72 L. J. Ch. 496; 88 L. T. 722.

4. *Debentures—"Floating charge"—Priority—Unregistered floating charge void against creditors—*

*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14 (1) (*d*).—A company incorporated under the Companies Acts, which had previously issued debenture stock secured by a floating charge upon the assets of the company, proceeded in 1902 to assign the book and other debts then owing, and also all future book and other debts, by way of mortgage to secure guarantors of the company's overdraft at their bankers from liability in respect of their guarantee.

It appeared from provisions in the mortgage deed that it was not intended to thereby prevent the company from continuing to trade or collect outstanding debts, although the guarantors had power to intervene at any time, upon a majority of them considering it desirable.

Clause 21 of the debenture trust deed contained a provision allowing the company "to sell or specifically mortgage or charge or otherwise deal with and dispose of the property and assets expressed to be charged by way of floating security or any part thereof."

Held, that the charge created by the mortgage deed was a "floating charge" within the meaning of that expression, as used in section 14 (1) (*d*) of the Companies Act, 1900; and that it was void as against creditors inasmuch as it was not registered as required by that sub-section.

Decision of Farwell, J. (*ante*, p. 537), affirmed.—YORKSHIRE WOOLCOMBERS' ASSOCIATION, RE, *C.A.*; [1903] 2 Ch. 284; 72 L. J. Ch. 635; 88 L. T. 811.

5. *Debentures—Registration—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.—The registration under sub-section 4 of section 14 of the Companies Act, 1900, of the particulars therein mentioned protects the whole of the series of debentures in respect of which such registration is effected, at whatever time such debentures are issued, provided they be not issued more than twenty-one days before such registration.

The meaning of section 14 of the Companies Act, 1900, discussed.—HARROGATE ESTATES (LIMITED), RE, *Ch.D. Buckley, J.*, 334; [1903] 1 Ch. 498; 72 L. J. Ch. 313; 88 L. T. 82.

6. *Debentures—Registration—Extension of time—Winding up before registration—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.—An order was made under section 15 of the Companies Act, 1900, extending the time for registering a charge created by a trust deed on certain debentures until a date fourteen days after the making of the order, but "without prejudice to the rights of parties acquired prior to the time when such trust deed and debentures shall be actually registered." Ten days after the order was made the company passed a resolution for voluntary winding up. On the fourteenth day after the order was made the charge was duly registered.

Such registration held not to make the debenture-holders secured creditors as against the general body of creditors, whose rights were protected by the form of the order.—ANGLO-ORIENTAL CARPET CO., RE, *Ch.D. Buckley, J.*, 634; [1903] 1 Ch. 914; 72 L. J. Ch. 458; 88 L. T. 391.

7. *Debenture-holder's action—Plaintiff suing in representative capacity—Plaintiff* dominus litis—*Discontinuance after decree pronounced.*—A plaintiff in a debenture-holder's action, although suing "on behalf of himself and all other debenture-holders," may discontinue his action after decree pronounced if he has no notice of claim and is not required to continue by any other debenture-holder of the same class.

Forms of decree in creditors' administration actions and in debenture-holders' actions respectively, compared.

*Handford* v. *Storie*, 2 Sim. & St. 196, discussed.—ALPHA CO., RE, WARD *v.* ALPHA CO., *Ch.D. Kekewich, J.*, 201; [1903] 1 Ch. 203; 72 L. J. Ch. 91; 87 L. T. 646.

8. *Debenture-holder's action—Sale by order of court—Purchase-money in court—Trustees' remuneration.*—Trustees for the debenture-holders who by the terms of their trust deed are entitled to remuneration, to be paid by the company, are not, in the absence of express provision in the trust deed, entitled to be paid such remuneration in priority to the debenture-holders, out of proceeds paid into court of a sale of the mortgaged property, in a debenture-holder's action.—ACCLES (LIMITED), RE, HODGSON *v.* ACCLES, *Ch.D. Farwell, J.*, 57.

9. *Director—Disqualification—Clause validating the acts of* de facto *directors.*—No. 108 of the articles of a company provided that all acts done at any meeting of the directors, or by any person acting as such director, should, notwithstanding that it should afterwards be discovered that there was some defect in the appointment of such director or person acting as aforesaid, or that they or any of them were disqualified, be valid, as if every such person had been duly appointed and was qualified to be a director. It was also provided that two directors should form a quorum, and that a director who accepted or held any office under the company, other than that of managing director, was to vacate office as director.

B., a director of the company, was elected secretary of the company, but subsequently resigned the office. At board meetings, subsequent to the resignation, at which B. and only one director were present, various business was transacted, such as the election of directors.

Held, that the acts done by B. in his capacity of a director were validated by clause 108 in the articles of association.—BRITISH ASBESTOS CO. *v.* BOYD, *Ch.D. Farwell, J.*, 667; 88 L. T. 763.

10. *Director — Qualification shares — Acting as director—Implied agreement to take shares—Reasonable time to obtain qualification—"Ceases to hold his qualification"—Qualification of director raised by resolution of company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 23, 37—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s* 3.—By the articles of association of a company the qualification of a director was the holding in his own right of £50 in shares of the company. The plaintiff, who was a director, held this number of shares. Subsequently the directors resolved that a resolution should be put to the shareholders at the next general meeting that the qualification of a director should be the holding of 250 £1 shares in the company. At the general meeting resolutions were passed for increasing the capital of the company and altering the articles of association by raising the qualification of a director as above. This resolution was duly confirmed, and a prospectus was issued which the plaintiff signed and in which his name appeared as a director. The plaintiff was present at all the meetings. After the resolutions had been confirmed, and before the issue of the prospectus, the secretary and manager of the company, without the plaintiff's knowledge, entered the plaintiff's name on the register for 200 shares, making in all the requisite 250 shares. The plaintiff subsequently sent in his resignation as a director. Upon a counterclaim for calls in respect of the 200 shares,

Held, (1) that the plaintiff had not "ceased to hold his qualification" within the meaning of

section 3, sub-section 2, of the Companies Act, 1900, when the qualification of a director was raised, and that therefore his office was not thus vacated; and (2) that, as the plaintiff had accepted the office of and had acted as a director after he knew of the increase in the qualification, he must be taken to have contracted with the company that he would obtain the requisite shares within a reasonable time, and that he ought to have obtained the shares before signing the prospectus; and that, therefore, his name had been properly placed on the register, and he was liable for the calls.—MOLINEAUX *v.* LONDON, BIRMINGHAM, AND MANCHESTER INSURANCE CO., *C.A.*, 36; [1902] 2 K. B. 589; 71 L. J. K. B. 848; 87 L. T. 324.

11. *Directors—Prosecution—Payment of costs out of assets—Refusal of public prosecutor to prosecute—Discretion—Winding up of company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 167.—In order to determine whether leave ought to be given to institute criminal proceedings against the director of a company which is being wound up, and whether the costs of the prosecution ought to be paid out of the assets of the company, the court will look at the question from the point of view of an individual, and will consider whether it would be the duty of a good citizen even at a loss to himself to institute and carry on proceedings to punish the criminal. It is not necessary to find that the facts are so plain that a conviction must ensue. The proportion of creditors who support and oppose the application, and the effect which will be produced upon the estate by payment of costs, will be taken into consideration, but not the personal advantage of the individual, nor motives of vengeance against the offender, nor pecuniary benefits to be obtained for the creditors or shareholders. The fact that the law officers of the Crown have refused to allow the public prosecutor to undertake the prosecution is not necessarily revelant.—LONDON AND GLOBE FINANCE CORPORATION (LIMITED), RE, *Ch.D. Buckley, J.*, 651; [1903] 1 Ch. 728; 72 L. J. Ch. 368; 88 L. T. 194.

12. *Directors — Purchase of shares — Fiduciary position—Negotiation of sale of undertaking—Duty to disclose.*—The fiduciary relations which exist between partners do not apply as between directors of an incorporated company and other individual shareholders, even after negotiations for the sale of the company's undertaking have arisen. A person buying or selling shares in a company, of which he is a director, is under no obligation to disclose matters which have come within his knowledge as a director, whether such matters have arisen in the ordinary course of the company's business or relate to a contemplated sale of the company's undertaking.—PERCIVAL *v.* WRIGHT, *Ch.D. Swinfen Eady, J.*, 31; [1902] 2 Ch. 421; 71 L. J. Ch. 846.

13. *Promotion—Secret profit—Fiduciary relationship—Prospectus—Non-disclosure— Misrepresentation —Damages.*—A company bought two music halls, the conveyance being taken to a nominee of the company who afterwards executed a declaration of trust in favour of the company. He then purported to resell the halls at a greatly enhanced price to another nominee of the company as a trustee for another company not yet formed, which was intended to work the halls. The original purchase price was paid and the purchase price on the resale received by the first company, which settled the memorandum and articles of the second company, and registered it, and nominated the signatories to its memorandum and most of its directors, one of whom was a director of the first company. The prospectus of the second company represented the nominee of the first company as vendor of the halls, concealing the interest of the first company in them, and contained material misrepresentations.

Held, on the evidence, that the first company bought the halls with the intention of reselling them to the second company at an inflated price; that it promoted the second company; that the prospectus of the second company was issued with the knowledge and privity of the first company; and that the first company therefore stood in a fiduciary relation to the future allottees of shares in the second company, and was liable for the damage sustained by that company through the breach of duty and fraud of the first company.

Decision of Wright, J., affirmed.—LEEDS AND HANLEY THEATRES OF VARIETIES, RE, *C.A.*, 5; [1902] 2 Ch. 809; 72 L. J. Ch. 1; 87 L. T. 488.

14. *Prospectus—Contract by company—Omission from prospectus—Rights to be "honourably met"—Cancelled contract—Materiality—Companies Act*, 1867 (30 & 31 *Vict. c.* 131). *s.* 38—*Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.—A promoter in May, 1898, agreed to float a company for a sum of £20,000. Shortly after the company was incorporated it was resolved to purchase the business of another company as a going concern, and the buying company in September, 1898, entered into a contract with the promoter by which the promoter agreed to advance a sum of £14,250 by way of deposit on the purchase-money. The company, by a contract contained in a letter of the 21st of September, 1898, agreed to repay this deposit if the purchase went through, and further agreed to pay a bonus of £7,500 in consideration of the promoter's additional services. The agreement of purchase was signed on the 26th of September, 1898. The directors of the vendor company, some of whom were to join the board of the new company, objected to the payment of the £7,500. Consequently, on the 10th of October, 1898, an agreement was come to whereby the contract of the 21st of September was cancelled, and the promoter was satisfied with an assurance that his right to receive proper remuneration for commission should be honourably met. A fortnight later the directors issued a prospectus, in which it was stated, on the advice of counsel, that the only contracts to which the company was a party were the promotion agreement of May and the purchase agreement of the 26th of September.

Held, that the contract of the 21st of September was not wholly cancelled by the arrangement of the 10th of October, and that in any event both contracts should have been disclosed in the prospectus under section 38 of the Companies Act, 1867.

Held, also, that the fact that the contracts were omitted on the advice of counsel was no defence.

Decision of Buckley, J. (50 W. R. 614), affirmed. —BROOME *v.* SPEAK, *C.A.*, 258; [1903] 1 Ch. 586; 72 L. J. Ch. 251; 88 L. T. 580.

15. *Prospectus—Director—Promoter—Shareholder —Contract by directors and promoters—Omission from prospectus—"Fraudulent" prospectus—Waiver clause —Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38. —The directors and promoters of a company in process of formation agreed with a firm that, in consideration of the latter's underwriting 10,000 shares in the company, the firm was to receive 12,000 vendor shares as a commission therefor, but 10,000 shares were in fact for the use of the firm's name on the prospectus on their approving of the soundness of the undertaking; and, further, that the firm was to be appointed commercial

agents for the company, whose registered office was to be situate at its address, while a member of the firm was to go on the prospectus as chairman of the company. The prospectus of the company did not disclose this agreement, but contained a waiver clause, that there might be various trade contracts and business arrangements of which intending subscribers were to be deemed to have notice.

Held, that the contract was one which it was material to an intending investor to know, that the waiver clause did not give such intending investor fair and sufficient notice of the omission, and that by reason of its omission from the prospectus the prospectus must be deemed fraudulent within section 38 of the Companies Act, 1867, though such omission was not in fact made with any fraudulent intent.

Decision of Farwell, J. (50 W. R. 16), affirmed.—CACKETT *v.* KESWICK, *C.A.*, 69; [1902] 2 Ch. 456; 71 L. J. Ch. 641; 87 L. T. 11.

16. *Prospectus—Misrepresentations in prospectus—Contribution from co director—Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 54), *s.* 5.—By section 5 of the Directors' Liability Act, 1890, "every person who by reason of his being a director, or named as a director, or as having agreed to become a director, or of his having authorized the issue of the prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment."

Held, that this section gives a right of contribution in respect of a claim to recover damages for fraudulent misrepresentations in a prospectus of a company inviting persons to subscribe for shares, as well as in respect of a claim to recover damages for an untrue statement in the prospectus apart from fraud.—GERSON *v.* SIMPSON, *C.A.*, 610; [1903] 2 K. B. 197; 72 L. J. K. B. 603.

17. *Prospectus — Misrepresentation as to assets—Property subsequently acquired—Measure of damages—Waiver clause—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.—If the prospectus of a company contains a statement that certain assets have been acquired by the company, though at the date of the prospectus the assets in question are not and possibly might never be acquired by the company, the fact that the assets are subsequently acquired is no defence to an action against the directors of the company based on the misrepresentation contained in the prospectus, and the damages will be assessed on the footing of the difference between the price paid for the shares and their true value, having regard to the actual state of things at the date of the prospectus. — MCCONNEL *v.* WRIGHT, *C.A.*, 661; [1903] 1 Ch. 546; 72 L. J. Ch. 347; 88 L. T. 431.

18. *Prospectus—Omission of material contracts—"Knowingly issue"—Waiver clause—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.—The defendant, who was a director of a company, took part in issuing a prospectus inviting persons to subscribe for shares in the company. The prospectus did not disclose certain material contracts which had been entered into, as required by section 38 of the Companies Act, 1867. It, however, contained a clause stating that contracts relating to the formation and promotion of the company had been entered into, and that these "are or may be" contracts within the 38th section of the Act, and that applicants for shares were to be deemed to have waived all claims against directors and others for the section not being more fully complied with. The defendant had actual knowledge of the existence of the undisclosed contracts, but not of their nature and effect, and was content to leave the statements of the prospectus to others without inquiry. The plaintiff took shares upon the faith of the prospectus, but upon hearing of the undisclosed contracts brought an action against the defendant for compensation.

Held, that the defendant had "knowingly issued" the prospectus, and that, under the circumstances, his ignorance of the nature and effect of the undisclosed contracts was no answer to the action.

Held, also, that the waiver clause did not fairly disclose to an intending investor what it was that he should waive, and therefore did not protect the defendant from liability for non-disclosure of the contracts.

Judgment of Byrne, J. (*ante*, p. 44, [1902] 2 Ch. 628), affirmed.—WATTS *v.* BUCKNALL, *C.A.*, 433; [1903] 1 Ch. 767; 72 L. J. Ch. 447; 88 L. T. 845.

19. *Reduction of capital—Cancellation of shares—No loss of capital—No return of capital—Equilibrium of balance-sheet—Prejudice of creditors—Fresh shares accepted and paid for of larger nominal value than shares proposed to be cancelled—Companies Act*, 1867 (30 & 31 *Vict c.* 131), *ss.* 9, 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.—A limited company cannot reduce its capital by cancelling any of its fully paid-up shares merely because the holders consent to give them up, because to do so would affect the equilibrium of the balance-sheet to the prejudice of the creditors, by diminishing the amount of the assets which can only be used for capital purposes.

But when, as part of the arrangement for the reduction of capital, the holders of the shares given up take from the company further shares of greater nominal value, so that the nominal capital of the company is not diminished, the court may confirm the reduction.

Section 3 of the Companies Act, 1877, by specifically giving power to cancel lost capital or to return paid-up capital, impliedly forbids the writing off of capital which is neither lost nor returned.—ANGLO-FRENCH EXPLORATION CO., RE, *Ch.D. Buckley, J.*, 8; [1902] 2 Ch. 845; 71 L. J. Ch. 800.

20. *Reduction of capital—Certificate of registrar—"Conclusive"—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 15.—The certificate of the registrar that the order of the court sanctioning a reduction of capital and the accompanying minute has been registered is conclusive evidence that the reduction has been duly carried out, behind which the court will not go even in a case where the company had no power in its articles of association to reduce its capital.

*Ladies' Dress Association* v. *Pulbrook*, 49 W. R. 6, [1900] 2 Q B. 376, followed.—WALKER & SMITH (LIMITED), RE, *Ch.D. Byrne, J.*, 491; 72 L. J. Ch. 572; 88 L. T. 792.

21. *Reduction of capital—Dissentient stockholders—Sanction of court—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26).—A scheme for reduction of capital is not necessarily unfair or inequitable because it involves the alteration of rights of voting and priority, as between the different class of stockholders.

Judgment of Byrne, J., reversed.—ALLSOPP & SONS (LIMITED), RE, *C.A.*, 644.

22. *Reduction of capital — Power to reduce in memorandum, but not in articles of association—Regulations—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9.—The memorandum of association of a company gave the company power to reduce its capital, but the articles of association of the company contained no such power.

The company passed special resolutions purporting to reduce its capital, and petitioned the court for confirmation of the reduction.

Held, that the word "regulations" in section 9 of the Companies Act, 1867, meant the articles and not the memorandum of association, and that it was necessary to alter the articles by inserting a power to reduce capital before passing a special resolution for reduction.—DEXINE PATENT PACKING CO., RE, *Ch.D. Byrne, J.*; 88 L. T. 791.

23. *Reduction of capital—Shares paid up in varying amounts—Loss to be borne by all shares equally.*—Where a scheme for reduction of capital is neither unjust nor inequitable, the court has jurisdiction to sanction it, even though it has the effect of varying the original rights of the shareholders.

Decision of Farwell, J. (50 W. R. 629, [1902] 2 Ch. 178), reversed. — CREDIT ASSURANCE AND GUARANTEE CORPORATION, RE, *C.A*, 20; [1902] 2 Ch. 601; 71 L. J. Ch. 775; 87 L. T. 216.

24. *Sale of assets to another company—Shares in purchasing company—Voluntary winding up—Dissentient member—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.—Appeal from the decision of Buckley, J. (reported *ante*, p. 29, [1902] 2 Ch. 837), dismissed on technical grounds.—DOUGHTY *v.* LOMAGUNDA REEFS (LIMITED), *C.A.*, 564; [1903] 1 Ch. 673; 72 L. J. Ch. 331; 88 L. T. 337.

25. *Sale to intermediary company—Resale to new company—Commission — Underwriting agreement—Offer to public—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 8 (1) (2).—A company sold its undertaking on the terms that the purchasers should form a new company to repurchase the property. The consideration for sale to the purchasers was to be shares in the new company, and the consideration for the resale to the new company was to be the same number of shares together with a sum in cash. The purchasers were to take up all shares that were not taken up by members of the old company.

Held, that the proposed cash payment was a payment by way of "commission, discount, or allowance . . . in consideration of . . . subscribing . . . for . . . shares" of the new company within sub-section 2 of section 8 of the Companies Act, 1900, and that as such payment was not authorized by the articles of the new company it was not validated by sub-section 1 of the same section.—BOOTH *v.* NEW AFRIKANDER GOLD MINING CO., *C.A.*, 193; [1903] 1 Ch. 295; 72 L. J. Ch. 125; 87 L. T. 509.

26. *Shares — Commission — Underwriters — Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 8, *sub-section* 2.—Where directors of a company limited by shares are acting in good faith, and within the discretion vested in them by the articles of association, there is nothing to prohibit them from agreeing to grant an option to persons subscribing or underwriting shares entitling such persons by way of brokerage or commission to purchase at par within a certain time unissued shares of the company. Section 8, sub-section 2, of the Companies Act, 1900 (63 & 64 Vict. c. 48), does not render such an agreement unlawful.

Decision of the Court of Appeal reversed.

*Burrows* v. *Matabele Gold Reefs Co.*, 49 W. R. 500, [1901] 2 Ch. 23, discussed.—HILDER *v.* DEXTER, *H.L*, 225; [1902] A. C. 474; 71 L. J. Ch. 781; 87 L. T. 311.

27. *Shares—Forfeiture for non-payment of calls—Re-sale by company—Liability for future calls—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Table A, arts.* 20 *and* 22.—A company forfeited shares for non-payment of calls and resold them on the terms that the purchasers should be held discharged from any calls then due.

Held, that the purchasers were liable to pay the amount unpaid on the shares, and that they were not discharged by there having been a previous call which remained unpaid.

*Semble*, that any contract which purported to release a shareholder from paying the full nominal value of the share would be *ultra vires*.—RANDT GOLD MINING CO *v.* NEW BALKIS CO., *C.A.*, 391; [1903] 1 K. B. 461; 72 L. J. K. B. 143; 88 L. T. 189.

28. *Shares—Forfeiture of shares — Rescission of forfeiture— Articles of association.* — The articles of association of a company provided that on non-payment of a call on shares the directors might forfeit the shares; that the forfeited shares should be the property of the company; that before the shares were disposed of the directors might "annul the forfeiture" upon such conditions as they thought fit; and that notwithstanding the forfeiture the shareholders should be liable to pay all calls, interest, and expenses owing in respect of the shares at the time of forfeiture.

The directors passed a resolution forfeiting the the shares of L. for non-payment of a call, and gave him notice of the forfeiture. On demand L. paid the call, interest, and expenses, and at the same time wrote that he repudiated any further liability on the shares.

Nine months afterwards the directors passed a resolution purporting to rescind the forfeiture and giving notice to L. that he was registered in respect of the shares. L. replied declining to have his name reinstated as owner of the shares.

Held, that the company had no power adversely to L. to reinstate him with the liability of a shareholder.—EXCHANGE TRUST, RE, LARKWORTHY'S CASE, *Ch.D. Buckley, J.*; [1903] 1 Ch. 711; 72 L. J. Ch. 387; 88 L. T. 56.

29. *Shares—Transfer—Insufficient stamp—Refusal to register—Right to go behind that which appears in document—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 14 *sub-section* 4; *s.* 17.—A transfer to the plaintiff of shares in the defendant company was presented for registration. The stamp on the transfer was in accordance with the consideration stated on the face of it, but it was discovered that the consideration so stated was less than that which had been given. The directors thereupon refused to register the transfer. In an action to recover damages arising out of this refusal:

Held, that since a transfer not duly stamped according to law would not, by reason of section 14, sub-section 4, of the Stamp Act, 1891, be available in a court of law either to enforce rights of the company against the transferee, or to justify an alteration of the register of shareholders, the directors were entitled to refuse to register the transfer, and that in determining whether the transfer was duly stamped they were entitled to go behind that which appeared on the face of the document.—MAYNARD *v.* CONSOLIDATED KENT

COLLIERIES CORPORATION (LIMITED), *C.A.*; [1903] 2 K. B. 121; 88 L. T. 676.

30. *Special resolution—Amendment thereof—Validity—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51. —Notice was given to the shareholders of a company convening an extraordinary general meeting at which a special resolution, of which a copy was given, was to be considered. At the meeting an amendment to the special resolution was proposed and carried. The amendment did not affect the form, but made a slight difference in the terms of the original resolution.

Held, that the alteration occasioned by the amendment did not invalidate the resolution.—TORBOCK *v.* WESTBURY (LORD), *Ch.D. Swinfen Eady, J.*, 133; [1902] 2 Ch. 871; 71 L. J. Ch. 845; 87 L. T. 165.

31. *Winding up—Action for calls before winding up—Set-off pleaded in defence—Liquidation of plaintiff company before judgment in action—Summons in winding up for balance order.*—Where an action for calls had been commenced prior to a voluntary winding up and set-off pleaded as a defence, but no judgment had been given,

Held, on a summons being taken out in the winding up for a balance order in respect of those calls, that no allowance could be made by way of set-off against the sums payable under that order. —HIRAM MAXIM LAMP CO., RE, *Ch.D. Byrne, J.*, 74; [1903] 1 Ch. 70; 72 L. J. Ch. 18; 87 L. T. 729.

32. *Winding up—Contributory—Shares allotted without consideration—Liability of allottee—Misfeasance of directors.*—In 1899 two brothers, Messrs. R. I. and J. I., who had certain patent rights, arranged with six shipowners to form a private company, and to sell to such company their business and patent rights for £6,000, payable as to £3,000 in cash and as to £3,000 in fully-paid shares. It was arranged (1) that the capital of the company should be £25,000, divided into 2,500 shares of £10 each; (2) that the vendors should take 300 fully paid-up shares as the balance of their purchase-money; (3) that the six shipowners should take and pay for fifty shares apiece for the purpose of raising the £3,000 payable in cash to the vendors; (4) that of the remaining 1,900 shares each of the six shipowners should take 300 fully-paid shares for his own benefit; (5) that the last 100 shares should be held in reserve and should be applied in making bonus payments to persons introducing business to the company. On the 7th of December, 1899, the company was duly incorporated with the capital above stated. No prospectus was issued, and there was no intention to go to the public with shares.

In pursuance of the above-mentioned arrangement an agreement, dated the 23rd of March, 1900, was entered into between the vendors and the company, whereby the vendors purported to sell their business and patent rights to the company for £25,000, payable as to £3,000 in cash and as to £22,000 by the allotment to the vendors or their nominees of 2,200 fully-paid shares. This agreement was duly registered, and the shares were allotted in accordance with the antecedent arrangement.

In November, 1901, the company went into liquidation, and a summons was taken out by the liquidator against the four directors—viz., R. I. and three of the shipowners, for a declaration that the three shipowner directors were liable as contributories for the full amount of the fully paid-up shares which they had received, and, in the alternative, for a declaration that all four directors were liable for misfeasance.

Held, that the contract of the 23rd of March, 1900, carried out the true previous intention of the parties; that it was a genuine contract of sale as between the vendors and the company; that the director allottees received these shares as nominees under the rights of the vendors; and consequently that the liquidator could not make them liable as contributories.

Held, further, that the directors were not liable on the ground of misfeasance, all the shareholders having known of and acquiesced in the transaction.

Judgment of Kekewich, J. (*ante*, p. 378, [1903] 1 Ch. 674), reversed.—INNES, RE, *C.A.*, 514; [1903] 2 Ch. 254; 72 L. J. Ch. 643.

33. *Winding up—Costs—Appeal—More than one set of contributories supporting respondent in court below—One set of costs.*—An appellant from an order on a winding-up petition, when the respondent has been supported in the court below by more than one set of contributories, if he does not wish to disturb that part of the order which gives one set of costs amongst those persons, should give notice by letters to the creditors or shareholders in question that an appeal is pending which, however, does not affect the order made in the court below, so far as their costs are concerned. If creditors or shareholders, after receiving such a letter, appear on, and successfully oppose, the appeal, they will only be entitled to one set of costs among them, the rule in the court below applying in such a case in the Court of Appeal.—IBO INVESTMENT TRUST, RE, *C.A.*, 593; 72 L. J. Ch. 661; 88 L. T. 752.

34. *Winding up—Costs—Withdrawal of petition—Costs of persons appearing to support or oppose—Companies Winding-up Rules, April*, 1892, *r.* 20.—When the petitioner for a winding-up order elects at the hearing to withdraw his petition, he will be ordered to pay the costs of those persons who have given notice, within the time limited by the Companies Winding-up Rules, April, 1902, r. 20, of their intention to appear—one set of costs to those supporting, and another set to those opposing.—BRITISH ELECTRIC STREET TRAMWAYS, RE, *Ch.D. Buckley J.*; [1903] 1 Ch. 725; 72 L. J. Ch. 386.

35. *Winding up—Liquidator's statement of account—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *and the Companies Winding-up Rules*, 1890 *and* 1891—*Power to compromise action—Extraordinary resolution—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 160.—A compromise by the liquidator of a company in voluntary liquidation of a claim by the company against a third party is, if not set aside, binding on the company, although entered into by the liquidator without obtaining the sanction of an extraordinary resolution of the company under section 160 of the Companies Act, 1862.—CYCLEMAKERS' CO-OPERATIVE SUPPLY CO. *v.* SIMS, *K.B.D.*; [1903] 1 K. B. 477; 72 L. J. K. B. 160; 88 L. T. 360.

36. *Winding up—Right to present a petition—Equitable assignee.*—The equitable assignee of a debt can present a winding-up petition as a creditor under section 82 of the Companies Act, 1862.

*Ex parte Cooper, In re Baillie*, L. R. 20 Eq. 762, applied.

*Dictum* of Cotton, L.J., in *In re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99, 104, followed.—MONTGOMERY MOORE SHIP COLLISION DOORS SYNDICATE (LIMITED), RE, *Ch.D. Byrne, J.*; 72 L. J. Ch. 624.

37. *Winding up—Stay of proceedings—Discretion of court—Application of bankruptcy rule—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 89.—In exercising its discretionary power to order a stay of proceedings in a winding up, the court (as in the analogous case of rescinding a receiving order or annulling an adjudication in bankruptcy) will not merely regard the wishes of the creditors and shareholders, but will also consider whether an exercise of that discretion is conducive or detrimental to commercial morality and the interests of the public at large.—TELESCRIPTOR SYNDICATE, RE, *Ch D. Buckley, J.*, 409; [1903] 2 Ch. 174; 72 L. J. Ch. 480; 88 L. T. 389.

38. *Winding up—Voluntary winding up—Scheme of arrangement involving reduction of capital—Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104).—A reduction of capital involved by a scheme of arrangement must be carried out in accordance with the statutes specially dealing with reduction of capital.—COOPER, COOPER, & JOHNSON, RE, *Ch.D. Byrne, J.*, 314.

COMPROMISE.—See Practice, 6; Solicitor, 2.

CONFLICT OF LAWS—

1. *Intestate—Domicil of origin—Domicil of choice—Distribution*—A testatrix, born in Malta died in Baden, leaving part of her personal property undisposed of by her will. She was domiciled in Baden at the date of her will and up to her death, but was not naturalized there. According to the law of Baden the legal succession to the property which the testatrix had not disposed of by will was governed solely by the law of the country of which she was a subject at the time of her death.

Held, that the undisposed-of personal estate was to be distributed among the persons who would be entitled thereto according to Maltese law.—JOHNSON, RE., ROBERTS *v.* ATTORNEY-GENERAL, *Ch.D. Farwell, J.*, 444; [1903] 1 Ch. 821; 88 L. T. 161.

2. Lex loci contractus—*Contract made according to the laws of the country of the contract, and intended to be performed there—Invalid in England—Right to enforce such contract in England*—K., the plaintiff, handed to one Emile Gerson, the husband of the defendant, in France a sum of money to be used in buying skins to be dressed and sold for their joint benefit. Gerson appropriated part of the money to his own use, instead of applying it to buy skins. His conduct was criminal in France, and plaintiff threatened a prosecution. In order to avoid a prosecution the defendant, by an agreement in writing made in France, agreed to pay to the plaintiff by instalments out of her own money the amount of the defalcation on the express terms of the plaintiff abstaining from prosecuting. This agreement was intended to be governed by the French law and to be wholly performed in France. By the French law this agreement was not invalid. The defendant being temporarily resident in England, and having property here, action was brought against her here to recover instalments due and payable under the agreement.

Held, that the contract, being valid by the law of the country in which it was made and intended to be performed, though invalid in England as being contrary to public policy, was enforceable here.—KAUFMAN *v.* GERSON, *K B.D.*, 683; [1903] 2 K. B. 114; 72 L. J. K. B. 596; 88 L. T. 691.

3. *Power of appointment—Execution—Domiciled foreigner—Will valid by law of domicil but invalid by English law—General bequest—Construction—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 27.—Although a will executing a power takes effect as operating on the instrument containing the power, and must be read as if it was interpolated into that instrument, yet being a will, it must, in the absence of a contrary intention, be construed according to the law of the domicil of the testator. In such construction, if the domicil of a testator be foreign, section 27 of the Wills Act, which is a rule for the construction only of wills of which an English court is the court of construction, has no place, in the absence of any express direction that the will is to be construed according to English law.

A French subject domiciled in France, having a power of appointment over a fund under an English instrument, left all her property to her husband by a will which was valid according to French, but invalid according to English law. The will contained no express reference to the power, and no express direction that it was to be construed according to English law. Administration with the will annexed was granted in England.

Held, that the power had not been exercised.

*In re Price*, 48 W. R. 373, [1900] 1 Ch. 442, distinguished.—D'ESTE'S SETTLEMENT, RE, POULTER *v.* D'ESTE, *Ch.D. Buckley, J.*, 552; [1903] 1 Ch. 898; 72 L. J. Ch. 305; 88 L. T. 384.

4. *Scotch law—Scotch marriage contract made in Scotland*—Lex loci—*Life interest by way of alimentary provision—Inalienable life interest in domiciled Englishman—Fraud upon creditors—Public policy.*—By a Scotch marriage contract a domiciled Scotchwoman settled property (including what by the law of Scotland is for certain purposes deemed to be Scotch real estate) upon trust (among other purposes) to pay the income to F., her intended husband, a domiciled Englishman, for his life, and the contract contained a declaration "that all payments to the said F. should be strictly alimentary, and should not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors." The trustees of the settlement were English, and the trusts had been administered in England. F. had purported to charge his life estate.

Held, that even if the construction and effect of the contract was to be determined by Scotch law, yet its validity and operation must be governed by the law of England, and that an inalienable life estate to a man being contrary and repugnant to the public policy of English law, F. was not entitled to payment of the income as against his incumbrancers.—FITZGERALD, RE, SURMAN *v.* FITZGERALD, *Ch.D. Joyce, J.*, 586; [1903] 1 Ch. 933; 72 L. J. Ch 430; 88 L. T. 326.

CONTRACT:—

1. *Agreement to participate in profits of business for a specific period—Sale of business within such period—Implied stipulation not to sell—Breach.*—The plaintiffs brought an action for the price of goods sold and delivered. The defendants admitted the claim, but counterclaimed for damages in respect of an alleged breach of contract by the plaintiffs under the following circumstance. In March, 1902, the plaintiffs entered into an agreement with the defendants whereby they agreed to participate with the defendants, for the period of four years from that date, in the profits of the plaintiff company's business on the goods sold for them by the defendants. In the course of the same year the plaintiffs sold their goodwill and business to another company. The defendants alleged that the plaintiffs had thereby committed a breach of contract, and they claimed damages in respect of such breach, on the ground that, owing to such

sale, they, the defendants, were thereby prevented from participating in the profits promised by the plaintiffs for the remainder of the four years.

Held, that the plaintiffs had by the sale of their business committed a breach of contract, as there was an implied stipulation that they would continue to carry on their business for four years.

Test in *Hamlyn* v. *Wood*, 40 W. R. 24, [1891] 2 Q. B. 488, applied.—OGDENS *v.* NELSON, *K.B.D.*, 696; [1903] 2 K. B. 287.

2. *Assignability—Obligation performable by deputy—Action by assignor and assignee.*—By a contract between T., the owner of a chalk quarry, and a cement manufacturing company, who were the owners and occupiers of neighbouring land, it was agreed that T. would supply and the company would take and buy at a specified price 750 tons of chalk a week, and so much more as the company should require for the manufacture of cement on their said land. The contract was to last for fifty years. Subsequently the company went into liquidation for the purpose of being amalgamated with a new company with a very much larger capital, and all the property and business of the old company, and the benefit of its trade contracts, were assigned to the new company. The deed of assignment contained a covenant by the new company to indemnify the old company against all liabilities on trade contracts. In an action by the old company and the new company against T.,

Held, that, as there was nothing personal to the old company in receiving or paying for chalk, or in the requirements for the manufacture of cement on the said land, the contract remained enforceable against T., and he was bound to supply chalk to the new company at the price specified in the contract.

Decision of Mathew, J. ([1901] 2 K. B. 811, 50 W. R. Dig. 38), reversed.—TOLHURST *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (LIMITED), *C.A.*, 81; [1902] 2 K. B. 660; 72 L. J. K. B. 949; 87 L. T. 465.

3. *Author and publisher—Agreement to edit—"Cheaper or other form of edition"—Parol agreement—Damages for breach.*—An author and publisher entered into an agreement in 1894 under which the author was to edit the whole of the plays of Shakespeare (to be called the Temple Shakespeare), and was to write an introduction, notes, and glossary for each play. The publisher was to pay the author a royalty, and the copyright was vested in the publisher. Clause 10 provided: "In the event of a cheaper or other form of edition of any or either of the plays being thought advisable by the publisher, it shall form the subject of an agreement with the author on similar *pro rata* terms to those embodied herein." The publication was very successful, and in 1899 a large Temple Shakespeare was produced, the notes and glossary being identical with those in smaller editions, but illustrations were added; a royalty was paid to the author upon this edition. Discussion took place as to the production of a Shakespeare for schools, and the author stated that in March, 1901, a definite agreement was made as to the royalty to be paid him in respect of this edition, and denied that he ever failed or neglected or threatened to abandon its production. The publisher produced a Temple Shakespeare for schools with notes, introduction, and glossary written by a person other than the author. The author applied for an injunction restraining the issue of this edition, or, in the alternative, for damages for breach of the agreement.

Held, that there had been an agreement that the author should be paid a royalty on the school Shakespeare, and that he had always been ready to perform the work, and that the publisher had committed a breach of the agreement of 1894, supplemented by the verbal agreement of 1901; that it was not a case for an injunction, but that there must be a reference to chambers to assess the damages.—GOLLANCZ *v.* DENT, *Ch.D. Swinfen Eady, J.*; 88 L. T. 358.

4. *Bailee of goods—Owner's risk clause—Act intentionally done—No knowledge that damage would result—Liability.*—Cheese was received by the defendants "to be stored at owner's risk," and the defendants were not to be responsible for damage or loss caused by certain specified matters or "from any other cause whatever." The cheese was kept at too low a temperature, and the jury found there was want of skill.

Held, that there was nothing to do away with the owner's risk clause, for although the act was intentionally done that did not amount to wilful misconduct, and so the defendants were not liable.—CORDEY *v.* CARDIFF PURE ICE CO., *C.A.*; 88 L. T. 192.

5. *Breach — Several provisions — Liquidated damages—Penalty.*—By an agreement W. agreed to purchase a public-house of B. and the fittings, and to take the stock to a certain amount and pay for the same; B. agreed to assign the licences and pay certain rates and taxes and give possession, and not carry on the business of a licensed victualler within one mile, W. further agreeing to pay the purchase-money and produce references.

It was further provided "that if either of the said parties should neglect to perform or refuse to comply with any part of this agreement" the party refusing or neglecting should pay the other £25 as liquidated damages.

Held, that this was a penalty.—BRADLEY *v.* WALSH, *K.B.D.*; 88 L. T. 737.

6. *Construction of works—Plant and materials on ground—Mortgage by contractor—Default in completion of works—Rights of building owner.*—The clause in an ordinary contract for the construction of works upon lands, that the plant and materials brought upon the land to be used for the purposes of construction shall be considered to be the property of the owner of the land, must, in the absence of any stipulation in the contract incompatible with such construction, be construed as immediately vesting in such owner all plant and materials so brought upon the land, subject to a right of the contractor, upon his completion of the works, to have the plant returned to him.—HART *v.* PORTHGAIN HARBOUR CO., *Farwell, J.*, 461; [1903] 1 Ch. 690; 72 L. J. Ch. 426; 88 L. T. 341.

7. *Damages—Negligence—Plans negligently drawn by architect.*—The plaintiffs, lessees of a piece of land, intending to erect a factory thereon, employed the defendant, an architect, to prepare plans. The architect, acting on unauthorized and incorrect information as to the dimensions of the building site, drew up plans and neglected to measure the site himself. The plaintiffs paid for the plans, believing them to be correct, but owing to financial difficulties were unable to proceed with the building operations, and eventually sold their interest in the site, when it was discovered that the plans were incorrect. The plaintiffs thereupon sued the defendant, claiming the return of the money paid as having been paid upon a consideration which had wholly failed, or, in the alternative, damages for negligence.

Held, that the consideration had not wholly failed, but that the plaintiffs were entitled to nominal damages in respect of the defendant's negligence.—COLUMBUS CO. *v.* CLOWES, *K.B.D.*, 366; [1903] 1 K. B. 244; 72 L. J. K. B. 330.

8. *Implied condition—Contract to take room to view procession—Purpose incorporated into contract—Postponement of procession—Impossibility of performance at time of making contract—Amended contract for postponed procession—Right to recover back money paid for room.*—On the 24th of June, 1902, the plaintiff agreed to take and the defendant agreed to let to the plaintiff a room for the purpose of viewing the Coronation procession on the 27th of June, upon the condition (amongst others) that the room should be used by the plaintiff only for the purpose of viewing the procession on that day, and the plaintiff agreed to take the room on those conditions for the purpose and period specified, and he then paid his money for the letting of the room. There was no provision in the contract for the return of the money if the procession did not take place. Immediately afterwards the plaintiff saw an announcement in a newspaper that the procession had been postponed, and he then went back to the defendant and showed him the announcement. The defendant replied that the postponement was only for a day or two, and the defendant then at the plaintiff's request wrote and signed under the conditions a note that if the procession should be postponed the plaintiff was to have the use of the room on the same conditions as arranged for the 27th of June. At the time the contract was made the condition of the King had been ascertained to be such as to make the procession impossible, and the procession was ultimately abandoned. In an action by the plaintiff to recover back the money paid by him for the room,

Held, as to the contract in its original form, that as the purpose for which the contract was made—namely, the viewing of the procession—was incorporated into and became part of the contract and the substance of it, the contract must be taken as subject to the implied condition that if the intention to hold the procession were abandoned neither party should be bound by the contract, and consequently, as the purpose was, at the time the contract was made, impossible of performance, the contract was inoperative, and the plaintiff upon that ground would have been entitled to recover back the money paid by him if no subsequent arrangement had been made.

But held, further, that the effect of the subsequent arrangement was to make a new contract between the parties in respect of a postponed procession into which no such implied condition could be imported, and as this postponed procession was not impossible at the time the arrangement was made, the money must remain in the hands of the receiver, and the plaintiff was not entitled to recover it back.—CLARK *v.* LINDSAY, *K.B.D.*; 88 L. T. 198.

9. *Impossibility of performance—Charter of ship for review and cruise—Review abandoned.*—A ship was chartered for the 28th of June "for the purposes of viewing the Naval Review and for a day's cruise round the fleet; also on Sunday, the 29th of June, for a similar purpose. . . . Price £250, payable £50 down, balance before ship leaves H. B." On the Naval Review being abandoned the plaintiffs telegraphed to the defendant: "What about *C.*? She is ready to start six to-morrow. Waiting cash." Receiving no reply, they continued *C.* in her ordinary sailings.

Held, in an action to recover £200, the balance under the agreement, that the plaintiffs could not recover.—HERNE BAY STEAMBOAT CO. *v.* HUTTON, *K.B.D.*; 88 L. T. 269.

10. *Impossibility of performance—Money paid before that event—Right to recover back—Money paid for seats to view Coronation procession.*—Tickets having been purchased for seats to view the Coronation procession on the 27th of June, the money was paid over to the vendors. The Coronation procession did not take place on the 27th of June, owing to the illness of the King, and was abandoned. In actions by the purchasers to recover back the money so paid to the vendors,

Held, that the money could not be recovered back. Where money has been paid under a contract the further performance of which has become impossible owing to the non-existence of the subject-matter of the contract, the contract is not rescinded *ab initio*, but both parties are excused from any further performance under the contract.

*Per* Channell, J.—If the money had been payable by the contract on some day subsequent to the abandonment of the procession, it could not have been recovered. If the money was payable prior to the abandonment it would be the same as if it had been actually paid and could be recovered by action.—BLAKELEY *v.* MULLER, HOBSON *v.* PATTENDEN, *K.B.D.*; 88 L. T. 90.

11. *Personal services—Jockey—Injury—Temporary incapacity—"Failure to procure licence."*—On the 28th of October, 1899, by an agreement the defendant was to have the first claim on the services of the plaintiff as a jockey for the flat-racing seasons 1900, 1901, and 1902, and in case the plaintiff should die "or shall fail to procure a licence during the said term this agreement shall be at an end." On the 14th of November, 1901, the plaintiff was severely injured in an accident while riding. On the 17th of March the flat-racing season commenced for 1902. The plaintiff having in due course applied for his licence, the stewards suggested that he should apply when he was sufficiently recovered so as to be able to ride. On the 14th of April, 1902, he applied again, and received his licence a few days before he was fit to ride, and rode his first race on the 14th of May.

Held, that the incapacity from the effects of the accident to ride for the period from the 13th of March to the 14th of May did not involve such a failure of consideration and such destruction of the substance of the agreement as to bring the agreement to an end.

Held, further, that the plaintiff had not "failed to procure a licence."—LOATES *v.* MAPLE, *K.B.D.*; 88 L. T. 288.

12. *Setting aside on ground of common mistake—Date to which common mistake should be referred—No delay in seeking the aid of the court.*—Although the court is in some cases averse to setting aside a contract after completion upon the ground of common mistake, even where there is a suggestion of fraud, yet the court will set aside such a contract after completion if the plaintiff seeks the aid of the court with promptitude, and if the parties can without difficulty be restored to the position in which they were before the contract.—SCOTT *v.* COULSON, *Kekewich, J.*, 394; affirmed [1903] 2 Ch. 249; 72 L. J. Ch. 600; 88 L. T. 654.

13. *Statute of Frauds—Letters—Offer "subject to agreement stating fully the conditions being prepared and signed"—Specific performance.*—W.'s solicitor wrote on his behalf to M. as follows: "*Re* Mason's

Arms, Dinnington.—We agree to sell the above for £1,775 subject to agreement stating fully the conditions being prepared and signed at our office on Monday, say, at eleven o'clock." The agent of M. replied: "I beg to accept yours of this date *re* Mason's Arms on behalf of Mr. M"

Held, that these two letters did not constitute a contract between the parties. — WATSON *v.* MCALLUM, *Joyce, J.*; 87 L. T. 547.

CONVICT:—

*Administrator of convict's property—Power of sale—Action by convict against administrator—Felony Act,* 1870 (33 & 34 *Vict. c.* 23), *ss.* 12, 17, 20.—The power of sale over the property of a convict conferred, by section 12 of the Felony Act, 1870, on his administrator, is absolute, and is not limited to a power of sale for the purpose of making the payments authorized by the Act. If in regard to any sale of such property the administrator has in fact exercised a discretion, and his conduct has been otherwise *bonâ fide*, there has been a *bonâ fide* sale by him within section 17, and the sale cannot be called in question by the convict.

Decision of Buckley, J. (*ante*, p. 166, [1903] 1 Ch. 90), affirmed.—CARR *v.* ANDERSON, *C.A.*, 465; [1903] 2 Ch. 279; 72 L. J. Ch. 534; 88 L. T. 503.

COPYRIGHT:—

1. *Literary copyright—Encyclopædia—Contributor and publisher—Employment and payment—Ownership of copyright—Separate publication—Copyright Act,* 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18.—In a case where an author agrees with publishers to write for payment articles for an encyclopædia to be published by them, and there is no express agreement as to the ownership of the copyright in the articles, it is not to be inferred as a matter of law from the fact of employment and payment that the employment was on the terms that the copyright should belong to the publishers. And such articles are "separately published" within the meaning of the definition of "book" in section 2 of the Copyright Act, 1842.

So held by Romer and Stirling, L.JJ. (*dissentiente* Vaughan Williams, L.J.).

Held, by Vaughan Williams, L.J., that in the absence of evidence to the contrary the true inference was that the copyright in the articles was to belong to the publisher, and that they were not "separately published."

*Sweet* v. *Benning*, 3 W. R. 519, 16 C. B. 459, discussed.

Decision of Joyce, J. (50 W. R. 24, [1902] 1 Ch. 264), affirmed.—AFLALO *v.* LAWRENCE & BULLEN, *C.A.*, 360; [1903] 1 Ch. 318; 72 L. J. Ch. 107; 87 L. T. 605.

2. *Music—Summary jurisdiction—Evidence that pirated copies were being sold at a private house—Magistrate's order for seizure—Musical (Summary Proceedings) Copyright Act,* 1902 (2 *Ed.* 7, *c.* 15), *ss.* 1, 2.—The words "sold or offered for sale" in section 1 of the Musical (Summary Proceedings) Copyright Act, 1902, are not confined to a sale in a public place.

Therefore where a court of summary jurisdiction is satisfied that pirated copies of a musical work are being sold at a private house it has jurisdiction to make an order in the terms of the section, authorizing a constable to seize such copies without a warrant.

*Semble*, a court of summary jurisdiction has no power under section 1 to issue a search warrant —FRANCIS, RE (No. 2), *K.B.D.*, 698; 88 L. T. 806.

3. *Music—Sale of pirated music—Seizure—Order of magistrate for forfeiture—Necessity of summons before making order—Summary Jurisdiction Acts,* 1848 (11 & 12 *Vict. c.* 43), *s.* 1, *and* 1879 (42 & 43 *Vict. c.* 51), *ss.* 34 *and* 51 (3)—*Musical (Summary Proceedings) Copyright Act,* 1902 (2 *Ed.* 7, *c.* 15), *ss.* 1, 2.—A court of summary jurisdiction has no power under section 2 of the Musical (Summary Proceedings) Copyright Act, 1902, to order the destruction of copies of pirated music seized by a constable when they were being offered for sale, unless the person from whom the copies have been seized has been served with a summons under the Summary Jurisdiction Acts.—FRANCIS, RE (No. 1), *K.B D.*, 267; [1903] 1 K. B. 275; 72 L. J. K. B. 120; 88 L. T. 176.

4. *Photograph—Photograph taken at request of sitter—Implied promise by sitter to pay photographer —Ownership of copyright—Fine Arts Copyright Act,* 1862 (25 & 26 *Vict. c.* 68), *s.* 1.—Where a person has his photograph taken and at the same time expressly or impliedly agrees to pay the photographer for it, the copyright of the photograph is vested in him by section 1 of the Fine Arts Copyright Act, 1862, even though the property in the negative may remain in the photographer.

Observations of Kekewich, J., in *Melville* v. *Mirror of Life Co.*, 73 L. T. Rep. 334, [1895] 2 Ch. 531, commented on.—BOUCAS *v.* COOKE, *C.A.*; [1903] 2 K. B. 227; 88 L. T. 760.

CORPORATION:—

1. *Borough councillor—Disqualification—Bankruptcy—Holding or exercising office*—Quo warranto.—By section 32 of the Bankruptcy Act, 1883, a bankrupt is disqualified not only for election to, but also for holding the office of a borough councillor. Notwithstanding section 87 of the Municipal Corporations Act, 1882, a bankrupt may still by an information in the nature of a *quo warranto* be ousted from holding or exercising the office.—REX *v.* BEER, *K.B D.*; 72 L. J. K. B. 608.

2. *Borough fund—Resolution of owners and ratepayers—Demand of poll, What amounts to—Municipal corporation—Borough Funds Act,* 1872 (35 & 36 *Vict. c.* 91), *s.* 4—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *Sched. III., r.* 6.—A resolution having been declared carried at a meeting of owners and ratepayers, one of the ratepayers present demanded a poll, and another rose and seconded it, "if necessary": the latter was told by the town clerk that it was unnecessary to second the demand, which had been acceded to; the meeting then separated. Subsequently the original demand for a poll was withdrawn by its proposer, and the mayor refused to treat the action of the seconder as a demand of a poll by him. Upon an application by the second ratepayer for a *mandamus* to the mayor,

Held, that the action of the applicant was in substance a demand of a poll by him within the meaning of rule 6 of the schedule.

*Quære*, whether the original demand for a poll could be withdrawn after the close of the meeting. —REX *v.* DOVER (MAYOR OF), *K.B D.*; [1903] 1 K. B. 668; 72 L. J. K. B. 210; 88 L. T. 296.

3. *Contract—Agreement not under seal—Remuneration claimed for services rendered—Contract to pay implied from acceptance of benefit—Local Government Act,* 1894 (56 & 57 *Vict. c.* 73), *s.* 56 (1).—A rural district council employed the plaintiff as engineer in connection with a proposed sewage scheme. The plaintiff performed the services which he was from time to time required to perform, and the council

had the benefit of his services. The contract was not under seal.

Held (reversing the decision of Darling, J.), that the plaintiff was entitled to recover remuneration for the services which he had rendered, although there was no contract under seal, because his services had been accepted by the council, and the whole consideration for payment was therefore executed.

*Clarke* v. *Cuckfield Union* 21 L. J. Q. B. 349, and *Nicholson* v. *Bradfield Union*, 14 W. R. 731, L. R. 1 Q. B. 620, approved and followed.—LAWFORD *v.* BILLERICAY RURAL COUNCIL, *C.A.*, 630; [1903] 1 K. B. 772; 72 L. J. K. B. 554; 88 L. T. 317.

4. *Forged transfer of stock—Innocent transferee—Loss incurred by company—Liability incurred by company—Liability as between company and transferee to bear loss—Sheffield Corporation Act*, 1883 (46 & 47 *Vict. c. lvii.*), *ss.* 27, 29, 30.—The transferee of a forged transfer of corporation stock, innocently and without negligence presented such transfer to the corporation requesting them to register the transfer. The corporation, acting without negligence, accepted and registered the transfer, and in due course issued certificates to the transferee, one of the defendants, as holder and owner of the stock, thereby incurring liability to the real owner whose name had been forged, and in an action subsequently brought against him by the latter, they were ordered to make good the loss sustained by him.

Held, that as between the corporation and the transferee, both innocent parties, the loss incurred by the former in acting on the forged transfer must be borne by the transferee who, although he had acted in good faith and without negligence, had sent the forged transfer to the corporation requesting them to act upon the same.

Opinion of Lindley, J., in *Simm* v. *Anglo-American Telegraph Co.*, 28 W. R. 290, 5 Q. B. D. 188, at p. 195, as to the liability of the transferee, dissented from.—SHEFFIELD CORPORATION *v.* BARCLAY, *K.B.D.*, 204; [1903] 1 K. B. 1; 72 L. J. K. B. 8; 87 L. T. 479.

5. *Statutory powers—Provisional order—Electric lighting—"Public duty"—Negligence—Action—Acts done in execution of statute—Judgment—Costs—"Solicitor and client"—Appeal—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).—By the Public Authorities Protection Act, 1893, s. 1 (*b*), judgment for the defendant in an action brought in respect of acts or alleged defaults, in execution of an Act of Parliament, "or of any public duty or authority," carries costs as between solicitor and client.

Held, that the protection of the section extended to a municipal corporation acting under the powers conferred upon it by a provisional electric lighting order, duly confirmed by statute.

The enactment does not apply to appeals.—JEREMIAH AMBLER & SONS (LIMITED) *v.* BRADFORD CORPORATION, *C.A.*; [1902] 2 Ch. 585; 71 L. J. Ch. 744; 87 L. T. 217.

COSTS.—See County Court, 1, 2; Practice, 7-15; Solicitor, 3-7; Vendor and Purchaser, 5; Will, 35.

COUNTY COURT:—

1. *Costs — Action founded on tort — Detinue — Recovery of goods in specie—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—Section 116 of the County Courts Act, 1888, does not apply to an action of detinue in which the goods claimed are recovered in specie.—DU PASQUIER *v.* CADBURY, JONES, & Co., *C.A.*, 113; [1903] 1 K. B. 104; 72 L. J. K. B. 78; 87 L. T. 519.

2. *Costs—Money paid into court—Plaintiff recovering no more than amount paid in—Costs of particular issues—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 113.—Where money has been paid into court, and the plaintiff recovers no more than the amount paid in, the defendant is entitled to the general costs of the action, but the county court judge has the same power as a judge of the High Court to give the plaintiff the costs of any issue on which he has succeeded. — DUNN *v.* SOUTH-EASTERN RAILWAY CO., *K.B.D.*, 427; [1903] 1 K. B. 358; 72 L. J. K. B. 127; 88 L. T. 60.

3. *Execution—Seizure of goods not the property of judgment debtor—No claim made by owner—Sale—Title of purchaser—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 154.—Where goods are taken in execution by the bailiff of a county court, and, no claim having been made to them, are sold by the bailiff, and it subsequently appears that they were not the property of the judgment debtor at the time of the seizure or sale, the purchaser does not acquire a good title to the goods as against the real owner.

*Goodlock* v. *Cousins*, [1897] 1 Q. B. 348, 558, distinguished.—CRANE & SONS *v.* ORMEROD, *K.B.D.*; [1903] 2 K. B. 37; 72 L. J. K. B. 507.

4. *Jurisdiction—Power of judge to grant injunction only—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 89—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 56.—A county court judge has jurisdiction to grant an injunction where no damages are claimed, provided that the claim is one in which the damages would, if claimed, have been under £50.—STILES *v.* ECCLESTON, *K.B.D.*, 411; [1903] 1 K. B. 544; 72 L. J. K. B. 256; 88 L. T. 294.

5. *Practice—Joint judgment—Order for committal against one defendant—Power to issue further summons—County Court Rules*, 1889, *r.* 25.—The power of the county court judge to issue a committal order is a new jurisdiction in which he has to consider all the facts of the case, and is not analagous to the old writ of *fi. fa.* It is therefore within his jurisdiction to give leave to issue a judgment summons against a debtor, even though one has been already issued against a co-defendant to which no return has been made.—REX. *v.* BIRMINGHAM COUNTY COURT JUDGE, *K.B.D.*, 75; [1902] 2 K. B. 283; 71 L. J. K. B. 881; 87 L. T. 296.

See Master and Servant, 1.

COVENANT:—

*Restrictive covenant—Covenant running with the land—No land retained by covenantee—Breach after death of covenantee—Right of executor to sue.*—Where a negative or restrictive covenant is imposed upon the user of land it will not be enforced against an owner not a party to the deed containing the covenant, if such covenant is merely personal and collateral to a conveyance of land.

In 1868 F. sold to X., a land company, all his land situate at a certain place. X. covenanted for themselves, their successors and assigns, with F., his heirs, executors, and administrators, that they would not build a beershop on a certain portion of the land sold. F. died in 1884, and X. conveyed the portion of land to which the restrictive covenant applied, with notice of that covenant, to B. In 1902 B. commenced to build in defiance of the covenant.

Held, in an action brought by the sole devisee and administratrix, with the will annexed of F., to

restrain B. from building, that no such action could be maintained.

*Tulk* v. *Moxhay*, 2 Ph. 774, considered.—FORMBY *v.* BARKER, *C.A.*, 646.

See Local Government, 8; Vendor and Purchaser, 6.

CRIMINAL LAW:—

1. *Conspiracy—Joint indictment of three persons—Plea of "Guilty" by one—Verdict of "Not Guilty" in respect of the others—Withdrawal of plea before sentence—Jurisdiction to allow withdrawal—Crown Cases Act*, 1848 (11 & 12 *Vict. c.* 78), *s.* 1.—The appellant and two other persons were jointly charged on an indictment which contained five counts for obtaining money by false pretences, and a sixth count for conspiring to defraud the Thames Conservators. The sixth count did not allege that there were any other or unknown parties to the conspiracy. All three defendants were indicted in one arraignment. All pleaded "Not Guilty" to the first five counts. The appellant pleaded "Guilty" to the sixth count; the other defendants plead "Not Guilty" to the sixth count as well as to the first five counts. The jury returned a verdict of "Not Guilty" in favour of the appellant on the first five counts, and the trial of the other defendants proceeded, and the appellant was called as a witness on behalf of the prosecution. The jury found the two defendants "Not Guilty" on all the six counts. The appellant thereupon requested to be allowed to withdraw his plea of "Guilty" on the sixth count. The court of quarter sessions held they had no jurisdiction to allow him the withdrawal, and convicted him.

Held, on appeal, that the judgment passed against the appellant was bad, and could not stand.

Held, further, that the court of quarter sessions had jurisdiction to allow the appellant to withdraw the plea of "Guilty" and plead "Not Guilty" before passing sentence upon him.

Held, further, that a question arising on a plea of "Guilty" is a question arising "on the trial," within the meaning of section 1 of the Crown Cases Act, 1848, and that, therefore, the Court for Crown Cases had power under section 2 of that Act to entertain a case reserving that question, and in the exercise of such power to make such order as justice may require.

*Reg.* v. *Brown*, 38 W. R. 95, 24 Q. B. D. 357, followed.

*Reg.* v. *Clark*, 15 W. R. 48, L. R. 1 C. C. 54, disapproved.—REX *v.* PLUMMER, *C.C.R.*, 137; [1902] 2 K. B. 339; 71 L. J. K. B. 805; 86 L. T. 836.

2. *Conspiracy—Trades union—Intimidation—Conviction insufficiently describing offence—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 7—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 39, *sub-section* 1.—Notwithstanding section 39, sub-section 1, of the Summary Jurisdiction Act, 1879, it is still obligatory to state on the face of a conviction the facts which are necessary ingredients of the offence.

By section 7 of the Conspiracy and Protection of Property Act, 1875, a person "who with a view to compel any other person to abstain from doing . . . any act which such other person has a legal right to do . . . wrongfully and without legal authority . . . injures his property," commits an offence.

The appellant was convicted under this section, the conviction stating that on the 4th of February, 1902, he, "with a view to compel" the respondent "to abstain from working for Messrs. John Bowes & Partners (Limited), at Felling Colliery, which he had a legal right to do, wrongfully and without legal authority did injure the property" of the respondent.

Held, that the conviction was not bad for not sufficiently stating the precise work which the respondent was compelled to abstain from doing; but that it was bad for not specifically stating what was the property injured.

*Reg.* v. *McKenzie*, 41 W. R. 144, [1892] 2 Q. B. 519, and *Ex parte Wilkins*, 64 L. J. M. C. 221, 43 W. R. Dig. 57, considered.—SMITH *v.* MOODY, *K.B.D.*, 252; [1903] 1 K. B. 56; 72 L. J. K. B. 43; 87 L. T. 682.

3. *Penalties—Informer—Discretion of magistrate to deprive informer of portion of penalty—Metropolitan Police Courts Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 34—*Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 9.—Notwithstanding section 9 of the Betting Act, 1853, which says that one-half of every pecuniary penalty which shall be adjudged to be paid under that Act shall be paid to the informer, a Metropolitan police magistrate has, under section 34 of the Metropolitan Police Courts Act, 1839, a discretion to deprive an informer in proceedings under the Betting Act, 1853, of any share in the penalty imposed under that Act, even though the informer has not been guilty of any corrupt practice.—HAWKE *v.* MACKENZIE (No. 3), *K.B.D.*, 239; [1902] 2 K. B. 234; 71 L. J. K. B. 570; 87 L. T. 131.

4. *Sale of intoxicating liquor to child under fourteen—Delivery in vessel improperly corked and sealed—Intoxicating Liquor (Sale to Children) Act*, 1901 (1 *Ed.* 7, *c.* 27), *ss.* 2, 5.—Where the holder of a licence to sell intoxicating liquor sells or delivers, save at the residence or working place of the purchaser, any such liquor to a child under the age of fourteen years for consumption by any person on or off the premises in a vessel not corked and sealed as required by the Intoxicating Liquors (Sale to Children) Act, 1901, he is guity of an offence under section 2 of that Act, notwithstanding that at the time he sold and delivered such liquor he honestly believed that the vessel was properly corked and sealed in accordance with the requirements of the Act.—BROOKS *v.* MASON, *K.B.D.*, 224; [1902] 2 K. B. 743; 72 L. J. K. B. 19; 88 L. T. 24.

5. *Sale of intoxicating liquor to children—Vessel not properly sealed—Evidence—Gummed paper label—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 *Ed.* 7, *c.* 27), *s.* 2.—The appellant was charged under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, with selling beer to a child under fourteen, the beer not being sold in a sealed vessel. It was proved that a gummed paper label was affixed over the screw stopper of the bottle, extending about an inch down two sides of the neck of the bottle. The label was dry at the time of sale, but by moistening the label with the tongue and so damping the gum the label could be removed without its being torn. The justices found that the bottle was not sealed as required by the Act, and convicted the appellant.

Held, that there was evidence to support the finding of the justices.—MITCHELL *v.* CRAWSHAW, *K.B.D.*; [1903] 1 K. B. 701; 72 L. J. K. B. 389; 88 L. T. 463.

6. *Summary jurisdiction — Prosecution—Unlawfully killing house pigeon—Right of any person other than owner to prosecute—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 23.—The right to prosecute under section 23 of the Larceny Act, 1861, for unlawfully and willfully killing a house pigeon under such circumstances as do not amount to larceny at com-

mon law, is not limited to the owner of the pigeon or the person aggrieved, and it is competent to any person to prosecute for an offence committed under that section, even though compensation has been paid to the owner and the owner is satisfied with such compensation.—SMITH *v.* DEAR, *K.B.D.*; 88 L. T. 664.

7. *Treason—Procedure—Defect in indictment—Power to quash—Nationality—Change in time of war—Adhering to the King's enemies in the realm or elsewhere—Statute of Treasons* (25 *Ed.* 3, *c.* 7)—*Naturalization Act*, 1870 (33 *&* 34 *Vict. c.* 14), *ss.* 6 *and* 15.—The prisoner, a British subject, went to the Transvaal and there signed a declaration declaring his willingness to take up arms against Great Britain, and also took the oath of allegiance to the Transvaal Republic. He was then naturalized there, and fought against the British forces. He was indicted for treason under 25 Ed. 3, Statute 5, c. 2, on a charge (*inter alia*) adhering to the King's enemies in the realm or elsewhere.

Held, that naturalization in time of war is an illegal act, and confers no rights on anyone, and that the prisoner was not protected by the 6th section of the Naturalization Act, 1870.

Held, further, that it was not necessary that the prisoner should be within the realm in order to support an indictment under the Act of Edward III.

Held, also, that in cases of treason it is not usual to quash the indictment, but the prisoner can proceed by way of motion in arrest of judgment.—REX *v.* LYNCH, *K.B.D.*, 619; [1903] 1 K. B. 444; 72 L. J. K. B. 167; 88 L. T. 26.

See also Extradition, 1; Gaming, 1-5; Justices, 1; Licensing Law, 6, 7.

DISTRESS—

*Distress—Sale—Property in goods distrained*—2 *W. & M., Sess.* 1, *c.* 5, *s.* 2.—A landlord distrained upon premises for rent due, and seized amongst other articles, a sewing machine which had been hired by the tenant. The goods were sold by auction, and at the sale the machine was bought in by the landlord's agent. The owners of the machine then seized it. In an action for conversion,

Held, that a sale to be valid must be a sale to third parties, and that the buying in by the landlord did not change the property in the sewing machine.

*King* v. *England*, 4 B. & S. 782, followed.—MOORE, NETTLEFOLD, & CO. *v.* SINGER MANUFACTURING CO., *K.B D.* 699; [1903] 2 K. B. 168; 72 L. J. K. B. 577; 88 L. T. 739.

DISTRIBUTIONS, STATUTE of—

*Administration—Inoperative will—Intestacy—Advances to children—Hotchpot—Statute of Distributions* (22 *&* 23 *Car.* 2, *c.* 10 *s.* 5—1 *Will.* 4, *c.* 40.—Where a will has become inoperative by reason of the sole executor and universal devisee and legatee dying in the life of the testator, there is a intestacy within section 5 of the Statute of Distributions, and the provisions of that statute as to children sharing in the residue bringing their advances into hotchpot apply.

Decision of Buckley, J. (50 W. R. 91), affirmed.—FORD, RE, FORD *v.* FORD, *C.A.*, 20; [1902] 2 Ch. 605; 71 L. J. Ch. 778; 87 L. T. 113.

DIVORCE:—

1. *Condonation—Adultery—Desertion—Revival—Decree of dissolution of marriage.*—Desertion for two years without reasonable excuse revives condoned adultery.

Where a husband was guilty of incestuous adultery, which was condoned by the wife, and he was afterwards guilty of desertion:—

Held, that the desertion revived the condoned adultery, and that the wife was entitled to a decree dissolving her marriage.—HOUGHTON *v.* HOUGHTON, *P.D. & Ad.D.*; [1903] P. 150; 72 L. J. P. 31.

2. *Maintenance—Husband's petition—Permanent alimony for wife—State of wife's health and other circumstances—Discretion of court—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 32—The court has an absolute discretion under section 32 of the Matrimonial Causes Act, 1857, as to ordering the husband to grant permanent alimony to his wife on a decree for dissolution of the marriage, and may suspend the making absolute of the decree until the husband makes provision for her if the wife is in ill-health and cannot support herself, even though she be the guilty party and his own conduct be irreproachable, and though he has derived no pecuniary benefit from the marriage and has obtained no damages from the co-respondent.

*Robertson* v. *Robertson*, 31 W. R. 652, 9 P. D. 94, discussed.—ASHCROFT *v.* ASHCROFT, *C.A.*, 292; [1902] P. 270; 71 L. J. P. 125; 87 L. T. 229.

3. *Maintenance—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 32.—The court has no power under section 32 of the Matrimonial Causes Act, 1857, to order a lump sum to be paid to the petitioner for maintenance.—TWENTYMAN *v.* TWENTYMAN, *P.D. & Ad.D.*, 575; [1903] P. 82; 72 L. J. P. 36; 88 L. T. 571.

4. *Nullity of marriage—Decree—Variation of settlements.*—After a decree absolute had been obtained in a suit for nullity of marriage on the ground of the incapacity of the husband, the court was of opinion that all points affecting the antenuptial settlement of the parties should be dealt with finally and at once, even though it was not decided whether such a settlement came to an end by reason of a decree absolute. It was ordered that the interest of the husband (respondent) in the fund settled by the wife should be extinguished, and that the fund settled by the husband should be retransferred to him after payment of the costs of the petitioner and the trustees of the settlement.—ATTWOOD *v.* ATTWOOD, *P.D. & Ad.D.*; [1903] P. 7; 71 L. J. P. 129; 87 L. T. 750.

5. *Order—Mistake—Power of court to rectify—Nullity of marriage.*—Where a mistake has been made in drawing up an order the court or a judge has power to alter it, even where it is under appeal and though the request for alteration be made by the party who has given notice of appeal against the order as drawn up.—E. *v.* E., *P.D. & Ad.D.*; [1903] P. 88; 72 L. J. P. 44; 88 L. T. 570.

6. *Practice—Act on petition—Mode of trial—Jury—Discretion of court.*—Notwithstanding rule 61 of the Divorce Court Rules, 1865, the court has a discretion whether an act on petition shall or not be tried with a jury.—LÖWENFELD *v.* LÖWENFELD, *C.A.*; [1903] P. 177.

7. *Practice—Consolidated suits for judicial separation and dissolution—Power to hear* in camerâ.—The court possesses inherent jurisdiction to order any case to be heard *in camerâ*.

In a suit for judicial separation by a wife, the particulars in which disclosed allegations of filthy practices, but in which no suggestion was made of sodomy or bestiality, the court, notwithstanding the fact that with the wife's suit had been consolidated a suit by the husband for dissolution of the marriage on the ground of the wife's adultery with the co-respondent, ordered, with the consent

of all the parties, that the case should be heard *in camerâ* by a judge sitting with a special jury.—D. *v.* D., *P.D. & Ad.D.*; [1903] P. 144; 72 L. J. P. 51; 88 L. T. 573.

8. *Practice—Husband's petition—Wife's adultery—Passive acquiescence on husband's part—Conduct conducing to adultery—Refusal of decree.*—Where, in a petition for divorce by the husband on the ground of his wife's adultery, it appeared that he had taken no steps beyond mere verbal remonstrances to terminate a course of conduct on the part of his wife and the co-respondent, which, if it did not bring about actual adultery at the time, eventually resulted in it,

Held, that the petitioner was not entitled to relief, and that the petition should be dismissed.—ROBINSON *v.* ROBINSON, *P.D. & Ad.D.*; [1903] P. 155.

9. *Practice—Intervener's costs.*—Where the respondent did not deny at the trial his adultery with a woman, who, on learning that he was not going to deny the charge, obtained leave to intervene, and the petition as against her was dismissed,

The court held that the intervener ought to be placed in the best possible position to obtain the costs of her intervention, and that the costs of it ought to fall upon the respondent as well as the petitioner.—WADE *v.* WADE, *P.D. & Ad.D.*, 464; [1903] P. 16; 72 L. J. P. 1; 87 L. T. 751.

10. *Practice—Pleading—Custody of children—Paternity.*—If a wife, respondent in a suit for dissolution of marriage, wishes to raise any question as to the paternity of any child or children whose custody is claimed by the husband (petitioner), she must file an answer in the suit specifically raising the question as to the paternity of such child or children; and, unless she so plead, she will not be allowed at the hearing to raise any question as to the paternity, in opposition to her husband's application for custody of such child or children.—GORDON *v.* GORDON & BELL, *P.D. & Ad.D.*; [1903] P. 92; 72 L. J. P. 34; 88 L. T. 573.

**EASEMENT:—**

1. *Ancient lights—Consent or agreement—Window—Skylight—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 3.—In 1873 the predecessor in title of the plaintiff erected a conservatory abutting on the defendant's property, and entered into an agreement with the defendant's predecessor in title whereby he agreed to pay one shilling a year to defendant's predecessor for allowing the window of his conservatory to overlook and open on to the defendant's property. The sloping top of the conservatory was of glazed glass, as also was the whole of the vertical side adjoining the defendant's property above a few feet from the ground. Portions of the glazed side of the conservatory were movable, so that when opened they overhung the defendant's property. The yearly rent was duly paid until 1888, when the conservatory was converted into a passage or corridor, the sloping top of the conservatory being retained and giving light to and forming the roof of the corridor. The defendant erected certain buildings which obstructed the access of light to the corridor through the glazed roof. The plaintiff brought an action for an injunction and damages.

Held, that the word "window" in the agreement referred to the sloping roof of the conservatory as well as the vertical side. Consequently the light was enjoyed only by virtue of the said agreement, which was a consent or agreement within the meaning of section 3 of the Prescription Act, and therefore the action failed.

Decision of Joyce, J. (50 W. R. 472), affirmed.—EASTON *v.* ISTED, *C.A.*, 245; [1903] 1 Ch. 405; 72 L. J. Ch. 189; 87 L. T. 705.

2. *Church way for inhabitants of parish—Custom—Prescription—Trespass—Mandatory injunction.*—The regular usage for over twenty years of a church way by the inhabitants of a parish is sufficient to warrant the finding of the existence of an immemorial custom, and, in the absence of proper evidence limiting such usage to a particular class of the parishioners by virtue of a manorial custom or otherwise, the church way will be deemed to be for the benefit of the inhabitants of the parish generally, to enable them to go to their parish church.

Any person within the custom would be entitled to a mandatory injunction to prevent the blocking up of a church way by the owner of the estate through which it passes.—BROOKLEBANK *v.* THOMPSON, *Ch.D. Joyce, J.*; [1903] 2 Ch. 344; 72 L. J. Ch. 626.

3. *Light—Implied grant—Derogation from grant—Title of grantor to adjacent land—Leaseholds—Building agreement—Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 6 (2) (4) (5).—A builder entered into an agreement under which he was to be at liberty to enter upon certain plots of land for the purpose of building houses thereon. On the completion of each house a lease of the premises was to be granted him, but nothing in the agreement was to operate as a demise of any part of the land. A house was built and a lease duly granted to the builder, who assigned it to the plaintiffs. The builder subsequently erected, under the terms of the agreement, another house on an adjoining plot of land which interfered with the lights of the plaintiffs' house.

Held, that, as the builder had no such interest in the adjacent land as would have enabled him at the time of the assignment to the plaintiffs to grant them an easement of light over it, no action could be maintained by the plaintiffs against him on the ground of derogation from the grant of light implied in the assignment to them.—QUICKE *v.* CHAPMAN, *C.A.*, 452; [1903] 1 Ch. 659; 72 L. J. Ch. 373; 88 L. T. 610.

4. *Light—Threatened injury—Injunction or damages—Jurisdiction—Special circumstances—Oppression—Lord Cairns' Act,* 1858 (21 & 22 *Vict. c.* 27), *s.* 2.—The plaintiff was the owner of a cottage possessing ancient lights and adjacent to ground whereon the defendant threatened and intended to erect valuable buildings which would (as the court found) materially obstruct the lights and cause the plaintiff substantial damage. The plaintiff had been unwilling to sell his property for a less sum than the cottage, together with its easement of light, would, having regard to its situation in relation to the adjacent ground, in fact command. In an action for an injunction to restrain the erection of the proposed building,

Held, that the plaintiff's conduct had not been extortionate, and that there were no circumstances such as would induce the court to award him damages in lieu of an injunction.

The *dictum* in *Dreyfus* v. *Peruvian Guano Co.*, 43 Ch. D. 316, 38 W. R. Dig. 63, that there is no jurisdiction to grant damages in lieu of a prohibitory injunction, must be considered binding.—COOPER *v.* LAIDLER, *Ch.D. Buckley, J.*, 539; [1903] 2 Ch. 337; 72 L. J. Ch. 578.

5. *Right of support—Conveyance—Implied reserva-*

*tion—Easement of necessity—Right by prescription.*—In 1861 the sides of a dock were, with the consent of the occupiers of an adjoining wharf, and also of the freeholders of both, supported by tie-rods which passed through the soil of the wharf and were fastened by nuts to piles. In 1877 the wharf was sold to the plaintiffs, but the conveyance contained no reservation of any right of support by the tie-rods. In 1886 the dock was sold to the predecessors in title of the defendants. In 1900 the plaintiffs, on making some excavations on their wharf, came across a number of the tie-rods and claimed the right to remove them, though they still supported the dock. No part of any of the rods was visible, except two nuts on the outside of certain piles on the plaintiffs' wharf, and the plaintiffs' had no knowledge of the existence of the rods until 1900.

Held (Vaughan Williams, L.J., dissenting), that the support of the tie-rods was not such an easement of necessity that a reservation of such a right ought to be implied in the conveyance of 1877; that the rods did not form part of the corporeal structure of the dock so as not to have passed by the conveyance to the plaintiffs of the adjoining property; that the defendants had not acquired any easement against the plaintiffs by prescription, as the enjoyment of it had not been open, and the plaintiffs were not aware of it, and there were no circumstances sufficient to justify the court in holding that the plaintiffs ought to have such knowledge attributed to them, or were put on inquiry, and therefore the plaintiffs were entitled to remove the tie-rods.

*Per* Stirling, L.J.—The "easements of necessity" referred to in the judgments in *Wheeldon* v. *Burrows*, 41 L. T. Rep. 327, 12 Ch. Div. 31, as reserved by implication in favour of a grantor of land are easements without which the property retained cannot be used at all, and not those merely necessary to the reasonable enjoyment of the property.

Held (by Vaughan Williams, L.J.), that the tie-rods constituted a corporeal part of the dock, and were essential to its maintenance as it stood before and at the time of the conveyance, and therefore the right to keep them in the position in which they were was an easement of necessity which was reserved by implication on the conveyance of 1877; that under the circumstances, especially the fact that the two nuts were visible, the plaintiffs were put on inquiry, and knowledge of the presence of the tie-rods must be imputed to them, and therefore the defendants had also obtained that right by prescription. — UNION LIGHTERAGE CO. *v.* LONDON GRAVING DOCK CO., *C.A.*; [1902] 2 Ch. 557; 71 L. J. Ch. 791; 87 L. T. 381.

6. *Way enjoyed with the land sold—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), *s.* 6, *sub-section* 2.—The owner of two adjoining houses sold one to a purchaser who was already in occupation, and had at the date of the conveyance enjoyed a way over the premises retained by the vendor.

Held, that the purchaser was entitled to a right of way.

*Kay* v. *Oxley*, L. R. 10 Q. B. 360, 23 W. R. Dig. 251, followed.—INTERNATIONAL TEA STORES *v.* HOBBS, *Ch.D Farwell, J.*, 615; [1903] 2 Ch. 165; 72 L. J. Ch. 543; 88 L. T. 725.

7. *Way, Right of—Uninterrupted enjoyment for forty years—Enjoyment as of right—Parol licence—Prescription Act*, 1832 (2 & 3 *Will.* 4, c. 71).—The appellant brought an action to establish a claim to a right of way across the yard of an adjoining house belonging to the respondents. It was proved that the appellant and her predecessor in title had enjoyed the right of way openly and regularly for upwards of sixty years without interruption, and that a fixed sum per annum had been paid by them for more than forty years to the owner or occupier of the yard, but there was no evidence of the origin of the payment, or of any agreement in writing, or of any request for permission to use the way during the forty years before the action was brought.

Held (affirming the judgment of the court below), that the proper inference from the facts was that the enjoyment was not "as of right" within the meaning of the Prescription Act, 1832, but that each payment was for permission to use the way for the year, though no such permission was expressly asked for or granted; and that a lost grant subject to a perpetual quit rent could not be presumed. — GARDNER *v.* HODGSON'S KINGSTON BREWERY CO., *H.L.*; [1903] A. C. 229; 72 L. J. Ch. 558; 88 L. T. 698.

See Lands Clauses Acts, 1, 7; Public Health 3, 4; Settled Land, 5.

ELECTION LAW:—

1. *Registration—Municipal franchise—Occupation list—Objection—Qualifying premises acquired during the qualifying period—"Promotion to an office"—Appointment of Wesleyan minister by the conference of the connexion—Municipal Corporations Act*, 1882 (45 & 46 *Vict.* c. 50), *s.* 33 (1).—The appellant, a Wesleyan minister, was, in August, 1901, appointed by the Wesleyan Conference to the ministry of the Gloucester circuit in succession to a previous Wesleyan minister, and the appellant, in August, 1901, entered as such minister into the occupation of the manse, in the city of Gloucester, vacated by the outgoing minister. The manse, which was vested in trustees, was occupied by each successive minister, rent free, but the minister in occupation was personally liable for the rates. The appellant's name was entered in Division III. of the occupiers' list of voters of the city of Gloucester in respect of the said manse as a dwelling-house, and was objected to, on the ground that appellant had not in fact occupied the qualifying premises during the whole of the qualifying period. The appellant contended that he had succeeded to the qualifying property by "promotion to an office"—namely, the ministry of the Gloucester circuit, and that the occupancy and rating of the preceding minister was equivalent to the occupancy and rating of himself within section 33, sub-section 1, of the Municipal Corporations Act, 1882. Save as aforesaid, no evidence was produced at the revision court of the terms of the deed of trust under which the qualifying property (the manse) was held. The revising barrister on the authority of *Foster* v. *Mulhall* held that the appointment to the ministry of the Gloucester circuit was not "promotion to an office" within the section, and accordingly allowed the objection and expunged the appellant's name. The appellant duly appealed, and the revising barrister, in stating a case, appended to the case as an exhibit the deed of trust under which the qualifying property was held, and added a note that this document was not produced in evidence at the revision court.

Held, that the court could not regard anything which was not in evidence before the revising barrister at the revision court; and that upon the evidence before him there was nothing to show that he had come to a wrong conclusion, and consequently that his decision must be affirmed.

*Foster* v. *Mulhall*, 10 Ir. C. L. Rep. 532, discussed

and explained.—WILLIAMS v. BLAKEWAY, *K.B.D.*, 127; 88 L. T. 231.

2. *Registration—Parliamentary franchise—Borough vote—Occupier's claim—Local Act—Alteration of boundaries of parish—Part of parish added to the City of London except for rating purposes—Metropolitan Meat and Poultry Market Act*, 1860 (23 & 24 *Vict. c. cxiii.*), *s.* 11—*Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c* 23), *6th Schedule.*—Under the Metropolitan Meat Market Act, 1860, the Corporation of the City of London were authorised to take a certain portion of the parish of St. Sepulchre, Middlesex, in connection with the establishment of a meat market, and by section 11 of that Act it was provided that, except for the purposes of rating, the premises so taken should be deemed to be in the City of London, but that they should, nevertheless, continue to be rated in and to the parish of St. Sepulchre. By the Redistribution of Seats Act, 1885, Schedule VI., the parish of St. Sepulchre, Middlesex, was included in the East Division of the Parliamentary Borough of Finsbury.

The appellant, who was the occupier of a stall in the meat market on a portion of the above premises, claimed to have his name inserted in Division I. of the occupiers' list of voters for the East Division of the Parliamentary Borough of Finsbury, and his claim was objected to.

The revising barrister disallowed the claim, on the ground that, on the true construction of the Act of 1860, the qualifying premises ceased in 1860 to form part of the parish of St. Sepulchre, Middlesex, for the purposes of the electoral franchise, and that that was so notwithstanding the provision as to rating contained in section 11.

The Court affirmed his decision on the same grounds.—PICKARD v. PRESTON, *K.B.D.*, 156.

3. *Registration—Parliamentary franchise—Occupation claim—Disabilities—Volunteer absent on military service in South Africa—"During the continuance of the present war"—Declaration of peace—Electoral Disabilities (Military Service) Removal Act*, 1900 (63 *Vict c.* 8), *ss.* 1, 3—*Electoral Disabilities Removal Act*, 1891 (54 *Vict. c* 11), *s.* 2.—The appellant, who claimed to be placed on the occupiers' list of electors for the parish of St. Clement's, Ipswich, had volunteered and was absent on military service in South Africa during the whole of the twelve months preceding the 15th of July, 1902. The claim was objected to. The revising barrister decided that, as peace was proclaimed in June, 1902, the appellant's case was not covered by section 1 (i.) of the Electoral Disabilities (Military Service) Removal Act, 1900, inasmuch as section 3 provided that the Act should apply only to absence during the continuance of the present war in South Africa; and he accordingly disallowed the claim.

Held, on appeal, reversing the revising barrister's decision, that whether or not the benefit of the Electoral Disabilities (Military Service) Removal Act, 1900, terminated immediately upon the proclamation of peace, the interval between the declaration of peace and the end of the qualifying period was covered by section 2 of the Electoral Disabilities Act, 1891.

*Per* Lord Alverstone, L.C.J.—That the whole of the qualifying period was covered by the Act of 1900, s. 1 (i.), as the word "during" in section 3 referred less to the mere continuance of the war than to the continuance of military service rendered necessary by the war.—MARSH v. BANTOFF, *K.B.D.*, 155; 88 L. T. 230.

EMPLOYER.—See Master and Servant.

ESTATE DUTY.—See Inland Revenue, 1-7.

ESTATE *PUR AUTRE VIE*:—

*Tenant—Special occupant—Intestacy—Devolution.*—An estate *pur autre vie* was conveyed to A., his heirs and assigns. By his will A. devised the said estate to trustees in trust for the use of B. when he should attain the age of twenty-five, or at such earlier period as the trustees should decide upon. The estate vested in B. who subsequently died intestate before the *cestui que vie.*

Held, that, on the death of B. intestate his interest in the estate *pur autre vie* devolved upon his administrator as part of his personal estate.—INMAN, RE, INMAN v. INMAN, *Ch.D. Swinfen Eady. J.*, 188; [1903] 1 Ch. 241; 72 L. J. Ch. 120; 88 L. T. 173.

ESTATE TAIL:—

*Grant by Crown for services rendered—Consideration—Reversion in Crown—Power to disentail—Fines and Recoveries Act.* 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 18—34 & 35 *Hen.* 8, *c.* 20, *s.* 2.—An estate tail granted by the Crown to a subject "for divers good causes and considerations" (with reversion to the Crown in case of lack of heirs who can take under the grant) comes within the exceptions mentioned in section 18 of the Fines and Recoveries Act, 1833, and 34 & 35 Hen. 8, c. 20, and is therefore not barrable.—ROBINSON v. GIFFARD, *Ch.D. Farwell, J.*, 551; [1903] 1 Ch. 865; 88 L. T. 348.

ESTOPPEL:—

*Solicitor and Client—Conveyance to client prepared by solicitor—Portion of solicitor's property comprised—Negligence.*—A person who relies on an estoppel by negligence must show that he was led into a belief on which he acted to his detriment.

A solicitor was ordered by his client to investigate the title to and prepare a conveyance of property adjoining his (the solicitor's) property. In the conveyance a small portion of the solicitor's property was comprised, but the client did not believe, nor was he led by the solicitor to believe, that he was buying the small portion in question. The client subsequently brought an action claiming the land.

Held, that the solicitor was not estopped from setting up the truth.—BELL v. MARSH, *C.A.*, 325; [1903] 1 Ch. 528; 72 L. J. Ch. 360; 88 L. T. 605.

See Landlord and Tenant, 15; Principal and Agent, 2.

EXECUTOR. — See Covenant, 1; Vendor and Purchaser, 7; Will, 35.

EXTRADITION—

*Extradition treaty with Belgium—Fugitive criminal pleads an alibi—More evidence to support defence forthcoming since committal—Jurisdiction of the court to consider such evidence—Habeas corpus—Procedure—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *ss.* 9, 10, 11.—In an extradition case where a magistrate has jurisdiction to commit, and where there is any evidence to justify a committal, the court has no jurisdiction to review the question whether the magistrate had properly exercised his discretion or not.

Therefore, the court can only on an application for a *habeas corpus* entertain the question of the jurisdiction of the magistrate to commit under sections 10 and 11 of the Extradition Act, 1870, and decide whether the crime charged comes within the Act or whether it is an offence of a political character, and the question whether there was evidence to support the magistrate's decision.

The fact that there is fresh evidence forthcoming

which was not before the magistrate, and which might have affected his mind. is no ground for granting a *habeas corpus.*—REX *v.* HOLLOWAY PRISON (GOVERNOR OF). SILETTI, EX PARTE, *K.B.D.*, 191; 71 L. J. K. B. 935; 87 L. T. 332.

See Bankruptcy, 8.

FACTORY—

1. *Engine-house in workhouse—Machinery for generating electrical energy—Public building.*—Upon the premises of a workhouse under the control of the appellants were an engine-house and machinery used for the purpose of generating electrical energy for the lighting of the workhouse and for other purposes. The machinery included an engine, which was not securely fenced.

Held, that the engine-house was a "factory" within the meaning of section 149, sub-section 1 (*a*), of the Factory and Workshop Act, 1901, the workhouse being a "public building" within Part I. (20), of the Sixth Schedule, and that the appellants were therefore properly convicted of not having securely fenced the engine.—MILE END OLD TOWN GUARDIANS *v.* HOARE, *K.B.D.*; 72 L. J K. B. 651.

2. *Two separate factories in one building—Common owner—Works required for protection from fire of both factories—Right of entry of owner to execute works—Validity of notice—"Tenement factory"—"Power supplied"—Factory and Workshop Act,* 1901 (1 *Ed.* 7, *c.* 22), *ss.* 14 (2) (7), 149 (1).—Separate factories within the same building do not together constitute a tenement factory within section 149 (1) of the Factory and Workshop Act, 1901, unless the mechanical power which is supplied to them is supplied from a common source.

Where two separate factories in the same building which do not together constitute a tenement factory have a common owner, the owner has no right under section 14 of that Act, as against the occupier of one factory, to enter on that factory to do works which are reasonably required for the protection from fire of the other factory by reason of the fact that works are also reasonably required for the protection of the factory on which he proposes to enter, even though such works are the same (or nearly the same) for both factories.

A building contained two separate factories, each supplying its own mechanical power. The local authority, purporting to act under section 14 (2) of the Act, served on the owner of the building a notice requiring him to construct certain works for the protection from fire of the two factories jointly.

Held, that the notice was invalid, because (1) the two factories did not constitute a tenement factory, and were not, therefore, one factory within section 14 (2); and (2) it did not specify what works were required for the protection of both factories considered separately.

Held, consequently, that the owner had no power, as against the occupier of one factory, to enter his premises to execute works required for the protection of the other factory.—TOLLER *v.* SPIERS & POND, *Ch.D. Buckley, J.*, 381; [1903] 1 Ch. 191; 72 L. J. Ch. 191; 87 L. T. 578.

FALSE IMPRISONMENT:—

*Governor of prison—Clerk of the peace—Action against governor and clerk of the peace—Governor receiving prisoner without proper warrant of commitment—Warrant by magistrate—Sentence altered on appeal by quarter sessions—No fresh warrant by quarter sessions—Liability of governor and clerk of peace—Summary Jurisdiction Act,* 1848 (11 & 12 *Vict. c.* 43), *s.* 27.—The plaintiff was convicted by a court of summary jurisdiction and sentenced to a term of imprisonment with hard labour. He was taken to prison under a warrant of commitment made out by the magistrate, but released pending an appeal to quarter sessions. The conviction was affirmed, but the sentence was altered. No fresh warrant of commitment was made out by the recorder at quarter sessions, but the original conviction by the magistrate was altered by the recorder in accordance with his sentence. The plaintiff was then taken to prison, and the only documents handed to the governor of the prison were a copy of the original conviction by the magistrate as altered by the recorder and the original warrant of commitment by the magistrate. He was detained in prison for some days, when the conviction was quashed upon other grounds, and he was released.

In an action for false imprisonment against the clerk of the peace of the borough and the governor of the prison for unlawfully imprisoning the plaintiff,

Held, that the action could not be maintained against the clerk of the peace, as he was merely a ministerial officer, and his act was a ministerial act; but that the action was maintainable against the governor, as he was not justified in receiving the plaintiff into custody and detaining him without a fresh warrant of commitment by the recorder, and that the documents which the governor received were not equivalent to such warrant of commitment, and that the governor was liable in damages to the plaintiff.—DEMER *v.* COOK, *K.B.D.*; 88 L. T. 629.

FISHERY:—

*Oyster fishery—Depositing oysters on foreshore—Incident to right of fishery—Lease of foreshore by municipal corporation—Validity—Sea Fisheries Act,* 1868 (31 & 32 *Vict. c.* 45), *s.* 41—*Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *ss.* 105, 106, 107, 250.—A claim to the exclusive occupation of part of the foreshore belonging to a stranger for the purpose of depositing freshly dredged oysters thereon cannot be supported at common law as incident to the right of fishing for oysters.

Decision of Wills, J. (50 W. R. 151, [1901] 2 K. B. 870), reversed.—TRURO CORPORATION *v.* ROWE, *C.A.*, 68; [1902] 2 K. B. 709; 71 L. J. K. B. 974; 87 L. T. 386.

FIXTURES:—

1. *Machinery affixed to freehold by bolts and screws—Presumption of law—Hire-purchase agreement—Rights of mortgagees in possession as against owner of machinery.*—The plaintiff supplied certain machines on the hire-purchase system to the lessee of a factory, and by his workmen fixed them on concrete beds, in which were iron uprights to which the machines were fastened by screws and bolts and nuts. By the hire-purchase agreement the lessee was to make certain periodical payments, and until the whole of the payments were made the machines were to remain the property of the plaintiff; and, further, it was agreed that if the lessee made default in punctual payment of any instalment the plaintiff was to have the power to determine the hiring and remove the machines. Prior to the hiring of the machinery the lessee had mortgaged the factory. The lessee made default in payment of the instalments under the hire-purchase agreement, whereupon the plaintiff gave notice determining the hiring and demanding the return of the machinery. A few days previously, however, to this the mortgagees had entered into possession of the premises under their mortgage,

and they refuse to give up the machines, claiming them as fixtures.

In an action brought by the plaintiff against the mortgagees to recover the machines or their value, Lawrance, J., held, on the authority of *Hobson* v. *Gorringe*, 45 W. R. 356, [1897] 1 Ch. 182, that the machines were fixtures, and refused to leave any question to the jury.

Held, that the decision of the learned judge was right.

*Hobson* v. *Gorringe* followed.

*Gough* v. *Wood*, 42 W. R. 469, [1894] 1 Q. B. 713, distinguished.—REYNOLDS *v.* ASHBY, *C.A.*, 405; [1903] 1 K. B. 87; 72 L. J. K. B. 51; 87 L. T. 640.

2. *Mortgagor and mortgagee—Chairs in theatre screwed to floor—Hired by mortgagor—Removal by owner.*—The rule that chattels attached to the soil are fixtures may be displaced by showing that they were not annexed for the permanent improvement of the land, but for the purpose of their temporary enjoyment as chattels.

Accordingly, chairs in a theatre which are complete in themselves but are screwed to the floor for their better use and enjoyment are not fixtures, and do not pass under a mortgage of the premises and fixtures.—LYON & Co. *v.* LONDON CITY AND MIDLAND BANK, *K.B.D.*, 400; [1903] 2 K. B. 135; 72 L. J. K. B. 465; 88 L. T. 392.

See Landlord and Tenant, 13.

FOOD AND DRUGS.—See Adulteration.

FORGED TRANSFER.—See Corporation, 4.

FRAUDS, STATUTE of:—

*Agreement for service—Engagement for one year to commence on the day following that on which the contract was made—No memorandum—Action to recover damages for breach of agreement*—29 *Car.* 2, *c.* 3, *s.* 4.—A contract for service for one year, the performance of which was to commence from the day following that on which the contract was made,

Held, not a contract that was "not to be performed within the space of one year from the making thereof" within the meaning of those words in section 4 of 29 Car. 2, c. 3.

*Dictum* of Willes, J., in *Cawthorne* v. *Cordrey*, 13 C. B. N. S. 406, 11 W. R. C. L. Dig. 164, and of Brett, L.J., in *Britain* v. *Rossiter*, 27 W. R. 482, 11 Q. B. D. 123, at p. 125 approved.—SMITH *v.* GOLD COAST AND ASHANTI EXPLORERS (LIMITED), *C.A.*, 373; [1903] 1 K. B. 538; 72 L. J. K. B. 235; 88 L. T. 202.

See Contract, 13; Vendor and Purchaser, 8, 10.

FRAUDULENT CONVEYANCE:—

*Assignment to trustee for creditors — Deed of arrangement — Registration — Affidavit — List of creditors—Omission—Intentional exclusion of particular creditor—Delaying creditors*—Bona fides—13 *Eliz. c.* 5—*Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *ss.* 5, 6.—A deed of arrangement is not necessarily void under section 5 of the Deeds of Arrangement Act, 1887, because in the affidavit by the debtor filed on registration, under section 6, sub-section 1, the name of a particular creditor is omitted.

A deed of assignment to a trustee for creditors is not necessarily void under 13 Eliz. c. 5, because the debtor intentionally excluded a particular creditor from the benefits of the deed.

Where a deed of assignment to a trustee for creditors is impeached as being void under 13 Eliz. c. 5, the test is whether the deed was really a *bonâ fide* deed for the benefit of creditors or whether its object was to benefit the debtor at the expense of the creditors.

Decision of the Divisional Court ([1902] 2 K. B. 158, 50 W. R. Dig. 62) affirmed.—MASKELYNE AND COOK *v.* SMITH, *C.A.*, 372; [1903] 1 K. B. 671; 72 L. J. K. B. 237; 88 L. T. 148.

GAMING:—

1. *Betting—Coupon competitions—Advertisement—Use of newspaper office for betting by advertiser—Liability of proprietor of newspaper—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.—M., the proprietor of a newspaper called *Football Chat*, was the occupier of an office in Bedford-street, Strand, where his newspaper was published. T. had an office at Middelburg, in Holland, where he conducted sporting coupon competitions, which, by agreement between T. and M., were advertised week by week in the latter's paper. The advertisements contained offers of money prizes for correct guesses as to the winners of football matches, and offered coupons at certain rates to intending competitors. Appended to the advertisements were coupon sheets, which might be filled up, and were directed to be sent, with postal order, to *Football Chat*, Middelburg, Holland. M. was paid by T. for these advertisements a much higher price than the ordinary rate charged for advertisements, and was also paid at the ordinary rate for publishing the names of the prize-winners; but M. did not share in the profits of the coupon competition. The postal orders were returned to England and collected by a bank and placed to the credit of T.

Held, that there was evidence that T. was a person using the office of M.'s newspaper for the purpose of money being received by T. as the consideration for a promise to pay money on the event of a game within the meaning of section 1 of the Betting Act, 1853, and that M. was a person knowingly and wilfully permitting his office to be used as aforesaid within the meaning of section 3 of the said Act.—MACKENZIE *v.* HAWKE, *K.B.D.*, 233; [1902] 2 K. B. 216; 71 L. J. K. B. 561; 87 L. T. 122.

2. *Betting—Coupon competition—Advertisement—User of newspaper office by advertiser for betting—Publication of information or advice with respect to betting—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 7—*Betting Act*, 1874 (37 & 38 *Vict. c.* 15), *s.* 3, *sub-section* 1.—M., the proprietor of a newspaper, and the occupier of the office thereof in England, published an advertisement in the said paper whereby it appeared that such office was used for the purpose of a coupon competition conducted by another person abroad, in the carrying out of which money was received by such person abroad, as the consideration for a promise to pay money on the event of a football match.

Held, that M. was liable to be convicted upon a summons under section 7 of the Betting Act, 1853.

M. also published an advertisement in his paper whereby it appeared that two other persons, whose addresses were given, respectively would, on application, give information for the purpose of or with respect to certain bets, wagers, events, or contingencies mentioned in the Betting Act, 1853.

Held, that M. was liable to be convicted of an offence under section 3, sub-section 1, of the Betting Act, 1874.

*Reg.* v. *Stoddart*, 49 W. R. 173, [1901] 1 K. B. 177, followed.

*Stoddart* v. *Argus Printing Co.*, 49 W. R. 666, [1901] 2 K. B. 470, overruled. — HAWKE *v.* MACKENZIE (Nos. 1 and 2), *K.B.D.*, 236; [1902] 2 K. B. 225; 71 L. J. K. B. 565; 87 L. T. 127.

3. *Betting—Place used for betting—Bar of public-house—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.—A bookmaker was in the habit of frequenting the bar of a licensed house at certain hours for the purpose of there carrying on a ready-money betting business with persons who resorted thereto, and who knew that he carried on such business there. The carrying on of this business was also known to the landlord, and pursued under some arrangement or understanding with him.

Held, that the bookmaker used the bar for the purpose of betting with persons resorting thereto, contrary to the provisions of section 3 of the Betting Act, 1853.

*Belton* v. *Busby*, 47 W. R. 636. [1899] 2 Q. B. 380, approved and followed.—TROMANS *v.* HODKINSON, *K.B.D.*, 286; [1903] 1 K. B. 30; 72 L. J. K. B. 21; 87 L. T. 549.

4. *Place used for betting—Bar of public-house—Permission of landlord—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1 *and* 3.—Where a person is indicted for carrying on betting transactions in the bar or taproom of a public-house, it is necessary, in order to convict him of an offence under the Betting Act, 1853, to produce evidence showing that the landlord permitted him to carry on his betting transactions there. It must be shown that the defendant had something in the nature of a right or license to use the place for the purpose of his betting business over and above the right of an ordinary member of the public to resort thereto.—REX *v.* DEAVILLE, *C.C.R.*, 604; [1903] 1 K. B. 468; 72 L. J. K. B. 272; 88 L. T. 32.

5. *Using shop for unlawful game—Automatic machine—Unlawful gaming—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 2—*Gaming House Act*, 1854 (17 & 18 *Vict. c.* 38), *s.* 4.—The appellant kept in his shop an automatic machine which was worked by putting a penny in the slot and then pulling down and afterwards releasing a spring, whereby the penny was set in motion and might fall into one of seven compartments; if it fell into the centre compartment a ticket was automatically delivered entitling the recipient to two pennyworth of goods sold in the shop, if it fell into two other compartments the penny was automatically returned, but if it fell into any of the other four compartments it was retained.

Held, that the user of such machine was an unlawful game within the meaning of the Gaming Act, 1845, s. 2, and the Gaming House Act. 1854, and that the appellant had been rightly convicted under section 4 of the latter Act of having opened, kept, and used his shop for the purpose of unlawful gaming.—FIELDING *v.* TURNER, *K.B.D.*, 543; [1903] 1 K. B. 867; 72 L. J. K. B. 542.

GAS:—

1. *Arrears of gas rent due by outgoing tenant—Purchase by incoming tenant of outgoing tenant's business and interest in premises—Right to recover from incoming tenant—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 16—*Metropolis Gas Act*, 1860 (23 & 24 *Vict. c* 125), *s.* 39—*Gas Light and Coke Co.'s Act*. 1872 (35 & 36 *Vict. c. xxiii.*), *s.* 18.—By section 18 of the Gas Light and Coke Co.'s Act, 1872, it is provided that "in case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay such arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant and shall have paid to the owner, lessee, or mortgagee in possession or to the outgoing tenant of such premises a consideration for so doing; but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant, as required by this Act, on being required by him to do so."

Held, that, by virtue of the above section, arrears of rent left due for gas supplied to a tenant of premises who has sold the lease thereof and the goodwill of the business he carried thereon to an incoming tenant, who continued the trade or business of the outgoing tenant on the said premises, may be recovered by action by the gas company from the incoming tenant.

Decision in *Gas Light and Coke Co.* v. *Mead*, 45 L. J. M. C. 71, 24 W. R. Dig. 111, overruled.—GAS LIGHT AND COKE CO. *v.* CANNON BREWERY CO., *C.A.*, 565; [1903] 1 K. B. 593; 72 L. J. K. B. 308; 88 L. T. 314.

2. *London County Council—Power to test gas on Sundays—"Daily."*—A series of Acts of Parliament commencing in 1868 provided for the "daily" testing of the defendant company's gas in respect of illuminating power, pressure, and purity by the officers of the Metropolitan Board of Works, whose powers in this respect were transferred to the London County Council. There was no express exclusion of Sundays in any one of the Acts, but it appeared that throughout the period from 1868 down to 1903, when the county council claimed the right to test on Sundays, the practice had been to test on weekdays only.

Held, upon the construction of the word "daily" in the statute, that the *primâ facie* meaning of "daily" being "every day of the week," no artificial meaning for the word had been created by the practice which had hitherto obtained, and that the London County Council were none the less entitled to test on Sundays by reason of themselves and their predecessors not having chosen to do so in the past.—LONDON COUNTY COUNCIL *v.* SOUTH METROPOLITAN GAS CO., *Ch.D. Joyce, J.*; 72 L. J. Ch. 536; 88 L. T. 623.

*HABEAS CORPUS.*—See Extradition.

HIGHWAY:—

1. *Bridge over canal—Raised approaches to bridge—Liability to repair fences*—10 *Geo.* 4, *c.* 48.—A canal company liable to repair bridges and the "wing walls, ramparts, and side banks thereof," but not liable to repair "roads approaching bridges" beyond the extremity of the wing walls thereof, is not liable to repair the fences on the raised approaches to bridges.

Decision of Kekewich, J. (71 L J. Ch. 660, 50 W. R. Dig. 64). affirmed.—ATTORNEY-GENERAL *v.* OXFORD CANAL NAVIGATION, *C.A.*, 386; 72 L. J. Ch. 285; 88 L. T. 250.

2. *Level crossing over railway—Alteration of inclination of road—Liability of local authority to keep in repair raised parts of highway—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 16, 56.—Where a railway company crosses a highway on a higher level than the road and necessarily has to construct a permanent inclined plane on each side of the railway so as to admit of vehicles using the crossing, section 16 of the Railway Clauses Consolidation Act, 1845, does not cast the duty of maintaining and repairing the approaches upon the railway company.—WEST LANCASHIRE RURAL

COUNCIL *v.* LANCASHIRE AND YORKSHIRE RAILWAY, *K.B.D.*, 694.

3. *New street—Ownership of soil—Adjoining owner—Presumption of ownership* usque ad medium filum viæ *—Rebutting evidence.*—The owners of land abutting on a road or street are only presumed to own the land *usque ad medium filum viæ* in the absence of facts to disprove such presumption.

Land was taken by commissioners under an Act of Parliament for the purpose of making a new street, and the Act gave the commissioners power to lease the premises abutting on the new street not wanted for the purposes of the Act, but it was doubtful whether this gave the commissioners power to lease the soil of the street. The commissioners leased one of the houses to the plaintiff's predecessor, and in the lease the property was described as abutting on the new street.

Held, that the presumption that the soil of the adjoining street *usque ad medium filum viæ* passed with such lease was rebutted by the circumstances of the case, regard being had to the provisions of the Act and the terms of the lease.—MAPPIN BROTHERS *v.* LIBERTY & CO, *Ch.D. Joyce, J.*, 264; [1903] 1 Ch. 118; 72 L. J. Ch. 63; 87 L. T. 523.

4. *Public footpath—Right of passage—Public footpath through lane of varying breadth between fences—Presumption as to extent of public right—User—Evidence.*—Where a public footpath passes through a lane of irregular shape containing a private occupation road and of varying breadth between the fences, there is no presumption, as there is in the case of an ordinary public highway bounded by fences, that the public right extends to the whole space between the fences. The question how far in such cases the public right extends depends upon the evidence in each particular case, and the mere fact that the public in passing through the lane have been accustomed, without objection, to walk upon the greensward or strips of grass land between the fences does not show that any such presumption exists, or that the public right extends to the fences. —FORD *v.* HARROW URBAN COUNCIL, *K.B.D.*; 88 L. T. 395.

HUSBAND AND WIFE:

1. *Authority of wife to pledge husband's credit—Necessaries—Action against husband and wife jointly, severally, and in the alternative — Presumption of agency—Presumption of authority to pledge joint credit—Judgment against wife—Right to proceed against husband—Election—Practice—Ord.* 14, *r.* 5.—A husband, by arrangement with his wife, made an annual allowance of a substantial sum for the expenses of their household. Tradesmen who supplied goods for the use of the household on the orders of the wife sued the husband and wife for the price, claiming against them jointly. The plaintiffs obtained judgment against the wife under order 14 and proceeded with the action against the husband.

Held, that the ordinary presumption that a wife has authority to pledge her husband's credit for necessaries was rebutted.

Held, also, that, even if any such presumption could be made, at any rate the presumption that the wife had authority to pledge the joint credit of her husband and herself could not be made.

Held, also, that, if the plaintiff's claim could be amended by adding a claim against the defendants severally or in the alternative, the plaintiffs, having obtained judgment on their several claim against the wife, were debarred from setting up an inconsistent claim against the husband.

The special provision contained in ord. 14, r. 5, that a plaintiff who has obtained judgment under that order against one of two defendants may proceed with the action against the other, does not apply where the plaintiff claims against the defendants in the alternative.—MOREI BROTHERS *v.* WESTMORLAND (EARL), *C.A.*, 290; [1903] 1 K. B. 64; 72 L. J. K. B. 66; 87 L. T. 635.

2. *Insurance — Policy of assurance — Married Women's Property Act,* 1870 (33 & 34 *Vict c* 93), *s.* 10—*Policy "for benefit of his wife, or if she be dead between his children"—Death of wife and subsequent marriage of assured—Children born before and after issue of policy—Child of second marriage.*—A man who had a wife and four children effected a policy of assurance on his life under the Married Women's Property Act, 1870. The policy was expressed to be "for the benefit of his wife, or if she be dead between his children in equal proportions." The wife died, having had four more children after the issue of the policy. The assured subsequently married again, and had one child by his second wife. On his death, leaving his widow and nine children him surviving,

Held, that the widow was not entitled to participate in the policy moneys, but that they went to the children of the first and second marriages in equal shares.

*In re Burrow's Trusts,* (1864) 10 L. T. 184, followed.—GRIFFITHS' POLICY, RE, *Ch.D. Joyce, J.*; [1903] 1 Ch. 739; 72 L. J. Ch. 330; 88 L T. 547.

3. *Separation order—Adultery of wife—Liability of husband for weekly payments—Appeal.*—Where an order for a weekly payment by a husband to his wife is made, and the wife subsequently commits adultery, the husband is entitled to have the order discharged though he has been guilty of conduct conducing to the adultery.

No appeal lies under section 11 of the Summary Jurisdiction (Married Women) Act, 1895, to the Probate Division, but the court may state a case for the King's Bench Division on a point of law.—RUTHER *v.* RUTHER, *K.B.D.*; [1903] 2 K. B. 270.

INCOME TAX.—See Inland Revenue, 10-18.

INDIA, LAW of:—

*Principal and agent—Manager of family property—Right to sue beneficiary.*—The manager of a joint family property in India is not the agent of the members of the family who are interested in it, so as to make them liable to be sued as if they were his principals.

Judgment of the court below affirmed.—ANNAMALAI CHETTY *v.* MURUGASA CHETTY, *P.C.*; 88 L. T. 712.

INFANT:—

1. *Building society—Infant member—Advances—Mortgage—Infants' Relief Act,* 1874 (37 & 38 *Vict. c.* 62), *s.* 1—*Building Societies Act,* 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 38.—The Building Societies Act, 1874, enables an infant to become a member of a building society, where the rules do not prohibit it, but it does not authorize him to borrow money by means of advances on mortgage of his property, for it is not a necessary part of a member's position to do so.

An infant member of a building society purchased a piece of land by means of a loan from the society, paid to the vendor, and gave the society a mortgage to secure the loan and further advances, which were expended in building operations on the land.

Held, that the mortgage was void under the

Infants' Relief Act, 1874, but that the society were entitled to a charge on the land for the purchase-money paid to the vendor, together with interest at 4 per cent. on that amount.

Decision of the Court of Appeal (50 W. R. 179, [1902] 1 Ch. 1) affirmed.—NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY *v.* THURSTON, *H.L.*, 273; [1903] A. C. 6; 72 L. J. Ch. 134; 87 L. T. 529.

2. *Custody of child—Paternity—Evidence.*—In the case of a child born in wedlock, as to whose paternity questions are raised upon an application as to the child's custody, if the husband could, from circumstances of time, place, and health, have had nuptial intercourse with his wife, the mother of the child, and it be not proved that he did not have such intercourse, he must be considered the father of her child, even if she were shown to have committed adultery with any number of men.

Sexual intercourse between man and wife must be presumed, and nothing except evidence that the husband did not have such intercourse at the period of conception can bastardize a child born in wedlock.

Upon the authority of *Favard* v. *Favard*, (1896) 75 L. T. 664, a writ of attachment and a committal order were directed to be issued, upon the *ex parte* application of the petitioner, against the respondent, who had taken the child out of the jurisdiction.—GORDON *v.* GORDON AND GRANVILLE GORDON, *P.D. & Ad.D.*; [1903] P. 141; 72 L. J. P. 33.

3. *Will—Agreement for determining the trusts of the will by paying off annuities—Sanction of court on behalf of infants—Arrangement for benefit of infants other than a "compromise"—Jurisdiction.*—The court has jurisdiction to sanction an arrangement between parties, some of whom are infants, notwithstanding that such arrangement be not strictly speaking a "compromise."

*Pelo* v. *Gardner*, 2 Y. & C. C. C. 312, not followed.—WELLS, RE, BOYER *v* MCLEAN, *Ch.D. Farwell, J.*, 521; [1903] 1 Ch. 848; 72 L. J. Ch. 513; 88 L. T. 355.

INJUNCTION:—

*Jurisdiction—Attorney-General—Public right—New statutory offence—Special statutory remedy—Bye-laws—Penalties—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 183, 251.—The Attorney-General is entitled to an injunction, as an ancillary remedy, to restrain the breach of a public right in the same way as a private person is so entitled in respect of a breach of his private rights; and this is so in a case where the public right has been created by a statute which also provides a special remedy for its breach, as, for instance, the recovery of a penalty in a summary way.

An urban district council having, by its bye-laws, prescribed (amongst other things) the width of new streets under section 157 of the Public Health Act, 1875, and imposed penalties for offences against the bye-laws under section 183, which penalties were, by section 251, to be recovered before a court of summary jurisdiction, the Attorney-General at the relation of the council brought an action in the High Court against the defendant, who had contravened the bye-laws, for an injunction.

Held, that the action lay, and that the injunction should be granted.—ATTORNEY-GENERAL *v.* ASHBORNE RECREATION GROUND CO., *Ch.D. Buckley, J.*, 125; [1903] 1 Ch. 101; 72 L. J. Ch. 67; 87 L. T. 561.

See also County Court, 4; Easement, 4; Trade Union, 2; Tramway, 4.

INLAND REVENUE:—

1. *Estate duty—Gift of personal property—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c).—In pursuance of a bargain made between the father of the defendant, who was shortly about to marry, and the father of the intended bride, the latter agreed to settle the sum of £20,000 on his daughter on condition that the former would give his son the sum of £10 000. This sum was accordingly given to the defendant by his father, the marriage settlement was executed, and the marriage was subsequently solemnized. Within twelve months of the date of his gift to his son the father died.

Held, that there had been a gift of the £10,000, and that estate duty under section 2, sub-section 1 (c), of the Finance Act, 1894, was payable by the defendant in respect of it.

*Attorney-General* v. *Worrall*, 43 W. R. 118, [1895] 1 Q. B. 99, and *Attorney-General* v. *Johnson*, *ante*, p. 487. [1903] 1 K. B. 617, followed.—ATTORNEY-GENERAL *v.* HOLDEN, *K.B.D.*, 685; [1903] 1 K. B. 832; 72 L. J. K. B. 420; 88 L. T. 729.

2. *Estate duty—Incidence in respect of appointed fund—Residue—Testamentary expense—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1; *s* 6, *sub section* 2; *s.* 8, *sub-sections* 3, 4; *s.* 9, *sub-sections* 1, 4.—Where an executor receives personal property, appointed in pursuance of a general power, this property constitutes "assets which he has received as executor" within the meaning of section 8 (3) of the Finance Act, 1894. Assets which a person rightfully receives as executor are assets which pass to him as executor, within the meaning of the Finance Act, 1894, even although not strictly speaking assets to which he is entitled *virtute oficii*.

The estate duty is payable out of the residue and not out of the appointed funds. Estate duty is a testamentary expense.—FERNSIDE, RE, BAINES *v.* CHADWICK, *Ch.D. Swinfen Eady, J.*, 186; [1903] 1 Ch. 250; 72 L. J. Ch. 200; 87 L. T. 57.

3. *Estate duty—Incidence—Settled property—Pecuniary and residuary legatees—Finance Act*. 1894 (57 & 58 *Vict. c.* 30), *ss.* 8 (4), 9 (1) (5) (6), 14 (1).—In respect of property, of which the deceased was not competent to dispose, the scheme of the Finance Act, 1894, is to tax, not the interest which ceased with the death, but the property out of which the interest was enjoyed, and to make every person who takes property otherwise than through the executor liable to pay a proportionate part of the estate duty. Accordingly, where property, real and personal, was left upon trust for conversion and to pay an annuity to the testator's widow for life, and after her death upon trust to pay legacies amounting to £9,000 and to divide the residue among persons named,

Held, by the Court of Appeal, reversing the decision of Buckley, J., that under section 8 (4) of the Finance Act, 1894, the estate duty, which became payable on the death of the widow (who died in 1900), should be borne rateably both by the pecuniary legatees and the residuary legatees; and, consequently, that the pecuniary legatees were not entitled to throw the entire duty upon the residue.—BERRY *v.* GAUKROGER, *C.A.*, 449; [1903] 2 Ch. 116; 72 L. J. Ch. 435; 88 L. T. 521.

4. *Estate duty—Payment by instalments—Interest—Tenant for life and remainderman—Charge of interest upon inheritance—Interest properly incurred*

—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9 (5).—Though a tenant for life may properly exercise the option given by sub-section 8 of section 6 of the Finance Act, 1894, of paying estate duty by instalments, and thereby incur the obligation of paying interest on the unpaid instalments, he is not, as between himself and the remainderman, relieved by the exercise of such option from his duty to keep down interest on charges, and cannot charge such interest on the inheritance as "interest properly incurred by him" under sub-section 5 of section 9 of the Act.—HOWE'S (EARL) SETTLED ESTATES, RE, *C.A.*, 468; [1903] 2 Ch. 69; 72 L. J. Ch. 461; 88 L. T. 438.

5. *Estate duty—Policy of insurance—Settled property—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*d*).—In 1866 Sir H. P. effected a policy of assurance on his son's life, C. E. P. (who was born in the year 1855). All the premiums were paid by the father. In 1884 C. E. P. married, and the policy was brought into his marriage settlement by Sir H. P., with the approbation of C. E. P. In 1897 Sir H. P. died, and in 1900 Sir C. E. P. died, and the insurance company paid the amount of the policy to the trustees of the settlement. The Crown claimed duty in respect of the policy on the death of Sir C. E. P. as property passing on his death.

Held, that the policy fell within the words of section 2, sub-section 1 (*d*), as being an "interest purchased or provided by the deceased . . . in concert or by arrangement with any other person, and that the fact that the policy was void under 14 Geo. 3, c. 43, did not affect the matter, as the insurance company had paid the policy money.

*Attorney-General* v. *Dobree*, 48 W. R. 413, [1900] 1 Q. B. 442, and *Attorney-General* v. *Robinson*, [1901] 2 Ir. R. 67, followed.—ATTORNEY-GENERAL *v.* MURRAY, *K.B.D.*, 572; [1903] 2 K. B. 64; 72 L. J. K. B. 408; 88 L. T. 474.

6. *Estate duty — Settled property—Mortgage by tenant for life and remainderman—Indemnity to tenant for life—Value of property passing on death of tenant for life—Equity of redemption—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-section* 1 (h); *s.* 7.—An estate was settled by will upon a tenant for life with remainder to a second tenant for life, with remainder in fee. The first tenant for life and the remaindermen mortgaged the estate in fee as security for an advance to the remaindermen, who alone covenanted with the mortgagee to repay the advance and interest thereon. By an indenture of even date the remaindermen covenanted to indemnify the first tenant for life against any liability or loss and against any claims or proceedings in respect of the mortgage debt, and they conveyed an annuity to trustees as security for the performance of the covenant. The first tenant for life was in fact kept indemnified against any claim upon her or her estate. On the death in 1895 of the first tenant for life the Crown claimed estate duty under section 1 of the Finance Act, 1894, upon the principal value of the estate, without deducting the amount of the mortgage debt, as property passing on the death of the tenant for life, on the ground that the tenant for life, by reason of the indemnity, had been beneficially interested in the estate to its full value.

Held, that estate duty was only payable on the principal value of the estate after deducting the mortgage debt.

Judgment of Phillimore, J. (50 W. R. 270, [1902] 1 K. B. 429), reversed.—ATTORNEY-GENERAL *v.* MONTAGU (LORD), *C.A.*, 326; [1903] 1 K. B. 483; 72 L. J. K. B. 258; 88 L. J. 120.

7. *Estate duty—Succession duty—Gift in lieu of legacy to charitable society—Agreement for payment of annuity to donor—Donation with reservation*—Bonâ fide *purchase—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c); *s.* 3, *sub-section* 2—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 7.—An unincorporated charitable society, in consideration of the payment by B. of the sum of £500 in lieu of a legacy, agreed to pay an annuity of £25 to B. during his life and to his wife during her life if she survived him. The commercial value of the annuity was £210. The annuity was not charged on the funds of the society, but was paid by the directors as one of the ordinary outgoings of the society to B. during his life and after his death to his widow during her life. B. died in 1895, and his widow in 1900.

Held, that the society were liable to pay estate duty on the whole sum of £500 on the death of B. under section 2, sub-section 1 (c), of the Finance Act, 1894, and were also liable to pay succession duty on the same sum on the death of the widow, under section 7 of the Succession Duty Act, 1853.

Judgment of Phillimore, J. (50 W. R. 366, [1902] 1 K. B. 416) varied.—ATTORNEY-GENERAL *v.* JOHNSON, *C.A.*, 487; [1903] 1 K. B. 617; 72 L. J. K. B. 323; 88 L. T. 445.

8. *Excise—Practice—Costs under the Summary Jurisdiction Acts—Power to grant to Crown—Finance Act* (61 & 62 *Vict. c.* 10), *s.* 4—*Summary Jurisdiction Acts*, 1848 (11 & 12 *Vict. c.* 43), *s.* 18, *and* 1879 (42 & 43 *Vict. c.* 47), *s.* 53.—In pursuance of section 53 of the Summary Jurisdiction Act, 1879, which provides that prosecutions under the excise laws are to be governed by the Summary Jurisdiction Acts, costs can now be awarded to and against the Crown in cases under those laws.—THOMAS *v.* PRITCHARD, *K.B.D.*, 58; [1903] 1 K. B. 209; 72 L. J. K. B. 23; 87 L. T. 688.

9. *House duty—School buildings—"Other offices"*—48 *Geo.* 3, *c.* 55, *Schedule B—House Tax Act*, 1851 (14 & 15 *Vict. c.* 36).—The appellant was the occupier of a dwelling-house and premises, which he used for the purposes of a boarding school. He also occupied adjacent buildings, which were separated from the first-mentioned premises by a wall. There was a door in the wall through which, by means of a covered-in passage, there was communication between the premises on each side of the wall. The adjacent buildings were respectively used as a chapel, a gymnasium, classrooms, fives court, and for such-like school purposes in connection with the boarding school, other than the ordinary purposes of a dwelling-house.

Held (reversing the judgment of Phillimore, J.), that the adjacent buildings must be included in the valuation of the premises for the purposes of inhabited house duty, as being offices belonging to and occupied with the dwelling-house within the meaning of rule 2 of Schedule B of 48 Geo. 3, c. 55.—BROWNE *v.* FURTADO, *C.A.*; [1903] 1 K. B. 723; 72 L. J. K. B. 296; 88 L. T. 309.

10. *Income tax—Annuity payable under contract—Option of such payment—Annual sum consisting partly of capital and partly of interest—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *s.* 102, *and* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedules C and D.*—Under the provisions of a contract entered into some years ago the Indian Government gave notice of its intention of paying off the purchase-money for a

railway by annual instalments called annuities. Part of these instalments represented capital and part interest. Upon payment being made income tax was deducted on the whole instalment.

Held, that the tax was not payable on that portion which represented the payment of capital.

Decision of the Court of Appeal (*ante*, p. 550) affirmed.—SECRETARY OF STATE FOR INDIA *v.* SCOBLE, *H.L.*, 675; [1903] A. C. 299; 72 L. J. K. B. 617.

11. *Income tax—Banking company—Purchase of banking business—Business "set up and commenced" within three years—Succession to business.*—The respondents acquired under an agreement the S. Bank, which had for some years carried on its business at W. The business of the S. Bank was carried on for some months after the purchase for the benefit of the respondents. The premises then became a branch of the respondent bank. All new cheque books and pass books were in the name of the respondent bank. From the date of the purchase the profits, if any, earned at the W. branch merged in and formed part of the general profits of the respondent bank, and there were no means of ascertaining whether there were any profits or the proportion of increase or decrease in the profits of the bank which had arisen from the purchase of the business. The general assessments of the respondent bank for the two years succeeding the purchase included some portion of the profits made by the W. branch, if any were made, but it was impossible to distinguish between such profits and the general profits of the bank. In the three years preceding the purchase the S. Bank had made certain profits, and additional assessments were made upon the respondent bank, being assumed profits made by them based on the average of the profits of the S. Bank of such three preceding years.

Held, first, that the business carried on by the respondents was not "set up and commenced" within the period of three years within the terms of the first proviso of rule 1 of the first case of Schedule D of the Income Tax Act, 1842; secondly, that the respondents had not "succeeded to any trade, manufacture, adventure, or concern" within the meaning of the fourth rule applicable to the first and second case in Schedule D; thirdly, that the business carried on by the respondents was their old business, enlarged by their acquisition of the S. Bank, and that they were only liable to be assessed upon the three years' average prescribed by rule 1 of the first case.—BELL *v.* NATIONAL PROVINCIAL BANK OF ENGLAND, *K.B.D.*; [1903] 2 K. B. 249; 72 L. J. K. B. 590; 88 L. T. 840.

12. *Income tax—Benefice, Incumbent of—Perquisites or profits accruing by reason of office—Gran by affiliated branch of Queen Victoria Clergy Sustentation Fund—Public office or employment of profit—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146; 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule E.*—The appellant, a beneficed clergyman, received for several years an annual grant of money from a diocesan branch affiliated to the Queen Victoria Clergy Sustentation Fund, a body incorporated with the object of providing adequate remuneration for the beneficed clergy for the work done by them; the fund was not intended to be merely a clerical charity. The funds of the diocesan branch were administered by a council whose aim was to raise the incomes of all benefices under £200 per annum in value to that amount. The council did not take into consideration the personal circumstances of the particular incumbent, but the onus rested upon the applicant of deciding whether his own circumstances justified him in applying for a grant. The incumbent of a benefice of less than £200 a year was not necessarily entitled to a grant, but the giving, withholding, continuance, and discontinuance of grants out of the funds were matters wholly within the discretion of the council. Where a benefice fell vacant during the year for which the grant was made, the grant was divided between the outgoing and incoming incumbent in proportion to the length of time for which each had been incumbent.

Held (reversing the decision of a Divisional Court, [1901] 2 K. B. 761), that the grants received by the incumbent from the diocesan branch were "perquisites or profits accruing by reason of his office" within the meaning of the first rule contained in section 146 of the Income Tax Act, 1842, for charging duties under Schedule E, and that he was therefore liable to pay income tax under Schedule E upon them.—HERBERT *v.* MCQUADE, *C.A.*; [1902] 2 K. B. 631; 71 L. J. K. B. 884; 87 L. T. 349.

13. *Income tax—Charitable institution—Restaurant—Profits.*—The Y.M.C.A. is a philanthropic association having classes, gymnasium, and publication department. Its expenses are defrayed by charitable subscriptions, donations, and fees, the latter of which are not sufficient to cover the expenditure. It also carries on a restaurant on the usual commercial principles, which is open to the public.

Held, that the losses of the association on its other branches could not be set off against the profits of the restaurant.—GROVE *v.* YOUNG MEN'S CHRISTIAN ASSOCIATION, *K.B.D.*; 88 L. T. 696.

14. *Income tax—Colonial investments; Interest from—Remittances not identified as capital—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D case* 4.—By section 100 of the Income Tax Act of 1842 it is provided that the duty chargeable under Schedule D, case 4, in respect of interest from "securities" in the Colonies, &c., is to be computed on the sums which have been, or will be, received in Great Britain in the current year.

A mutual life assurance society with its head office in Edinburgh, and where its management was exclusively vested in directors, sent to Australia for investment down to the end of 1898 a total sum of £1,504,000. The total remittances made to this country to the same date was £716,500, while the total funds in Australia, including accumulated interest and deducting all Australian expenses to the same date, was £1,822,207. The funds still remaining in Australia thus exceeded by £318,207 the sums sent there for investment. The amount remitted to this country from Australia in 1898 was £217,350. All this except £5,000 was intermixed with the society's funds in Australia, and the society did not show in their statement that the balance of £212,350 was in fact capital sent home.

Held, affirming the decision of the First Division of the Court of Session ([1901] 3 F. 874), that the Income Tax Commissioners had rightly charged the £212,350 with income tax.—SCOTTISH PROVIDENT INSTITUTION *v.* ALLAN, *H.L.*; [1903] A. C. 129; 72 L. J. P. C. 70; 88 L. T. 478.

15. *Income tax — Company resident in United Kingdom hold 98 per cent. of shares in foreign company—Control—Liability to pay income tax on profits made by foreign company—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, case* 1—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—The respondent company was incorporated in England and registered under the Companies Acts

to acquire (*inter alia*) not less than 95 per cent., and did in fact acquire 98 per cent. of the share capital of a foreign company, the remaining 2 per cent. being held by shareholders abroad independantly of the English company.

Held, that the respondent company was not assessable under Schedule D, case 1, of the Income Tax Act, 1842, to income tax upon the full amount of the profits of the foreign company as the Crown contended, because there was no evidence to rebut the respondent's contention that their interest in the foreign company was simply that of a shareholder, that they did not direct and control the foreign company, and that there was no such relationship of principal and agent or of master and servant existing between the two companies as to make the respondents liable under the claim put forward by the Crown.

Decision of Phillimore, J. (*ante*, p. 75, [1902] 2 K B. 450), affirmed.—KODAK (LIMITED) *v.* CLARK, *C.A.*, 459; [1903] 1 K. B. 505; 72 L. J. K. B. 369; 88 L. T. 155.

16. *Income tax—Deductions—Premium on life insurance—Advance by insurance company of half premium—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 54, *Schedules D and E.*—By the terms of a policy of life insurance it was provided that, if the assured should so desire, a portion of the premium—viz., £33, should in each year be advanced by the insurance company, and that the money so advanced should, with interest thereon, be a first charge on the policy. The premium was expressed to be £66 17*s.* 6d. The assured paid in respect of premium each year £33 17s. 6d., and obtained a receipt for £66 17s. 6d., the balance of £33 being advanced as provided for by the policy.

Held, that, under section 54 of the Income Tax Act, 1853, the assured was not entitled to deduct from his assessment to income tax the sum of £66 17s. 6d., as the amount of the annual premium paid by him for life insurance, but only the sum of £33 17s. 6d.

Judgment of Phillimore, J. (50 W. R. 618, [1902] 2 K. B. 255), reversed.—HUNTER *v.* REX, *C.A.*, 489; [1903] 1 K. B. 514; 72 L. J. K. B. 230; 88 L. T. 184.

17. *Income tax—Salary—Deductions—Sum payable or chargeable by virtue of any Act of Parliament—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *rr.* 1, 9, *Schedule E—Manchester Corporation Act*, 1891 (54 & 55 *Vict. c. ccvii.*), *ss.* 5, 7.—The Manchester Corporation Act, 1891, empowered the corporation to establish a fund for encouraging thrift amongst their officers and servants, and to frame a scheme under which every person who contributed to the fund should on retirement be entitled to receive back the whole amount of his contributions with interest, and in case of his death his representatives should be entitled to receive the same. The scheme made under this power provided that persons entering the service of the corporation after the passing of the Act should contribute to the fund a certain percentage of their salaries or wages, to be deducted by the corporation, and that persons who were in the service of the corporation at the passing of the Act might, on application, be admitted to the benefit of the fund and become contributors, and that no contributor should cease to contribute while in the service of the corporation.

Held, affirming the judgment of Phillimore, J., in *Hudson* v. *Gribble*, 50 W. R. 557, [1902] 2 K. B. 298, and reversing his judgment in *Bell* v. *Gribble*, that a servant of the corporation who contributed to the fund, whether compulsorily or on his own application, was not entitled, under the first rule of section 146 of the Income Tax Act, 1842, to have the amount of his contribution deducted from his assessment to income tax under Schedule E.

*Beaumont* v. *Bowers*, 48 W. R. 557, [1900] 2 Q. B. 204, not followed.—HUDSON *v.* GRIBBLE, *C.A.*, 457; [1903] 1 K. B. 517; 72 L. J. K. B. 242; 88 L. T. 186.

18. *Income tax—Ship owned by company and other persons—Two assessments.*—The S. Steamship Co. owned the steamship *B.* and fifty-nine sixty-fourths of the steamship *G.*, the remaining five sixty-fourths being owned by other persons.

Held, that the company was rightly assessed by two assessments, one in respect of the steamship *B.* and the other in respect of the steamship *G.*, as the latter was an adventure carried on by them jointly with other persons within the third rule, applying to both the first and second cases to section 100 of the Income Tax Act, 1842.—FARRELL *v.* SUNDERLAND STEAMSHIP CO., *K.B.D.*; 88 L. T. 741.

19. *Inhabited house duty—Exemption—House let in different tenements.*—A bank was the owner of a building, the basement and ground floor of which they occupied themselves for the purposes of the bank. The first and second floors were let to a firm of solicitors under a lease restricting the use of them to business purposes. The third and fourth floors were occupied as residences by the bank manager and a caretaker. Access to the first and other floors was obtained by a staircase from the street. There was also a door leading from the bank on the ground floor to this staircase. The door was kept locked, but the manager had a key so that he could pass from his residence to the bank without going outside the building.

Held, that the bank were liable to be assessed to inhabited house duty in respect of the whole building.—LONDON AND WESTMINSTER BANK *v.* SMITH, *H L.*; 87 L. T. 244.

20. *Stamp duty — Company — Consolidation of debenture stock—Issue of loan capital—Finance Act*, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.—By the special Act of the defendant company, three different debenture stocks of the company, being respectively 3 per cent., 4 per cent., and 4¼ per cent. stock, and amounting to £411,852, were extinguished, and in lieu thereof there was created a new 3 per cent. debenture stock. The holders of the original 3 per cent. stock received the same nominal amount of the new stock, and the holders of the 4 per cent. and 4¼ per cent. stocks received new stock to such nominal amount as at the rate of 3 per cent. would yield to the holder the same amount as was payable in respect of the stock previously held. The amount of the new debenture stock requisite to carry out the Act was £529,136, and stock to this amount was inscribed in the names of the persons entitled thereto, and certificates were issued in exchange for the old certificates.

Held, that the company had not proposed to "issue any loan capital" within the meaning of section 8 of the Finance Act, 1899, and that the stamp duty imposed by that section was not payable.—ATTORNEY-GENERAL *v.* REGENT'S CANAL AND DOCK CO., *K.B.D.*; [1903] 2 K. B. 86; 72 L. J. K. B. 511; 88 L. T. 740.

21. *Stamp duty—Medicines—Owner, proprietor, original or first vendor—Stamp Act*, 1804 (44 *Geo.* 3, *c.* 98), *s.* 2—*Medicine Stamp Acts*, 1802 (42 *Geo.* 3, *c.* 56, *s.* 3, *and* 1812 (52 *Geo.* 3, *c.* 150), *s.* 2, *Schedule.*—A chemist bought from a firm of wholesale chemists a well-known drug, called ammoniated

tincture of quinine. He affixed to it a label stating that it was a well-known and highly recommended remedy for influenza.

Held, that he was not the "owner, proprietor, original or first vendor" of the medicine in question within the meaning of the schedule, 52 Geo. 3, c. 150, and that therefore he was not liable to stamp duty as having held out or recommended the medicine.—FARMER *v.* GLYN JONES, *K.B.D.*, 524; [1903] 2 K. B. 6; 72 L. J. K. B. 523.

22. *Stamp duty—Mortgage—Collateral, auxiliary, or additional security—Trust deed for securing debentures—Subsequent conveyance of property to trustees—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s* 86, *Schedule I.*, "*Mortgage.*"—By a trust deed for securing debentures in a limited company, the company acknowledged that it was indebted to the trustees in the sum of £750,000, and agreed to convey to the trustees certain freehold hereditaments, which were described in the deed as "the specifically mortgaged premises." At the date of the execution of the trust deed the hereditaments had not been conveyed to the company. After their conveyance to the company the latter conveyed them to the trustees to hold them upon the trusts contained in the trust deed. The conveyance contained no obligation by the company to pay the moneys secured by the trust deed or any part thereof. The trust deed was stamped at the rate of 2s. 6d. per £100 of the amount secured, as a primary security under the heading "Mortgage, bond, debenture, covenant" in Schedule I., clause 1, in the Stamp Act, 1891.

Held, that the conveyance was a "a collateral or auxiliary, or additional security, or by way of further assurance" within clause 2 of the heading "Mortgage," &c., and was therefore liable to stamp duty at the rate of 6d. per £100 of the amount secured by the trust deed.—BRITISH OIL AND CAKE MILLS *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 388; [1903] 1 K. B. 689; 72 L. J. K. B. 312; 88 L. T. 526.

23. *Succession duty—Alienation—Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *s.* 15.—A tenant for life and remainderman having executed a disentailing assurance, in pursuance of a joint power of appointment conveyed land in fee to a purchaser. The purchaser by will devised the land, and on the death of the devisee succession duty was paid.

Held, that on the death of the tenant for life, one of the joint appointors, succession duty was also payable.—ATTORNEY-GENERAL *v.* NORTHUMBERLAND (DUKE), *K.B.D.*; [1903] 2 K. B. 71; 72 L. J. K. B. 442; 88 L. T. 600.

See also Will, 29-31.

INSURANCE:—

1. *Accident—"Intervening cause"—Construction of policy.*—A person insured himself with the defendants under a policy whereby the defendants agreed to pay him a certain sum in case he should be injured by accidental violence and should die within three months of its occurrence, if the injury should be the "direct and sole cause" of his death. The policy was subject to the condition that it should not apply to "death . . . caused by or arising wholly or in part from" any "intervening cause." The assured on the 2nd of July accidentally inflicted a wound on his leg with his thumbnail. His leg became inflamed, and on the 9th of July erysipelas had set in. This was followed on the 12th of July by septicæmia, and on the 16th of July by septic pneumonia, of which complaint he died on the 22nd of July. It was conceded by the defendants that the septic germs, the development of which resulted in the man's death, were introduced into his system at the time of the infliction of the wound.

Held, that the erysipelas, septicæmia, and septic pneumonia were not "intervening causes" within the meaning of the policy, but merely different stages in the development of the septic condition which was immediately brought about by the introduction of the poison, and that the man's death was directly and solely caused by the accidental injury to his leg.—MARDORF *v.* ACCIDENT INSURANCE CO., *K.B.D.*; [1903] 1 K. B. 584; 72 L. J. K. B. 362; 88 L. T. 330.

2. *Accident — Master and servant — Notice of accident—Delay by employer to give notice until notice of claim by workman was sent in—Award in favour of workman under Act of* 1897—*Insurance company's liability to indemnify employer.*—The appellants took out a policy of insurance against liability in respect of injury to any workman in their employ under (*inter alia*) the Workmen's Compensation Act, 1897, with the respondent company.

Clause 3 of the policy provided that the employer was "to give immediate notice to the company of any accident causing injury to a workman," and that "time should be the essence of this condition." At the foot of the policy there was a notification that every notice to be given by the assured should be in writing sent by post to, or delivered at, the head office of the company.

An accident having happened to a workman of the appellants on the 10th of October, 1900, on the 16th of October the appellants notified the fact of the accident by telephone to the person who had introduced the insurance company to them. The appellants received a notice in writing from the workman of his intention to claim compensation on the 1st of December, 1900, and they forwarded that notice to the respondent company on the 4th of December.

An award under the Act of 1897 having been made in favour of the workman, the appellants, the employers, claimed to be indemnified by the insurance company.

Held, that the giving of immediate notice of the accident was a condition precedent to the employers' right to indemnity under the policy, that the communication to the person who had introduced the appellants to the company was no notice to the company at all, and that under the circumstances the company were not liable.—WILLIAMS AND LANCASHIRE AND YORKSHIRE INSURANCE CO.'S ARBITRATION, RE, *K.B.D.*, 222.

3. *Bullion—Detainments of foreign government—"Free of capture, seizure, and detainments"—Seizure by enemy of property of its own subject—Commandeering of gold.*—The plaintiffs, a gold mining company incorporated under the laws of the South African Republic, insured gold whilst on transit from the mine to the United Kingdom with the defendants against arrests, restraints, and detainments of kings, princes, and people. The policy contained this clause: "Warranted free of capture, seizure, and detention and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." While in transit the gold was seized at the frontier under orders from the Government of the South African Republic. At that time war had not been declared against Great Britain, but the commandoes had been called out, and evidence was given that the

seizure was in accordance with the laws of the Republic.

Held, that the defendants were not liable, as the loss was caused by "seizure" within the meaning of the exception in the policy.

Judgment of Phillimore, J., (50 W. R 109, [1901] 2 K. B. 919), affirmed.—ROBINSON GOLD MINING CO. *v.* ALLIANCE ASSURANCE CO., *C.A.*; 105; [1902] 2 K. B. 489; 71 L. J. K. B. 942; 86 L. T. 858.

4. *Bullion—Seizure of gold by foreign government—Subsequent declaration of war—Insurance of enemy's property*—An insurance by a British subject of an alien's goods effected before war actually breaks out between this country and the foreign government to which the alien owes allegiance, is an binding agreement which may be enforced on the resumption of peace, and this is so though the goods were seized by the foreign government when hostilities were imminent and for the purpose of carrying on the war.

Decision of the Court of Appeal (49 W. R. 660, [1901] 2 K. B. 419) affirmed.—JANSON *v.* DRIEFONTEIN CONSOLIDATED MINES, *H.L.*, 142; [1902] A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372.

5. *Fire insurance—Arbitration—English contract—Conditions — Law of Jersey.*—A fire policy was issued by an English company in favour of a Jersey gentleman upon property in Jersey. It was in English, and executed in Jersey by the agents of the insurance company. Among the conditions indorsed on the policy it was provided that no action should be brought for any money payable under the policy until the liability and the amount had been fixed by arbitration, and also that the submission to arbitrators should be subject to the provisions of the Arbitration Act, 1889, and might be made a rule of the High Court of Justice.

Held, that this was an English contract, and ought to be governed by English law; that, consequently, no action could be sustained in Jersey or in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the conditions.—SPURRIER *v.* LA CLOCHE, *P.C.*, 1; [1902] A. C. 446; 71 L. J. P. C. 101; 86 L. T. 631.

6. *Life—Illegality—Insurable interest—Action to recover premiums paid—Insurance law, knowledge of.*—The fact that a person will at some future date be under a moral, though not a legal, obligation to pay for the funeral expenses of a relative is not sufficient to create an insurable interest in that relative's life.

The agent of the defendants, an insurance company, in good faith and believing his statement to be true, represented to the plaintiff that an insurance effected by the plaintiff upon the life of his mother would be a good and valid insurance, and the plaintiff, relying upon that representation, effected an insurance with the defendants on his mother's life, and paid premiums thereunder. The policy being illegal and void for want of an insurable interest,

Held, that, as the plaintiff was entitled to assume that the defendants' agent would have a knowledge of insurance law, the parties were not *in pari delicto*, and the premiums could consequently be recovered back.—HARSE *v.* PEARL LIFE ASSURANCE CO., *K.B.D.*; [1903] 2 K. B. 92; 72 L. J. K. B. 638

7. *Life—Industrial assurance company—Policy—No insurable interest—Premiums paid under void policy—Claim for return of premiums—Jurisdiction of justices—Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 & 60 *Vict. c.* 26), *s.* 7—*Life Assurance Act*, 1774 (14 *Geo.* 3, *c.* 48), *s.* 1—*Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.—Section 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, provides that in all disputes between an industrial assurance company and any member or person insured that member or person may apply to the court of summary jurisdiction for the place where that member or person resides, and the court may settle the dispute.

Held, that the section applies only the settling of disputes between the assurance company and its members, or persons insured, or under the rules of the society; and that, consequently, where a person, who has effected an insurance with an industrial assurance company on the life of another person, afterwards claims the return of premiums paid under the policy, on the ground that the insurance never was a valid insurance, and the policy was void for want of insurable interest, the section does not apply, and the court of summary jurisdiction has no jurisdiction to determine such claim, as the claimant's case then is that he never was insured with the company at all, and, therefore, he is estopped from saying that he is a "person insured."

In such case the objection that there is no jurisdiction in the justices can be taken before the Divisional Court, although such objection was not taken or raised before the justices, and no question as to it is left to the court by the justices; but the party so taking the objection may have to pay the costs thrown away by not taking the objection at the proper time.—LONDON, EDINBURGH, AND GLASGOW ASSURANCE CO. *v.* PARTINGTON, *K.B.D.*; 88 L. T. 732.

8. *Life—Payment into court—Opinion of directors—Reasonable ground for opinion—Costs—Life Assurance Companies (Payment into Court) Act*, 1896 (59 & 60 *Vict. c.* 8), *s.* 3—*Ord.* 54c, *rr.* 3, 5, 7.—A life assurance company, against whom an action has been brought on a policy, are entitled to an order under ord. 54c, r. 3, giving them leave to pay the insurance money into court, under section 3 of the Life Assurance Companies (Payment into Court) Act, 1896, if it is shown that in the opinion of the board of directors no sufficient discharge can otherwise be obtained. It is not necessary to show that the directors have reasonable grounds for being of that opinion.

Any prejudice to the claimant by reason of the directors having acted unreasonably in the matter may be remedied by an order as to costs on the subsequent application for taking the money out of court.—HARRISON *v.* ALLIANCE ASSURANCE CO., *C.A.*, 281; [1903] 1 K. B. 184; 72 L. J. K. B. 115; 88 L. T. 4.

9. *Life—Premium, payment of—Premium payable by quarterly instalments—Instalment becoming due during currency of policy—Payment during days of grace after death of assured—Liability on policy.*—The premium on an annual policy of life insurance was payable by quarterly instalments on certain specified days or within thirty days after. One of the conditions in the policy provided that in case a claim should arise during the subsistence of the policy and before all the premiums, whether half-yearly or quarterly, for the then current year should have become due and been paid, the amount of such premiums should be deducted from the sum assured; and the policy should become void if at the time of the death of the assured any of the above-mentioned premiums were more than thirty

days in arrear. The assured, having assigned the policy, died after the day on which one of the quarterly instalments for the current year became due, but before the expiration of the thirty days of grace, without having paid the instalment. The assignee, after the death of the assured, paid the instalment within the thirty days, both he and the insurers being unaware of the death of the assured. In an action on the policy by the assignee against the insurers to recover the amount of the policy moneys,

Held, that as the insurance was for a year, subject to a condition for forfeiture if any of the quarterly instalments were not paid within thirty days after they became due, the payment of the instalment within the thirty days of grace during the subsistence of the policy, though after the death of the assured, was a valid payment, and the assignee was entitled to recover.

*Pritchard* v. *Merchants' Life Assurance Society*, 6 W. R. 340, 3 C. B. N. S. 622, discussed.—STUART *v.* FREEMAN, *C.A.*, 211; [1903] 1 K. B. 47; 72 L. J. K. B. 1; 87 L. T. 516.

10. *Marine—Concealment of facts—Knowledge of Lloyd's agent—Knowledge of individual member of Lloyd's.*—The knowledge of Lloyd's agents cannot be taken to be the knowledge of an individual member of Lloyd's, so as to make void a policy of marine insurance on the ground of concealment of facts, where such individual member has no actual knowledge in fact. — WILSON *v.* SALAMANDRA ASSURANCE CO., *K.B.D.*; 88 L. T. 96.

11. *Marine—Custom at Lloyd's—Periodical settlement between broker and underwriter—Bankruptcy of broker — Liability of underwriter.* — A policy of insurance was effected on a cargo of tea by an insurance broker on behalf of the plaintiff, and the defendant, a member of Lloyd's, subscribed the said policy. In accordance with a custom at Lloyd's, the broker and the defendant had a running account which was periodically settled, whereby premiums due to the defendant were set off as against losses due to the broker.

A loss under the said policy was thus settled in an account.

The broker, before paying the plaintiff the sum so due, became bankrupt, and the plaintiff sued the defendant.

Held, that the plaintiff was not bound by the custom, unless he knew of its existence, and that it lay on the defendant to prove that the plaintiff knew of the custom; and that *Sweeting* v. *Pearce*, 9 W. R. 343, was not affected by *Robinson* v. *Mollett*, L. R. 7 H. L. 802, 24 W. R. Dig. 222.—MATVEIEFF & CO. *v.* CROSSFIELD, *K.B.D.*, 365.

12. *Marine—Loss—Constructive total loss—Taking value of wreck into account.*—Where a vessel has been stranded by a peril insured against, in estimating whether or not she is a constructive total loss, the value of the wreck is not an element which ought to be taken into consideration.—ANGEL *v.* MERCHANTS' MARINE INSURANCE CO., *C.A.*, 530; [1903] 1 K. B. 811; 72 L. J. K. B. 498; 88 L. T. 717.

13. *Marine — Policy — Duration of risk—Construction—"Thirty days in port after arrival."*—A policy of marine insurance on a vessel was expressed to be four "a voyage from Portland, Oregon, by any route to Algoa Bay and for thirty days in port after arrival, however employed." The policy described the risk as running until the vessel "hath moored at anchor twenty-four hours in good safety." The words "twenty-four hours" were struck out and the words "as above" were written over them. The vessel arrived at Algoa Bay at 10 a.m. on the 2nd of August, 1902; was safely moored at anchor in the bay at 11.30 on the same day; and was totally lost at 4.30 p.m. on the 1st of September.

Held, that "thirty days" meant thirty consecutive periods of twenty-four hours, beginning at 11 30 a.m. on the 2nd of August, and not thirty calendar days, and that therefore the vessel was lost after the expiration of the time covered by the policy.—CORNFOOT *v.* ROYAL EXCHANGE ASSURANCE CORPORATION, *K.B.D.*, 527; 72 L. J. K. B. 387.

14. *Marine—Policy on hull and machinery of torpedo-boat, destroyer—"Latent defect"—"Breakage of shafts" — "Trials."* — A policy of marine insurance upon the hull and machinery of a torpedo-boat destroyer covered the following perils: "Fire in shops and on board, on stocks, trials, and all marine risks to completion and acceptance by the Admiralty . . . and all other perils, losses, or misfortunes." Attached to the policy was this clause: "This insurance is also specially to cover loss of or damage to hull or machinery through the negligence of mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect . . . with leave to go on trial trips." During a trial the connecting rod of the starboard engine broke, causing great damage.

Held, that "latent defect in machinery" did not cover a weakness in design; that the breakage of the connecting rod was not a "breakage of shafts": and that "trials" did not denote a period during which the assured were to be insured against fire, but specified a particular peril insured against—viz., peril of trials.—JACKSON *v.* MUMFORD, *K.B.D.*, 91.

15. *Marine—Reinsurance—Constructive total loss—"To pay as may be paid thereon"—Suing and labouring—Salvage charges.*—Shipowners insured their ship with the plaintiffs for a voyage against partial as well as total loss, the sound value of the ship being expressed in the policy to be agreed at a specified sum. The plaintiffs reinsured with the defendant against the risk of total or constructive total loss only, the ship being valued at per original policy. The policy of reinsurance was in the form of an ordinary Lloyd's policy, containing in print the usual undertaking by the assurers to contribute to suing and labouring charges. It also contained in writing the following clauses: "Being a reinsurance subject to the same clauses and conditions as the original policy and to pay as may be paid thereon"; and, "No claim to attach to this policy for salvage charges." During the course of the insured voyage the ship stranded and suffered damage. The probable cost of getting her afloat, taking her to a port of repair, and repairing her exceeded the agreed value of the ship as expressed in the policy, but as it was in fact less than her real repaired value, the owners elected not to give notice of abandonment. The ship was floated and placed in a condition of safety, and subsequently taken to a port of repair and repaired. The owners recovered from the plaintiffs upon their policy £107 per cent. of their proportion of the agreed value of the ship, that sum being made up partly of the expense of repairs and partly of the expense of floating. The plaintiffs then sued the defendant for the full amount underwritten by him as in respect of a constructive total loss, or in the alternative for his proportion of the suing and labouring charges.

Held, (1) that, there being, in the absence of a notice of abandonment by the owners, no original liability upon the plaintiffs to pay as for a constructive total loss, the mere fact that they had paid, in respect of a partial loss and suing and labouring charges combined, upwards of £100 per cent. did not entitle the plaintiffs to recover that sum from the defendant as for a constructive total loss under the words "to pay as may be paid thereon"; and (2) that the clause providing that no claim was to attach for "salvage charges" excluded the defendant's obligation to contribute to the suing and labouring charges, notwithstanding the omission to delete the printed clause imposing that obligation.

*Uzielli* v. *Boston Marine Insurance Co.*, (1884) 15 Q. B. D. 11, discussed.—WESTERN ASSURANCE CO. OF TORONTO *v.* POOLE, *K.B.D.*; [1903] 1 K. B. 376; 72 L. J. K. B. 195; 88 L. T. 362.

16. *Marine—"Restraints of people"—Prohibition against landing cattle—"Warranted free of capture, seizure, or detention."*—Under a Lloyd's policy cattle were insured for a voyage from Liverpool to Buenos Ayres against (*inter alia*) "arrests, restraints, and detainments of all kings, princes, and people." The policy also contained the following clause: "Warranted free of capture, seizure, or detention." Prior to the shipment the Argentine Government had issued a decree prohibiting the entry of animals suffering from contagious diseases, and providing for the slaughter of animals suspected of disease. On arrival at Buenos Ayres the cattle were found to be suffering from a contagious disease, and the authorities refused to allow them to be landed. The cattle were thereupon transhipped to another vessel outside the port and taken to another port, where they were sold at a considerable loss. In an action on the policy,

Held, (1) not agreeing with the judgment of Bigham, J., that the loss was a loss within the words "restraints of people" in the policy; and (2), agreeing with Bigham, J., upon this point, that the warranty against capture, seizure, or detention freed the underwriters from liability under the words "arrests, restraints, and detainments" in the earlier part of the policy.

Judgment of Bigham, J. (50 W. R. 474, 7 Com. Cas. 151, [1902] 2 K. B. 694), affirmed.—MILLER *v.* LAW ACCIDENT INSURANCE SOCIETY, *C.A.*, 420; [1903] 1 K. B. 712; 72 L. J. K. B. 428; 88 L. T. 369.

17. *Marine—Ship—Valued policy—Salvage and general average contribution—Real value of ship—Liability of underwriters.*—A ship was insured for £33,000 and was valued in the policy for the same sum. While the policy was current a general average loss was sustained and salvage services rendered to the ship, and the ship was valued in the salvage action at £40,000. In an action on the policy,

Held, that the shipowners were only entitled to recover from the underwriters thirty-three-fortieths of the amount due from the ship for salvage and general average.

Decision of the Court of Appeal (50 W. R. 35, [1901] 2 K. B. 896) affirmed.—BALMORAL STEAMSHIP CO. *v.* MARTEN, *H.L.*, 173; [1902] A. C. 511; 71 L. J. K. B. 819; 87 L. T. 247.

18. *Marine—Subject-matter of insurance—Liability of shipowner under contract of carriage—Suing and labouring clause—Applicability.*—A number of mules exceeding £20,000 in value having been shipped on the plaintiffs' steamship for carriage under a contract which contained no clause exempting the plaintiffs from liability for loss of the mules through the negligence of the plaintiffs' servants, the plaintiffs effected an insurance with the defendant, an underwriter at Lloyd's, to protect them against "liability of any kind" to the owners of the mules up to £20,000 owing to the omission of the negligence clause from the contract. The policy was in the printed form of an ordinary Lloyd's policy, containing the usual suing and labouring clause. During the voyage the vessel stranded through the negligence of the plaintiffs' servants, and expenses were incurred by the plaintiffs in saving some of the mules and in attempting to save others which were lost. The plaintiffs sought to recover these expenses, not as a direct loss under the policy, but under the suing and labouring clause as expenses incurred to avert or reduce the amount of the loss.

Held, that the suing and labouring clause was inapplicable to and formed no part of the contract of insurance, and that the plaintiffs were not entitled to recover in the action.—CUNARD STEAMSHIP CO. (LIMITED) *v.* MARTEN, *K.B.D.*; [1902] 2 K. B. 624; 71 L. J. K. B. 968; 87 L. T. 400.

19. *Marine—Time policy—General average—Contract of affreightment—Foreign statement—Belgian law.*—A policy of marine insurance contained the following clause: "General average payable according to foreign statement if so made up or York-Antwerp Rules if in accordance with contract of affreightment.

Attached to the policy were the Institute Time Clauses, 1900, one of which provides: "General average and salvage charges payable according to foreign statement or per York-Antwerp Rules if in accordance with the contract of affreightment."

By a charter-party made between the shipowner and the charterer it was agreed that, "In case of average the same to be settled according to York-Antwerp Rules, 1900, excepting that jettison of deck cargo (and freight thereon) for the common safety shall be allowable as general average."

The average statement was made up at Antwerp, and included jettisoned deck cargo and freight thereon. The shipowner paid the ship's contribution to general average. Apart from express agreement in the contract of affreightment, the Belgian law would not recognize such jettisoned deck cargo and freight thereon as being the subject of a claim for general average.

Held, in an action by the shipowner to recover from the underwriters the amount of his contribution, that the underwriters were liable.—DE HART *v.* COMPANIA ANONIMA "SEGUROS AURORA," *K.B.D.*, 318; [1903] 1 K. B. 109; 72 L. J. K. B. 64; 87 L. T. 716.

20. *Marine—Voyage policy—Round voyage—Implied warranty of seaworthiness—Insufficiency of coal—Sacrifice of cargo and spars—Negligence clause—Breach of warranty covered by insurance.*—Although the warranty of seaworthiness implied in a policy for a round voyage is that the ship is seaworthy for the whole voyage, the warranty, so far as the obligation of the shipowner to have on board a proper supply of coal is concerned, is sufficiently observed if the voyage is so arranged as that the vessel can and shall coal at convenient ports *en route*.

A policy of insurance for a round voyage contained the following clauses: "This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. . . . Held covered in case of any breach of warranty . . . at a premium to be hereafter arranged."

The vessel started on one of the stages of the voyage with an insufficient supply of coal to carry her to the next coaling place, in consequence of which it became necessary to sacrifice part of the cargo, spars, and fittings.

Held, that the starting of the vessel on a stage of the voyage with an insufficient quantity of coal was a breach of the implied warranty of seaworthiness on the part of the shipowner.

Held, also, that the right of the shipowner, under one of the above clauses, to call upon the underwriter to hold him covered in case of a breach of warranty could only be exercised by him on payment of a reasonable additional premium, and that in the present case such premium would exceed the amount of any loss that could be claimed by the shipowner.

Held, further, that the shipowner was not entitled to recover under the negligence clause, because the loss was not due to any negligent act. —GREENOCK STEAMSHIP CO. *v.* MARITIME INSURANCE CO., *K.B.D.*, 447; [1903] 1 K. B. 367; 72 L. J. K. B. 59; 88 L. T. 207.

INTEREST:—

*Charge on land—Order of court—No words charging interest—Interest-bearing debt—Presumption of satisfaction—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 42), *s.* 28.—A charge on land created by an instrument or order of the court carries interest, though there are no words in the instrument or order expressly charging interest. If a claim to have money raised and paid out of real estate is not barred by the Statute of Limitations, there is no ground, in the absence of any special circumstances, for raising a presumption of satisfaction.—DRAX, RE, SAVILE *v.* DRAX, *C.A.*, 612; [1903] 1 Ch. 781; 72 L. J. Ch. 505; 88 L. T. 510.

See also Will, 32.

INTERNATIONAL LAW:—

*Jurisdiction — British colony — Personalty and real property out of the jurisdiction—Will—Construction—Trust.*—A testator domiciled in a British colony left real and personal property in the colony. In an action instituted in England by the heir-at-law and next-of-kin of the testator against persons who had taken possession of the personal and real estate in the colony of the testator, all parties to the action being resident in England.

Held, that the English court had jurisdiction in the action to determine questions (1) as to the title to the real estate as well as the personalty situate in the colony, the two being so mixed together under the will that they could not be dealt with separately; and (2) as to whether a trust of the real estate had been created by the will or not.—CLINTON, RE, CLINTON *v.* CLINTON, *Ch.D. Joyce, J.*, 316; 88 L. T. 17.

INTERPLEADER:—

*Appeal—Summary decision of judge—Leave to appeal—Ord.* 57, *rr.* 9, 11.—Where in interpleader proceedings a judge decides the question as one of law without directing the trial of an issue or ordering a special case to be stated, his decision is a summary decision within the meaning of the Common Law Procedure Act, 1860, s 17, and is not subject to appeal, even by leave.—VAN LAUN & CO. *v.* BARING BROTHERS, *C.A.*; [1903] 2 K. B. 277.

JUDGMENT:—

*Scotch decreet—Registration in England—Enforcement—"Execution"—Appointment of receiver—Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 54), *ss.* 3, 4.—Where the certificate of an extracted decreet of the Court of Session in Scotland has been registered in the High Court of Justice in England under section 3 of the Judgments Extension Act, 1868, it can be enforced in England by the appointment of a receiver, as being a mode of "execution" within the meaning of section 4 of the Act.—THOMSON *v.* GILL, *C.A.*, 484; [1903] 1 K. B. 760; 72 L. J. K. B. 411; 88 L. T. 715.

JUSTICES:—

*Evidence—Previous conviction—Register of convictions in court of summary jurisdiction—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 22—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 14—*Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 18—*Jurisdiction—Conviction for drunkenness—Notice to police—Consent of defendant—Inebriates Act*, 1898 (61 & 62 *Vict c.* 60), *s.* 2, *sub-section* 1—*Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 6, *sub-section* 1.—The register of the minutes or memorandum of convictions of a court of summary jurisdiction which has to be kept under section 22 of the Summary Jurisdiction Act, 1879, by the clerk of the court is admissible in evidence to prove a previous conviction of the defendant for a similar offence in the same court.

The consent of the defendant to be tried summarily under section 2 of the Inebriates Act, 1898, is necessary before a magistrate can make an order under section 6, sub-section 1, of the Licensing Act, 1902.—COMMISSIONER OF POLICE *v.* DONOVAN, *K.B.D.*; [1903] 1 K. B. 895; 72 L. J. K. B. 545; 88 L. T. 555.

LAND TRANSFER ACTS.—See Merger, 2.

LANDLORD AND TENANT.

1. *Agreement to let—Implied covenant for quiet enjoyment.*—By a memorandum of agreement not under seal the landlord agreed to let and the tenant agreed to take a furnished house for a year.

Held, that, from the mere relation of landlord and tenant, there was an implied undertaking by the landlord for quiet enjoyment.

*Bandy* v. *Cartwright*, 1 W. R. 415, 8 Exch. 913, and *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737, 11 W. R. C. L. Dig. 86, followed.

*Dicta* of Kay, L. J., in *Baynes & Co.* v. *Lloyd & Sons*, 44 W. R. 328, [1895] 2 Q. B. 610, dissented from.

In all such cases as above it is a question of fact whether there has been a breach of such undertaking.—BUDD-SCOTT *v.* DANIELL, *K.B.D.*, 134; [1902] 2 K. B. 351; 71 L. J. K. B. 706; 87 L. T. 392.

2. *Contract of letting—Document not under seal—Weekly rent—Contract not to give notice to quit—Lease for life—Agreement for lease—Specific performance—Ejectment.*—By a document not under seal it was expressed that the plaintiff had let a house to the defendant at a weekly rent, and that the plaintiff agreed not to raise the rent so long as the defendant lived in the house and paid rent regularly, and that the plaintiff would not give the defendant notice to quit, and that, if at any time the defendant wished to move out, the plaintiff promised to return to him the sum of money he had paid on taking possession.

In an action of ejectment brought after the defendant had refused to quit, in pursuance of a week's notice to quit,

Held, that the interest intended to be created by document was a lease to the defendant for his life subject to certain conditions; that though it would be void as such a lease for want of a seal, it might be used as an agreement for such a lease; and that such an agreement was capable of specific perform-

ance; and that, therefore, the defendant, electing to ask for specific performance, was entitled to judgment.—ZIMBLER *v.* ABRAHAMS, *C.A.*, 343; [1903] 1 K. B. 577; 72 L. J. K. B. 103; 88 L. T. 46.

3. *Covenant by lessee to pay present and future outgoings charged on the premises—Expenses of private street works—Works completed before commencement of term—Final apportionment made afterwards—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 12, 13, 14.—A lease of certain premises contained a covenant by the lessee to "pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the said premises or the owner or occupier in respect thereof." Before the commencement of the term certain private street works, executed under the Private Street Works Act, 1892, had been completed, and the expenses thereof became, from the date of completion a charge upon the premises, though the final apportionment of the expenses was not made until after the commencement of the term. The lessor, having paid the amount of the expenses apportioned in respect of the premises, sued the lessee to recover the sum so paid as being an outgoing which the lessee was liable to pay under his covenant.

Held, that the covenant did not apply to an outgoing which was charged upon the premises before the commencement of the term, though not payable until afterwards.—SURTEES *v.* WOODHOUSE, *C.A.*, 275; [1903] 1 K. B. 396; 72 L. J. K. B. 302; 88 L. T. 407.

4. *Covenant by lessor not to carry on or permit a particular trade on adjoining premises—Lessees—Assigns—Injunction.*—The lessee of a person bound by a restrictive covenant can be sued, whether "assigns" are mentioned in the covenant or not.

In a lease by H. to the plaintiff company, the lessor covenanted that he, his heirs, executors, administrators, and assigns, would not carry on, or permit to be carried on by others, in certain named shops the business of a tailor; H. subsequently demised one of the shops to B. for a tailoring business. In an action by the plaintiff company against H. and B. for an injunction to restrain H. from permitting, and B. from carrying on, this business.

Held, on the construction of the covenant, that the mention of assigns, without mentioning lessees, afforded no ground, standing alone, for holding that the covenant was not binding upon B.; that though "lessees" were not mentioned *eo nomine*, the words of the covenant were sufficient to bind B. not to carry on the particular business referred to, and that an injunction ought to be granted.

*Bryant* v. *Hancock & Co.*, [1898] 1 Q. B. 716, distinguished.

The decision in *Kemp* v. *Bird*, (1877) 5 Ch. D. 549, 974, is not inconsistent with that of *Fitz* v. *Iles*, [1893] 1 Ch. 77.—HOLLOWAY BROTHERS *v.* HILL, *Ch.D. Byrne, J.*; [1902] 2 Ch. 612; 71 L. J. Ch. 818; 87 L. T. 201.

5. *Covenant for quiet enjoyment—Assignment of reversion—Liability of assignee—Acts done on land acquired subsequently to demise from strangers to lessor—Breach of covenant—Interference with access of air to chimneys.*—A covenant for quiet enjoyment in a lease must be construed with reference to the state of things at the date of the covenant, and cannot be extended to cover user by the lessor of land acquired by him subsequently to the date of the lease, and even if it could be so extended the obligation would not be binding on an assignee of the reversion who has acquired adjoining land under another title, and does the Acts complained of under that other title.

Section 11 of the Conveyancing Act, 1881, in no way alters the old law as to the class of covenants the burden of which will run with the reversion. A demise of offices to the plaintiff contained a covenant for quiet enjoyment. The lessor afterwards assigned the reversion on the term to the defendants. The defendants subsequently acquired the house next door to the demised offices, and having pulled it down rebuilt it much higher, thus causing the chimneys of the demised offices to smoke.

Held, that there was no breach of the covenant for quiet enjoyment.

*Per* Romer, L.J.—When by an alleged breach of the ordinary covenant for quiet enjoyment neither the title to nor the possession of the land is affected, and only the lessee's enjoyment of the land is interrupted by some act of the lessor, *Quære*, whether the act complained of is a breach of the covenant unless it amounts to a direct interference with the enjoyment.

*Per* Romer and Cozens-Hardy, L.JJ.—*Quære*, whether *Tebb* v. *Cave*, 48 W. R. 318, [1900] 1 Ch. 642, was rightly decided on the ground of breach of covenant for quiet enjoyment.

Decision of Byrne, J., *ante*, p. 42, [1902] 2 Ch. 635, affirmed. — DAVIS *v.* TOWN PROPERTIES INVESTMENT CORPORATION, *C.A.*, 417; [1903] 1 Ch. 797; 72 L. J. Ch. 389; 88 L. T. 665.

6. *Covenant for quiet enjoyment—Implied covenant—"Let"—Unlimited covenant.*—An unlimited covenant for quiet enjoyment cannot be implied from the use of the word "let" in a contract of letting.—JONES *v.* LAVINGTON, *C.A.*, 161; [1903] 1 K. B. 253; 72 L. J. K. B. 78; 88 L. T. 223.

7. *Covenant by lessee to pay all charges—Repair of defective drain by lessee by order of local authority—Liability of lessee to bear expense.*—A lease for years, granted by the plaintiff to the defendant, contained a covenant by the lessee to pay during the term "the sewers rate and all other taxes, rates, charges, and assessments whatsoever, parliamentary, parochial, or otherwise, which then were or thereafter should be imposed, charged, or assessed upon or in respect of the premises, or payable by either the owner or occupier in respect of the same." The lease also contained a covenant by the lessee to repair and keep in repair. In compliance with a notice given by the local authority, under section 94 of the Public Health Act, 1875, the plaintiff did the work necessary to abate a nuisance caused by a defective drain upon the premises, and brought this action to recover the cost of that work.

Held, that the expenses of doing this work came within the terms of the covenant as a "charge imposed upon or in respect of the premises or payable by either the owner or occupier in respect of the same"; and that the lessee was therefore liable to pay the expense thereof himself.—GEORGE *v.* COATES, *C.A.*; 88 L. T. 48.

8 *Covenant by tenant to pay "impositions"—Three years' tenancy—Notice by sanitary authority to reconstruct drains.*—A landlord let a house to a tenant for three years at the clear yearly rent of £54 to be paid free and clear of and from all deductions. The tenant covenanted to pay all impositions which might become due or assessed in respect of the premises during the tenancy, property tax excepted.

Held, that the duty and expense of complying with a notice from the sanitary authority to recon-

struct the drains constituted an imposition within the agreement which fell on the tenant.—WARRINER, RE, BRAYSHAW *v* NINNIS, *Ch.D. Eady, J.*; [1903] 2 Ch. 367; 88 L. T. 766.

9. *Covenant by lessee to pay taxes, rates, and assessments—Expenses of paving rate—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 150.—A covenant in a lease that the lessee would during the continuance "pay all taxes, rates, and assessments imposed or assessed upon the premises or on the landlord or tenant in respect thereof," does not impose on the lessee the apportioned cost of paving the road in front of the premises in respect of work done by the local authority under section 150 of the Public Health Act, 1875, where the work was done before, but the apportionment was made after, the granting of the lease.

*Baylis* v. *Jiggens*, [1898] 2 Q. B. 315, 46 W. R. Dig. 87, followed.

*Foulger* v. *Arding*, 50 W. R. 417, [1902] 1 K. B. 700, distinguisheded.—LUMBY *v.* FAUPEL, *K.B.D.*, 522; 88 L. T. 562.

10. *Covenant not to assign without licence—Flat—"Not to be unreasonably or arbitrarily withheld"—Proviso in licence.*—The lessee of a flat covenanted that he would not assign the flat without the licence in writing of the lessor, but such licence should not be unreasonably or arbitrarily withheld. On the lessee proposing to assign the flat to one J. H. H., a licence was granted to him by the lessor, but with the proviso "that this consent is granted upon the terms and conditions that if in consequence of the said assignment the rateable value of the said hereditaments and premises is increased you and the said J. H. H., or one of you, will on demand pay to the company (the lessor) any future increase of rates, taxes, charges, assessments, or impositions whatsoever assessed or imposed in consequence of the said assignment."

Declared, that the defendant company was not entitled to insert the proviso in the licence or any proviso to the like effect, and that the plaintiff might assign the flat to J. H. H. without any further consent from the defendant company.—YOUNG *v.* ASHLEY GARDENS PROPERTIES, *C.A.*; [1903] 2 Ch. 112; 72 L. J. Ch. 520; 88 L. T. 541.

11. *Covenant not to do or suffer any act—Sub-lease—Breach by subtenant—Liability of assignee of lessee.*—T. being the assignee of a lease which contained a covenant that the lessee would not do or suffer to be done on the premises any acts whereby the licence might be forfeited or indorsed, sub-leased to K., such sublease containing a covenant to the same effect.

K. committed a breach of the licensing laws and the justices refused to renew the licence.

In an action against T. by the lessor to recover damages for breach of the covenant,

Held, that T. had not suffered the Act to be done, and was not liable.—WILSON *v.* TWAMLEY, *K.B.D.*; 88 L. T. 803.

12. *Covenant not to make alterations—Shop—Fixture—Advertising sign.*—A tenant who occupied certain premises as a place of business under a lease, which contained a covenant by the lessee not to make any alteration to the premises without the consent of the landlord, erected on the front of the premises a clock some four feet in diameter and fastened into the stone of the front of the premises by iron bolts as an advertising sign without the consent of the landlord.

Held, that the covenant ought not to be so construed as to extend to any alteration which did not affect the structure or form of the premises, and at the same time was reasonable and proper for carrying on the business of the lessee in an ordinary way.—BICKMORE *v.* DIMMER, *C.A.*, 180; [1903] 1 Ch. 153; 72 L. J. Ch. 96; 88 L. T. 78.

13. *Covenant to yield up fixtures—Construction—Trade fixtures—General words—*Ejusdem generis*—Right of tenant to remove trade fixtures.*—In a covenant by a tenant to deliver up fixtures at the end of his lease, if there is a series of words which point to additions to the premises which ordinarily would not as between landlord and tenant be removable by the tenant, general words which follow those particular words ought to be confined to things not included in tenant's fixtures, unless there is something which clearly shows an express intention that they are not to be so confined.

In order to show that the covenant for delivery up has taken away the tenant's rights, the onus is on the landlord to show that that was the object and intention of the covenant, and if the language of the covenant leaves the matter doubtful, the ordinary rights of the tenant will not be interfered with.

*Bishop* v. *Elliott*, 3 W. R. 454, 11 Exch. 113, approved.

Decision of Kekewich, J., [1903] 1 Ch. 806, reversed.—LAMBOURN *v.* MCLELLAN, *C.A.*, 594; [1903] 2 Ch. 268; 72 L. J. Ch. 617; 88 L. T. 748.

14. *Covenant to pay—"Outgoings"—Tenancy for three years—Order by sanitary authority to reconstruct drain—Liability of tenant.*—The plaintiff let a house to the defendant for a term of three years, the tenant agreeing to pay all "outgoings payable in respect of the premises." During the tenancy the plaintiff, in obedience to an order from the sanitary authority, reconstructed the drainage system of the house.

Held, that the shortness of the term was no reason for putting a more limited construction upon the expression "outgoings" than that which would have been put upon it in a lease for a longer period, and that the defendant was liable under his agreement to recoup the plaintiff the expense of the drainage work.

Decision of Farwell, J., in *Valpy* v. *St. Leonards Wharf Co.*, [1903] 1 L. G. R. 305, distinguished.—STOCKDALE *v.* ASCHERBERG, *K.B.D.*; [1903] 1 K. B. 873; 72 L. J. K. B. 492; 88 L. T. 767.

15. *Forfeiture—Covenant not to assign or underlet without consent—Mortgage by sub-demise without consent—Issue of writ by lessor for recovery of possession—Distress by receiver of mortgagees on goods of tenant in possession after issue of writ—Action for wrongful distress—Payment of rent by tenant after issue of lessor's writ—Estoppel—Liability of solicitors of mortgagees.*—A lease of land and buildings for thirty-five years, made in 1896, contained a covenant that the lessee would not assign or underlet without the consent in writing of the lessor, which was not to be unreasonably withheld if the proposed assignee or under-tenant should be a respectable and responsible person, and also contained a proviso for re-entry upon a breach of any of the covenants therein. An assignee of the lease, having let the premises to a tenant from year to year, and mortgaged the premises by sub-demise without the consent of the lessor, was adjudicated bankrupt. On the 18th of September, 1901, the lessor issued a writ for recovery of possession of the premises, without stating the ground of the claim. The tenant, while disclaiming any intention of defending the action, entered an appearance to it, and, in order to gain time, with the object of keeping

possession of the premises, on the 15th of October paid the rent for the quarter ending the 29th of September to the receiver appointed by the mortgagees under the Conveyancing Act, 1881. The claim of the lessor was afterwards amended by alleging the breach of covenant by the mortgage without the consent of the lessor as the ground of forfeiture. On the 11th of January, 1902, the solicitors for the mortgagees having written to the receiver that they would be glad to hear that a distress had been put in, the receiver distrained upon the goods of the tenant on the premises for the rent due on the 25th of December, 1901. The tenant thereupon commenced an action for wrongful distress against the solicitors for the mortgagees and the receiver, at the hearing of which the jury returned a verdict for the tenant with damages. On the 20th of March, 1902, the lessor obtained judgment by consent in the action for recovery of possession.

Held, upon an application for a new trial of the action for wrongful distress—first, that the mortgage by sub-demise was a breach of the covenant not to assign or underlet without the consent of the lessor; secondly, that the issue by the lessor of the writ to recover possession and service thereof on the lessee determined the lease; thirdly, that, in the circumstances, the tenant was not estopped by the payment of rent after the service of the lessor's writ from asserting that the lease was determined; fourthly, that, in the circumstances, the tenant was entitled to recover damages against the solicitors for the mortgagees.—SERJEANT *v.* NASH, FIELD, & Co, *C.A*; [1903] 2 K. B. 304; 72 L. J. K. B. 630.

16. *Power given to lessee to determine lease on notice—Lessor's remedies for antecedent breaches of covenant to repair not reserved—Liability of lessee.*—By an indenture of lease for fourteen years it was provided that the lessees might, upon giving six months' previous notice in writing, determine the lease at the end of the first seven years, and that in such case the "indenture and every clause, matter, and thing" therein contained should upon the expiration of the notice "cease and determine and be void." The lease did not contain any proviso that the exercise by the lessees of their power to determine should be subject to the lessor's rights and remedies for existing breaches by the lessees of the covenants. The lessees duly determined the lease at the end of the seven years and left the premises out of repair.

Held, that the lessor was entitled to sue the lessees upon the covenant to repair contained in the lease, on their determining the lease under their above power, notwithstanding that no such right was expressly reserved.—BLORE *v.* GIULINI, *K.B.D.*, 336; [1903] 1 K. B. 356; 72 L. J. K. B. 114; 88 L. T. 235.

17. *Proviso for re-entry—Covenants "to be performed" by lessee—Default in "performance"—Negative covenant—Not to use premises for particular business without licence—Licence to predecessor in title—Breach.*—A lease contained a covenant by the lessee not to use the premises for any business except that of an outfitter without the licence in writing of the lessor. It also contained a proviso for re-entry in case the lessee should "make default in the performance of any of the covenants upon his part to be performed." The original lessor gave to the original lessee licence in writing to use the premises for a business other than that of an outfitter. The successor in title of the original lessee used the premises otherwise than for the business of an outfitter. In an action of ejectment by the successor in title of the original lessor,

Held, that the proviso for re-entry applied only to breaches of positive and not of negative covenants.

*Semble*, also, that there was no breach of covenant.—HARMAN *v.* AINSLIE, *K.B.D.*; [1903] 2 K. B. 241; 72 L. J. K. B. 533; 88 L. T. 770.

18. *Renewal of lease—"At the costs of the lessee"—Costs of arbitration to assess fine payable on renewal.*—A lease contained a covenant by the lessor that he would at any time during the term "upon the request and at the cost of the lessee," and on payment of a fine calculated upon the number of years of the term which had expired and the full improved annual value of the premises at the time of the renewal (such value to be determined by the lessor's surveyor or at the option of the lessee by the award of two referees or their umpire), renew the term. The lessee required the lessor to renew the term, and gave notice of his desire to have the full improved annual value of the premises determined by the award of two referees or their umpire.

Held, that the costs of the reference must be paid by the lessee.

Judgment of Wright, J. ([1902] 1 K. B. 512, 50 W. R. Dig. 92), reversed.—MOSTYN (LORD) AND FITZSIMMONS, RE, *C.A.*, 257; [1903] 1 K. B. 349; 72 L. J. K. B. 164; 88 L. T. 7.

19. *Residential flats—Express covenant for quiet enjoyment—General scheme—Implied obligation—Nuisance arising from acts of tenants in adjoining flats.*—The plaintiff was the tenant of a flat under an agreement with C. which contained the usual covenant for quiet enjoyment. The adjoining flats in the same building were held by other tenants under similar agreements, in all of which there was a stipulation by the tenant that he would not permit the premises to be used for any unlawful or immoral purpose, but, on the contrary, would as much as possible contribute to the respectability of the building and keep the premises as a private dwelling-house or residential chambers. C. contracted to sell the building, but no actual assignment of the lease had been executed, when the plaintiff brought an action against the ultimate purchasers, as the equitable assignees of the reversion, on the ground that the flat adjoining his own was being used for immoral purposes. He complained that a nuisance was thereby created and damage sustained by him; and he claimed a declaration that the defendants were bound by the covenant for quiet enjoyment, and an injunction to restrain them from permitting the adjoining flat to be used so as to interfere with the quiet enjoyment by the plaintiff of his flat; and from permitting any act inconsistent with the terms of the agreement. The defendants counter-claimed for arrears of rent, and submitted that no cause of action against them was disclosed. The points of law were first argued. It was decided by Buckley, J., that the covenant for quiet enjoyment related only to freedom from disturbance by adverse claimants extending to physical interference with the use by the plaintiff of his flat as distinguished from its comfortable enjoyment; that the case must go on to trial on this point; that the defendants were not liable for the acts of persons acting adversely to them; but that it might be shown at the hearing that such acts were impliedly authorized by continued receipt of rent from the offending tenant; and, further, that the plaintiff could rely on there

being a general scheme for the use of the flats. The defendants appealed.

Held, that, on the grounds stated by Buckley, J., it was impossible at the present stage of the proceedings for the court to say that there might not be a cause of action capable of proof; that whether that was so or not must depend upon what took place at the trial of the action; and that therefore the case must go to trial.—JAEGER *v.* MANSIONS CONSOLIDATED (LIMITED). *C.A.*; 87 L. T. 690.

20. *Weekly tenancy—Notice to quit.*—By an agreement for a weekly tenancy it was agreed that the tenancy might be terminated by either landlord or tenant giving the other one week's notice, the key to be given up before twelve o'clock on the day of leaving.

Held, that a notice given at 10 a.m. on the 17th of November to expire on the 24th of November was not a good notice. A week's notice is seven clear days, and the law does not take notice of the fraction of a day.—WESTON *v.* FIDLER *K.B.D.*; 88 L. T. 769.

LANDS CLAUSES ACT:—

1. *Acquisition of land—Boundary defined by "proposed road"—Description not grant of easement.*—Where a proposed road is mentioned in the particulars scheduled to a notice to treat for the compulsory purchase of land—*e.g.*, as the site for a board school—as one of the boundaries of such land, the same must be regarded as descriptive merely, and not as passing any right to have the road constructed, or any right over land adjacent to the land so compulsorily acquired. A school board gave notice to F., the owner of certain property which he contemplated developing as a building estate, to treat for the purchase of part thereof as the site for a school. In the particulars scheduled to the notice the land required was described as land with frontages to A.-road, B.-road, "and a proposed road leading therefrom." At the inquisition to determine the purchase-money and compensation a verdict was taken by consent for £8 000 "for the purchase of the estate and interest of F. in the land and hereditaments" in the warrant for the summoning of the jury mentioned; "also by way of compensation, for all damage sustained by severance or otherwise by reason of the exercise of the powers of" the school board. In the warrant the land was described by reference to the schedule to the notice to treat which was set out in the warrant. Subsequently to the inquisition F. informed the school board that it was not intended to form the proposed road shown on the scheduled plan, and suggested a modification of the boundary, his reason being that the road was part of his original scheme for developing his property as a building estate, but that under the altered circumstances it would not be worth his while to construct the road. A summons, under the Vendor and Purchaser Act, 1874, was taken out by the school board asking for a declaration that they were entitled to a conveyance of the piece of land specified in their notice to treat with frontages to A.-road, B.-road, and a proposed road leading therefrom and shown on the plan to such notice according to the draft conveyance submitted to F.

Held, that the school board had not obtained any right over F.'s land adjacent to the site which they had purchased; that they had no right to acquire an easement over adjacent land under their compulsory powers, which did not extend to the compulsory acquisition of easements, but only the right to acquire the land itself; that the reference in the notice to treat to the proposed road was merely descriptive; and that the proposed road could not be regarded as an actually made road.—SCHOOL BOARD FOR LONDON AND FOSTER, RE. *C.A.*; 87 L. T. 700.

2. *Compensation—Free and exclusive right to supply refreshments &c.—Estate and interest—Lands Clauses Act,* 1845 (8 *Vict. c.* 18), *s.* 68.—An agreement which grants and lets the free and exclusive right to sell refreshments in a theatre, together with the necessary use of the refreshment-rooms, bars, and cellars, and the right of free access to and from all parts of the premises as might be necessary, and of supplying and providing programmes, &c., and cloak-rooms and other accommodation, and also the sole and exclusive privilege of advertising and letting spaces for advertisements in the refreshment and cloak-rooms and on all the programmes does not create an estate or interest within section 68 of the Lands Clauses Act, 1845.—WARR & Co. *v.* LONDON COUNTY COUNCIL, *K.B.D.*; 88 L. T. 689.

3. *Compensation—Offer by promoters of undertaking—Time for acceptance—Acceptance at hearing before jury.*—An offer of a sum of money by the promoters of an undertaking under section 38 of the Lands Clauses Act, 1845, may be accepted by the owner of the lands sought to be purchased at any time before the verdict of the jury is given assessing the amount of the compensation.—REX *v.* WESTMINSTER HIGH BAILIFF. *K.B.D.*; [1903] 2 K. B. 189; 72 L. J. K. B. 600; 88 L. T. 834.

4. *Compulsory purchase—Personal inconvenience to limited owner—Compensation—Lands Clauses Act.* 1845 (8 *&* 9 *Vict. c.* 18), *s.* 73.—A limited owner of lands taken by compulsory purchase under the Lands Clauses Acts is entitled to have any personal inconvenience which may be caused to him by the works for which the land is taken considered in the fixing of the purchase price, and to have so much of the purchase price as is attributable to such consideration paid to him.—SAUNDERTON GLEBE LANDS, RE. *Ch D. Farwell, J.*, 522; [1903] 1 Ch. 480; 72 L. J. Ch. 276; 88 L. T. 267.

5. *Injurious affection—Taking lands—Notice to treat—Lease of adjoining land subsequently to service of notice—Right of lessee to compensation for injurious affection—Lands Clauses Consolidation Act,* 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 18, 68.—Where a notice to treat for land has been given under section 18 of the Lands Clauses Act, 1845, compensation must be assessed once for all under the notice both in respect of the land taken and also under section 68 for the injurious affection of other land belonging to the same owner, and the owner cannot, after the notice to treat and before the assessment of the compensation, grant a lease of or sell the land adjoining the land taken so as to confer upon the lessee or purchaser a right to claim compensation for the injurious affection of the land so leased or sold by the execution of the works.

Therefore, where, after the service of a notice to treat for land, and before the compensation had been assessed, the owner granted a lease of the adjoining land, and subsequently a sum was agreed upon between the owner and the undertakers as to the compensation payable to the owner under the notice to treat, the lessee is not entitled to compensation for the injurious affection of the demised land.

Judgment of Lord Alverstone, L.C.J. (50 W. R. 155, [1901] 2 K. B. 753), reversed.—MERCER *v.* LIVERPOOL, ST. HELEN'S, &c., RAILWAY CO., *C.A.*, 308; [1903] 1 K. B. 652; 72 L. J. K. B. 128; 88 L. T. 374.

6. *Railway—Reservation of minerals—Conveyance of surface — Costs — Lands Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 19), *ss.* 117, 119. —The appellants purchased the rights of a feuar, in whose feu contract the minerals were reserved by the superior, the respondents' predecessor. In 1892 a controversy arose between the appellants and the respondents as to the position of the appellants in respect to their dealings with minerals both above and below the authorized formation of level of the appellants' line. In 1894 the Court of Session decided that the respondents were entitled to the minerals below the authorized formation, and reserved to the respondents any claim they might have for the value of the minerals in the said lands above the authorized level of the railway to be determined by arbitration in terms of the Lands Clauses Consolidation (Scotland) Act, 1845, *s.* 117. In 1896 the respondents applied for compensation for the minerals above the surface. the appellants denied that they were under any liability for compensation, claiming to have purchased the minerals in their conveyance from the feuar of the surface, and that it was within their right to remove them. The respondents then commenced this action, contending that the appellants stood now to be treated as trespassers, it being too late for them to rely on section 117 of the Act of 1845, they not having lodged a notice to treat within six months from the decision in 1894. The appellants contended that if they were wrong in their claim of ownership, they were still entitled to pay for the minerals by way of compensation, and not by damages, the six months given by the said Act not yet having commenced to run, as they had all along disputed the respondents' right.

Held, reversing the decision of the Court of Session ((1899) 37 S. L. R. 150, 406), that there had been no final determination, within the language of the section, of the respondents' right, and that, although this House now held their claim good, yet the appellants were not trespassers, and were entitled to the minerals upon payment of compensation.

Held, also, that the claimants (the respondents) were the proper parties to initiate a claim which it would have been possible for the appellants to satisfy.—CALEDONIAN RAILWAY CO. *v.* DAVIDSON, *H.L.*; [1903] A. C. 22; 72 L. J. P. C. 25; 87 L. T. 602.

7. *Railway—Taking of land—Easement under church—Injuriously affecting church—Basis of compensation.*—By a private Act, incorporating the Lands Clauses Act, a railway company was authorized to take the site of a church in London. Subsequently the company promoted a Bill for an extension of time for the construction of the railway and purchase of lands. This Bill was opposed, and upon the second reading a resolution was carried instructing the committee "to consider whether any and what provisions can reasonably be made for the preservation of the church of . . . without preventing the construction of the railway and station." Clauses were accordingly inserted providing that, notwithstanding anything contained in the previous Act, the company should not purchase or take any part of the church, but might take an easement or right of using the subsoil under any part of the property, including the crypt and foundations of the church; that the company should at all times make good any damage to the church caused by the railway or works; and that the compensation "for the subsoil and crypt," &c., should be assessed by an arbitrator. The company took the subsoil and crypt, and constructed a station under the church.

Held, that the compensation payable by the company was properly assessed upon the basis that the site of the church might at some future time, under the Union of Benefices Act, 1860, become available as building land, and had been injuriously affected as building land by the construction of the railway.—CITY AND SOUTH LONDON RAILWAY *v* ST. MARY WOOLNOTH, *C.A.*; 88 L. T 530.

See Charity, 6; Local Government, 9.

LIBEL:—

*Fair comment — Criticism on literary work — Province of jury.*—Where the defence of fair comment is set up in an action for libel in respect of a criticism on a literary work, the jury ought not to be left to make their own opinion of the literary merits of the work the test of fairness or unfairness. Unless there is in the criticism some element which may support an inference of unfairness in some other sense, such as an attack on the personal character of the plaintiff or an imputation that the plaintiff has written something which he has not in fact written, it is the duty of the judge to withdraw the case from the jury and to hold that there is no libel.—MCQUIRE *v.* WESTERN MORNING NEWS CO., *C.A.*, 689; [1903] 2 K. B. 100; 72 L. J. K. B. 612; 88 L. T. 757.

LICENSING LAW:—

1. *Offence—Sale at place not authorized by licence—Unlicensed restaurant—Wine sent out for—Proprietor of restaurant part proprietor of licensed wine shop from which waiter fetched the wine—Appropriation of goods—Refreshment Houses and Wine Licences Act*, 1868 (23 & 24 *Vict. c.* 27), *s.* 19.—The appellant was proprietor of a restaurant which was not licensed for the sale of wine and part proprietor of a duly licensed wine shop a few doors off.

Held, that although the waiter received money from the customer before he fetched a bottle of wine from the wine shop, yet that there was some evidence upon which the magistrate was justified in finding as a fact that there was a sale by the appellant of the wine to the customer, and therefore the conviction of the appellant for having sold wine on unlicensed premises must stand.—PASQUIER *v.* NEALE, *K.B.D.*, 92; [1902] 2 K. B. 287; 71 L. J. K. B. 835; 87 L. T. 230.

2. *Renewal—Control of justices over structure of licensed premises—"Part of the premises where intoxicating liquor is sold"—Passage giving second entrance to bar—Jurisdiction to order passage to be closed—Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 11, *sub-section* 4.—Held, that the power conferred on licensing justices by section 11 of the Licensing Act, 1902, to refuse to renew a licence unless "such alterations as they think reasonably necessary to secure the proper conduct of the premises shall be made in that part of the premises where intoxicating liquor is sold or consumed" applied to any part of the licensed premises to which customers had access.

Therefore an order closing a passage which led to the bars and formed a second entrance to the licensed premises, the evidence being that although no liquor was sold or consumed at the back entrance or in the passage, it was frequently used by customers entering and leaving the premises, was one that the justices had jurisdiction to make.—BUSHELL *v.* HAMMOND, *K.B.D.*, 695.

3. *Renewal of licence—Objection taken by justices—Adjudication by justices raising the objection—Inquiries made by justices before hearing—Bias—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—

*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.—An objection to the renewal of a licence may, under section 42 of the Licensing Act, 1872, be made by licensing justices.

Licensing justices, having had their attention called by the county licensing committee to the large number of licensed houses in their district, appointed a committee to make inquiries and to report upon the matter. The committee collected statistics and inspected the licensed houses in the district and made a report, which was adopted at a meeting of the justices. At the general annual licensing meeting the chairman of the justices, on behalf of the justices, objected to the renewal of all the licences in the district, stating that the reason why the justices thus raised objection to the renewals was that every one of the licensees might bring evidence before them, and that they would thus be enabled to decide the cases with fairness and justice. The objections were accordingly adjourned, and the clerk to the justices, by their direction, served notice of objection, stating the grounds, upon each licensee requiring him to attend at the adjourned meeting. At the adjourned meeting the justices heard evidence on oath and refused the renewal of nine licences. Upon an application for a *mandamus* to the justices to hear and determine the applications for the renewal of the licences according to law, the chairman of the justices stated upon affidavit that the justices, in raising the objection, had not arrived at any decision whether or not to renew any of the licences, but had merely taken steps to put matters into proper train for fully considering each case on its merits, and that in deciding to refuse the renewals they had acted solely upon the evidence given upon oath in court.

Held, that, in the circumstances, the justices were not disqualified from sitting and deciding upon the applications for the renewal of licences.

Judgment of the Divisional Court (50 W. R. 573) affirmed.—REX *v.* HOWARD, *C.A.*, 21; [1902] 2 K. B. 363; 71 L. J. K. B. 754; 86 L. T. 839.

4. *Renewal—Transfer—Change of occupancy—Application by new occupier—Removal after expiration of licence—"Person so licensed"—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14.—At a general annual licensing meeting H., who was the tenant of a beerhouse and holder of a licence to sell by retail beer to be consumed on the premises, applied for a renewal licence. The application having been refused, H. gave notice of appeal to quarter sessions. H. remained in possession of the house till the appeal could be heard, and in the meantime the licence expired. The appeal was dismissed, and then H. removed from the house. A few days later R. became tenant and went into possession.

Held, that, as H. was not a licensed person at the time when he removed from the house, R. was not entitled to apply for a licence under section 14 of the Alehouse Act, 1828.

*Simpkin* v. *Justices of Birmingham*, 20 W. R. 702, L. R. 7 Q. B. 482, affirmed.—REX *v.* LONDON JUSTICES, *C.A.*, 629; [1903] 2 K. B. 19; 72 L. J. K. B. 647; 88 L. T. 673.

5. *Renewal of licence—Value of licensed premises—Break in continuity of licence—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94) *s.* 45.—Section 45 of the Licensing Act, 1872, which requires premises to be of a certain annual value as a qualification for being licensed for the sale of intoxicating liquor for consumption thereupon, does not apply to premises which were licensed at the time of the passing of the Act, and in respect of which the licence has been continuously renewed from that time. But where there has been a break in the continuity of the licence by the renewal having been refused since the passing of the Licensing Act, 1872, the annual value required by section 45 applies.

Judgment of Divisional Court (49 W. R. 559, [1901] 2 K. B. 740), reversed, Cozens-Hardy, L.J., dissenting.—IGOE *v.* SHANN, *C.A.*, 38; [1903] A. C. 320.

6. *Sale of liquor to children—Corking and sealing of vessel—Bottle with screw stopper and label—No evidence that label could be removed without destruction—Sufficiency of label as a "sealing"—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 *Ed.* 7, *c.* 27), *s.* 2.—The appellant sold to a child under the age of fourteen years, for consumption off the premises, a pint of beer in a bottle corked by means of a screw stopper and having an adhesive paper label fastened to the top of the stopper and to the sides of the neck of the bottle. Upon an information under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, the magistrate was of opinion that the label could be removed in several ways without destruction, as by steam or by a penknife, and the stopper withdrawn and the label afterwards refastened to the bottle, and he held that the bottle was not "sealed" in compliance with the section, and convicted the appellant. There was no evidence that the stopper had been removed or could be removed without destroying the label.

Held, that there was no evidence before the magistrate on which he could properly find that the label could be removed without destruction or that the bottle was not "sealed" in compliance with the section, and that the conviction therefore could not be supported.—MACEY *v.* MCKENZIE, *K.B.D.*; 88 L. T. 631.

7. *Sale of liquors to children—Knowingly allowing a person to sell—Sale by barman—Knowledge of licence-holder.*—The holder of a licence for the sale of intoxicating liquors, who has not delegated the charge or control of the licensed house or of the business carried on therein, is not liable under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, for the act of his servant who, without his knowledge or connivance, sells to a child under the age of fourteen years intoxicating liquor in a bottle which is neither corked nor sealed.—EMARY *v.* NOLLOTH, *K.B.D.*; [1903] 2 K. B. 264; 72 L. J. K. B. 620.

LIGHT.—See Easement.

LIMITATIONS, STATUTE of:—

1. *Acknowledgment—Promise to pay—Promise to pay sum found due on accounts taken*—21 *Jac.* 1, *c.* 16.—The defendant, whose debt of £100 to the plaintiff, his uncle, was barred by the Statute of Limitations, wrote to the plaintiff's wife within six years before action a letter in which he said that he was sorry at not having been able to pay it off long ago, that he was unable to satisfy himself as to the exact amount owing, but that he had some note of what he had paid back, and asking for particulars, adding that he would do his best to pay back what he owed. The plaintiff's wife having replied that the plaintiff denied that anything had been paid off, the defendant wrote to her as follows: "I must say your letter was a great surprise to me. I was well aware that I did give uncle £100 originally, but subsequently I gave him a cheque for £40, because I kept the stub of the cheque, and I am almost positive I gave him another cheque for £20, reducing the amount at the time I left him to

£40. How it is uncle did not credit me with it, I cannot think; but if he hunts up his old bank books he will be able to trace up the amounts, and I feel sure he will be satisfied that I am correct. Anyway I hope so. Just at present I cannot lay my hand upon my bank book of that date, or would be more positive on the subject. At present I have no money on hand, having bought some houses out of the portion I got, but as soon as there is another division I will send uncle some. In the meantime I hope you will hunt up the required information." Since that letter "another division" (*i.e.*, of property under a will) had taken place. In an action to recover the £100 and interest, the judge found that no part of the £100 had been repaid.

Held, that the letter, though not an acknowledgment of the debt of £100, contained a promise to pay the amount which might be found due from the defendant upon the accounts being taken, and that therefore the Statute of Limitations was no bar to the action.—LANGRISH *v.* WATTS, *C.A.*, 503; [1903] 1 K. B. 636; 72 L. J. K. B. 435; 88 L. T. 443.

2. *Mortgage of reversionary interest in realty—Action on covenant—Remedy—Period of limitation—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—The limitation of twelve years imposed by section 8 of the Real Property Limitation Act, 1874, to actions and suits for the recovery of money charged on land applies to an action by a mortgagee against mortgagors on a joint and several covenant to repay in a mortgage of a reversionary estate in realty, notwithstanding the fact that the estate is still reversionary at the time when the action is brought.—KIRKLAND *v.* PEATFIELD, *K.B.D.*, 544; [1903] 1 K. B. 756; 72 L. J. K. B. 355; 88 L. T. 472.

3. *Probate—Forged will—Revocation of probate—Letters of administration—Account*—21 *Jac.* 1, *c.* 16—*Hong Kong Ordinance, No.* 13 *of* 1864, *s.* 8; *No.* 8 *of* 1860, *s.* 29; *and No.* 9 *of* 1870, *s.* 1.—Upon revocation of the grant of probate of a forged will the grant becomes void *ab initio*, and therefore in an action for account by the administrator, subsequently appointed, the Statute of Limitations begins to run only from the date of the grant of the letters of administration so necessitated.—CHAN KIT SAN *v.* HO FUNG HANG, *P.C.*, 18; [1902] A. C. 257; 71 L. J. P. C. 49; 86 L. T. 245.

4. *Recovery of land—Surrender of lease—Merger—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 2.—A tenant cannot by the surrender of his lease convey to his landlord any better title than he could grant to a third person by assignment or underlease.

In 1837 A. granted a lease of three lives to B. In 1885 B. surrendered his lease to A. The last of the three lives dropped in 1895. In an action by A. against C., a trespasser, who had by himself or his predecessors been in possession for more than thirty years,

Held, that the Statute of Limitations began to run as against the landlord in 1895 and not 1885.

Held, further, that a lease for years was not "a particular estate on which any future estate or interest was expectant" within the meaning of section 2 of the Real Property Limitation Act, 1874, and that, therefore, the period fixed by the Act was twelve years and not six.—WALTER *v.* YALDEN, *K.B D.*, 46; [1902] 2 K. B. 304; 71 L. J. K. B. 693; 87 L. T. 97.

See also Metropolis, 8; Mortgage, 2.

LOCAL GOVERNMENT:—

1. *Buildings—Erection of premises in advance of building line—Plans submitted to urban authority—Approval of plans—Written consent — Action by private individual — Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.—By the Public Health (Buildings in Streets) Act, 1888, *s.* 3, it is not lawful, without the written consent of the urban authority, to erect or bring forward any house or building in any street beyond the front main wall of the house or building on either side thereof, and any person offending is liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority. The defendant prepared plans which showed that the buildings he intended to erect would be brought forward beyond the front main line, and these plans were produced before, and passed by, the urban authority. The plaintiff, who was the owner of the adjoining premises, alleged special damage, and claimed a mandatory injunction.

Held (1) that the plaintiff as a private individual had no right of action under the above section; and (2) that the resolution of the urban authority approving the plans constituted "written consent" within the meaning of the said section.—MULLIS *v.* HUBBARD, *Ch.D. Farwell, J.*, 571; 72 L. J. Ch. 593; 88 L. T. 661.

2. *Buildings — Surveyors' fees — Supervision of temporary wooden structures—Whether power transferred to borough councils — District surveyors — London Building Act*, 1894 (57 & 58 *Vict. c. ccxxciii.*), *s.* 84—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 5; *Schedule II., Part I.*—The transfer, by section 5 of the London Government Act, 1899, of the licensing power over temporary wooden structures, under section 84 of the London Building Act, 1894, from the London County Council to the borough councils, does not operate as a transfer of the powers and duties of the district surveyors, though those powers and duties are substantially diminished thereby. The district surveyors are officers under the London Building Act, 1894. They are therefore entitled, under section 145 of that Act, to receive notices of structures falling within section 84, and, in a proper case, are entitled to inspect and receive a fee for such inspection.—WESTMINSTER CITY COUNCIL *v.* WATSON, *K.B.D.*, 300; [1902] 2 K. B. 717; 71 L. J. K. B. 603; 87 L. T. 326.

3. *Bye-laws — Infringement — Urban authority—Erection of houses abutting on public highway—Laying out new street—Injunction—Special remedy—Proceedings before justices—Right of corporation to sue — Attorney-General's fiat — Jurisdiction.* — The defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways within the borough. The defendants, in pursuance of a building scheme, erected houses on their land fronting the highways. The plaintiffs alleged that the defendants were laying out the highways as new streets which did not comply with the requirements of the borough bye-laws as to width, and they claimed, first, an injunction, and, secondly, a declaration that the plaintiffs were entitled to remove or pull down any work begun or done by the defendants in contravention of the bye-laws. The bye-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might, subject to any

statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the bye-laws.

Joyce, J., held that the defendants were not laying out or intending to lay out the highways as new streets within the meaning of the bye-laws; (2) that the bye-laws could not be enforced by action for an injunction, but only by the special remedies thereby provided, or by way of information by the Attorney-General; and (3) that no such declaration as asked for ought to be made.

The court dismissed the appeal on the ground that the plaintiffs could not enforce the bye-laws by such an action without the intervention of the Attorney-General. The court also stated that they agreed with the decision of Joyce, J., that the defendants were not laying out a new street.—DEVONPORT CORPORATION *v.* TOZER, *C.A.*; [1903] 1 Ch. 759; 72 L. J. Ch. 411; 88 L. T. 113.

4. *Bye-law—Validity—General regulation—No dispensing power.*—A bye-law made under the Public Health Act, 1875, s. 157 (2) by a rural council having urban powers, provided that "every person who shall erect a new building shall cause such building to be inclosed with walls constructed of good bricks, stone or other hard and incombustible materials properly bonded and solidly put together." The district council had no power to dispense with the bye-law in exceptional cases.

Held, that the bye-law was not unreasonable or *ultra vires.*—SALT *v.* SCOTT-HALL, *K.B.D.*; [1903] 2 K. B. 245; 72 L. J. K. B. 627; 88 L. T. 868.

5. *Conversion of part of rural district into urban district—Adjustment of property and liabilities—"Property, income, debts, liabilities, and expenses"—Highway expenses—Loss of income to rural district—Local Government Acts,* 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 57, 62; *and* 1894 (56 *&* 57 *Vict. c.* 73), *s.* 54.—By an order made under section 57 of the Local Government Act, 1888, part of a rural district was converted into an urban district, and the property and liabilities of the rural district council, so far as regarded the area comprised in the new urban district, became vested in the urban district council, including the liability to maintain the highways. The rural district council claimed an adjustment of the income, liabilities, and expenses, under section 62 of the Act, in respect of the maintenance of the highways, upon the ground that the contributions formerly received by the rural district council from the area comprised in the new urban district exceeded the cost of the maintenance of the highways in that district, and that therefore there would be a loss of income to them by reason of the order.

Held, that this loss of income was a matter for adjustment under the words "property, income, debts, liabilities, and expenses" in section 62 of the Act.

Section 54 of the Local Government Act, 1894, does not apply to such a case.—GODSTONE RURAL COUNCIL AND CATERHAM URBAN COUNCIL, RE, *C.A.*, 353; [1903] 1 K. B. 554; 72 L. J. K. B. 279; 88 L. T. 414.

6. *"Drain"—Semi-detached house—Pipe used for draining—"One building only"—Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4 *and* 41.—The question whether a pair of semi-detached houses are "one building only" within the meaning of section 4 of the Public Health Act, 1875, which provides that "'drain' means any drain of and used for the drainage of one building only," is a question of fact, and depends upon the circumstances of each case.—HUMPHERY *v.* YOUNG, *K.B.D.*, 298; [1903] 1 K. B. 44; 72 L. J. K. B. 6; 87 L. T. 551.

7. *Hoarding—Open space—Adjoining landowner—Access of light—Building—Right to sue without Attorney-General—Metropolitan Open Spaces Acts,* 1877 (40 *&* 41 *Vict. c.* 35), *s.* 1; 1881 (44 *&* 45 *Vict. c.* 34), *s.* 5; 1887 (50 *&* 51 *Vict. c.* 32), *s.* 4—*Disused Burial Grounds Act,* 1884 (47 *&* 48 *Vict. c.* 72), *s.* 3.—A local authority managing an open space under statutory authority for the benefit of the public, if it acts in contravention of its statutory duties and thereby injures the property of an adjoining landowner, as by erecting a building so as to darken his windows, may be sued by the injured party without the Attorney-General, as he is suing either in respect of a private right or in respect of a right from the interference with which he has suffered special damage.

A hoarding upon a disused churchyard managed under the Metropolitan Open Spaces Acts, 1877, 1881, and 1887, and the Disused Burial Grounds Act, 1884, erected for the purpose of preventing an adjoining landowner from acquiring by prescription a right to access of light to windows of his houses overlooking the churchyard, is not a building within the meaning of those Acts, and its erection is therefore not prohibited by them.—BOYCE *v.* PADDINGTON BOROUGH COUNCIL, *Ch.D. Buckley, J.*, 109; [1903] 1 Ch. 109; 72 L. J. Ch. 28; 87 L. T. 564.

8. *Housing of the working classes—Compulsory acquisition of lands—Covenant running with land—Housing of the Working Classes Act,* 1890 (53 *&* 54 *Vict c.* 70), *s.* 21.—By the Housing of the Working Classes Act, 1890, s. 21, wherever the compensation payable in respect of any lands, or of any interest in any lands, proposed to be taken compulsorily in pursuance of the Act requires to be assessed, the estimate of the value of such lands or interests shall be based upon the fair market value as estimated at the time of the valuation being made of such lands.

Held, that a covenant in which a tenant of a brewery company bound himself to take all his beer from the company was a covenant which had to be taken into account in ascertaining the value of the land for the purposes of the Act.—CHANDLER'S BREWERY CO. *v.* LONDON COUNTY COUNCIL, *K B.D.*, 573; [1903] 1 K. B. 569; 72 L. J. K. B. 250; 88 L. T. 271.

9. *Lands taken compulsorily—Assessment for poor rate—Liability for deficiency in general rate—Lands Clauses Act,* 1845 (8 *&* 9 *Vict. c.* 18), *s.* 133—*London Government Act,* 1899 (62 *&* 63 *Vict. c.* 14), *s.* 10, *sub-section* 2.—By section 133 of the Land Clauses Consolidation Act, 1845, promoters of undertakings are liable to made good the deficiency in the poor rate caused by their taking lands for the purposes of the undertaking, and by section 10 of the London Government Act, 1899, the general rate and the poor rate are to be made and levied as one rate as if it were a poor rate.

Held, that section 10 of the London Government Act, 1899, did not impose any fresh liability upon promoters of the undertakings under the Lands Clauses Act, 1845, and that the defendants as promoters of an undertaking were only liable to make good the deficiency in that proportion of the general rate, which represented the poor rate.—ISLINGTON CORPORATION *v.* LONDON SCHOOL BOARD, *K.B.D.* 255; [1902] 2 K. B. 701; 71 L. J. K. B. 852; 87 L. T. 177.

10. *Omnibus for district council—Repairs—Sur-*

*charge.*—An urban council having purchased an omnibus for the purpose of conveying the members of the council about the district when performing their duties expended certain moneys in repairing such omnibus. The district auditor having surcharged this amount,

Held, that such surcharge was right.—REX *v.* DOLBY, NORTHFIELD, EX PARTE, *K.B.D.*; 87 L. T. 27.

11. *Provisional order—Sewer accommodation—Provision by owners—Appeal—Expenses of alterations—Justices to make such order "as to them may seem equitable."*—By the Bootle Provisional Order, 1897, when a sewer and water supply sufficient for the purpose were reasonably available, the appellants could, by written notice to the owner of any building, require any existing closet accommodation provided at or in connection with the building to be altered so as to be converted into a water-closet complying with the bye-laws in force and communicating with the sewer. If the owner failed to comply with the notice the appellants could do the work specified in the notice and recover the expenses from the owner. If any person deemed himself aggrieved by any of the requirements of the appellants, or as to the reasonableness of any expenses wholly or partially recoverable from him, he could appeal to the justices and they might make such order in the matter as to them might seem equitable. The respondent, the owner of certain houses, was served with a notice requiring him to alter the closet accommodation into water-closets. On an appeal to justices they held that the requirements of the corporation as to the alterations in the closet accommodation were reasonable, and they ordered him to comply with the notice. They further ordered that the expense of doing the work should be borne in equal shares by the appellants and the respondent.

Held, that the justices had power to make any order as to the expenses that appeared to them reasonable.—CORPORATION OF BOOTLE *v.* OWENS, *K.B.D.*; 87 L. T. 74.

12. *Street—Fee simple of road—Vesting in local authority—Electric light company—Overhead wires—Area of user—Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 149—*General Turnpike Act,* 1822 (3 *Geo.* 4, *c.* 126), *s.* 84.—The effect of section 149 of the Public Health Act, 1875, is to vest in the local authority so much of the actual soil of a street as is necessary for the control, protection, and maintenance of the street as a highway for the public. The section in no way considers the title of the original owner of the soil, and the rights of the local authority under the section are neither increased nor diminished according to the extent of such original ownership. Nor are the rights of the local authority increased by the fact that it is impossible to point to any actual owner. Thus where the ownership in fee simple in the soil of a road was originally acquired by turnpike trustees under 3 Geo. 4, c. 126, and the road subsequently became vested in an urban authority,

Held, that all that vested in the urban authority was so much as was necessary for the purposes of the user of the road by the public as a highway.

Decision of Farwell, J. (50 W. R. 470, [1902] 1 Ch. 866), reversed.—FINCHLEY ELECTRIC LIGHT CO. *v.* FINCHLEY URBAN COUNCIL, *C.A.*, 275; [1903] 1 Ch. 437; 72 L. J. Ch. 297; 88 L. T. 215.

13. *Street—Paving expenses—Decision of justices that street is a highway repairable by the inhabitants at large*—Res judicata—*Wakefield Corporation Act,* 1887 (50 *&* 51 *Vict. c. lxxi.*), *ss.* 29, 30, 31—*Private Street Works Act,* 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 6, 7, 8.—Upon an objection by the owners of premises in a street to a scheme for certain private street works which the local authority proposed to execute under a local Act (which contained provisions identical with sections 6, 7, and 8 of the Private Street Works Act, 1892), the justices decided that the street was a highway repairable by the inhabitants at large, and upheld the objection. Subsequently the local authority proposed to execute private street works in the street under a different scheme.

Held, upon objection taken by the owners by premises in the street, that the matter was *res judicata*, by reason of the former determination of the justices.

*Reg.* v. *Hutchins*, 29 W. R. 724, 6 Q. B. D. 300, distinguished.

Judgment of the Divisional Court (50 W. R. 254, [1902] 1 K. B. 188) reversed.—WAKEFIELD CORPORATION *v.* COOKE, *C.A.*, 305; [1903] 1 K. B. 417; 72 L. J. K. B. 345; 88 L. T. 225.

14. *Street—Private street works—Final apportionment of expenses amongst frontagers—Right of frontager to object to apportionment—When to be made—Private Street Works Act,* 1892 (55 *&* 56 *Vict. c.* 57), *s.* 12.—The respondents, an urban authority, acting in pursuance of section 6 of the Private Street Works Act, 1892, which Act had been adopted by them, employed a contractor to execute levelling, paving, channelling, metalling, and other works in a certain road which was a street within the meaning of the Public Health Act, 1875. Specifications, plans, and an estimate were duly made and deposited. The work was carried out, and on a final report by their surveyor that it had been satisfactorily completed the respondents paid to the contractor the contract price. The surveyor to the respondents then duly made a final apportionment of the expenses, and served notices of such apportionment upon the owners of premises affected thereby, in accordance with section 12 of the above Private Street Works Act. By sub-section 1 of that section it is provided that such final apportionment shall be conclusive for all purposes, and the sums thereby apportioned shall be recoverable in manner provided by the Act. Sub-section 2 of section 12 provides that within one month after notice of such final apportionment has been served, the owner of any premises charged with any expenses under such apportionment may object thereto upon the grounds, or any of them (*inter alia*), that the apportionment has not been made in accordance with the section, and that there has been an unreasonable departure from the specifications, plans, and sections.

The appellant, one of the frontagers affected by the notice of the final apportionment, objected thereto after one month had expired. The respondents took summary proceedings against the appellant to obtain payment of the sum apportioned upon him, and at the hearing before the justices the appellant objected that the works had not been completed within the meaning of section 12, because they had not been carried out in compliance with the specification, and that, therefore, the surveyor had no power to make a final apportionment of the expenses. He further desired to call evidence in support of his contention that the works had not been properly completed, but the justices refused to allow him to do so and ordered him to pay the sum claimed,

on the ground that the final apportionment not having been objected to in manner provided by the Act was conclusive against him, and they therefore could not entertain the objection.

Held, that the decision of the justices was right.—HAYLES *v.* SANDOWN URBAN COUNCIL, *K.B.D.*, 348; [1903] 1 K. B. 169; 72 L. J. K. B 48; 88 L. T. 61.

15. *Street—Private street works—Recovery of expenses by urban authority—Notice of provisional apportionment—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 267—*Private Street Works Act*, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 7, 12.—An owner whose premises are sought to be charged under the Private Street Works Act, 1892, is entitled to have service of the notice of the provisional apportionment, and proof that the owner has been served is a condition precedent to the recovery against him by the local authority of his share of the expenses incurred under the Act.—WIRRAL DISTRICT COUNCIL *v.* CARTER, *K.B.D.*, 414; [1903] 1 K. B. 646; 72 L. J. K. B. 332.

16. *Union—Portion of one parish added to another—Order of county council confirmed by Local Government Board—Poor law union of added portion—Local Government Act*, 1888 (51 *&* 52 *Vict. c* 41), *s.* 57.—A portion of a parish in one poor law union being added to another parish in another poor law union by an order of the county council, confirmed by the Local Government Board under section 57 of the Local Government Act, 1888, it follows as a legal consequence that the portion added to the parish becomes included within the poor law union of the parish to which it is added.—BOOTLE UNION *v.* WHITEHAVEN UNION, *Ch.D. Buckley, J.*, 550; [1903] 2 Ch. 142; 72 L. J. Ch. 582.

17. *Water—Supply by urban authority—Recovery of water rate—Demand—Summary procedure—Limitation of time—Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 56, 57, *and* 256.—A person who has entered into an agreement with a local authority for the supply of water to him under section 56 of the Public Health Act, 1875, and who fails to pay within fourteen days after demand in writing by the authority a sum of money due to them as a charge for water supplied by them to him in pursuance of such agreement, is a person assessed to a "rate made under this Act," within the meaning of section 256 of the above Act, and may be summoned under such section before a court of summary jurisdiction.

For the purpose of applying section 11 of Jervis's Act (Summary Jurisdiction Act, 1848) to the aforesaid circumstances, the matter of the complaint or information arises at the date of the demand of the sum due, and therefore the summons under section 256 the Public Health Act, 1875, may be taken out within six months from that date.

*East London Waterworks* v. *Charles*, 42 W. R. 702, [1894] 2 Q. B. 730, explained.—ELLIOTT *v.* RUSSELL, *K.B.D.*, 269; [1902] 2 K. B. 748; 72 L. J. K. B. 15; 88 L. T. 204.

18. *Water supply—Water rate—Extension of boundaries of borough—Right of corporation to differentiate the water rate—"Rates" in added part not to exceed a specified sum—Whether water rates are included as "rates."*—A corporation, under a Waterworks Act, were entitled to charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per cent. on the net rateable value, and they were also empowered, if there were a deficiency in the amount of the water account for any year, to make up the deficiency out of the general district rate. The corporation, whose boundaries were extended by an extension order, had been charging a uniform water rate of 7½ per cent. over the whole borough, but for certain reasons they reduced it in the old borough to 5 per cent., while retaining it in the added part at 7½ per cent.

Held, that the corporation had no power so to differentiate the water rate, but must charge the same water rate over the whole borough. An article of the extension order provided that the general district rates to be levied in the added part should not in any one year for a number of years exceed such an amount in the pound as when added to the poor rate and to the borough rate "and any other rate made by the corporation" in the same year would make up a certain specified total on each pound of the rateable value.

Held, that the water rate was not a "rate" within the meaning of the words "any other rate" in this article, but was merely the price to be paid for the water supplied, and that the water rate, therefore, was not to be included in the computation of such total.—CORPORATION OF NORTHAMPTON *v.* ELLEN, *K.B.D.*; 87 L. T. 335.

See also Metropolis, 1-9; Tramway, 3.

LUNACY:—

*Maintenance of lunatic's children—No committee appointed—Sale of lunatic's business—Application of lunatic's estate in maintenance of lunatic's children—Refusal of lunatic on his release to ratify this expenditure—Right to recover the proceeds of sale of business.*—The plaintiff, who had carried on business, was confined in a lunatic asylum from 1882 to 1894, but no committee of his estate had been appointed. In 1883 the plaintiff's business was sold by the defendant, and the proceeds of the sale were with authority and consent of the plaintiff's wife expended by the defendant in the maintenance of the plaintiff's children (not of tender years) while he was in the asylum. The plaintiff upon his release in 1894 refused to ratify what had been done, and brought an action against the defendant to recover the proceeds of sale of the business.

Held, that the plaintiff not being legally liable to maintain the children while in the asylum, and no committee having been appointed of his estate who might have sanctioned such expenditure, the plaintiff could recover the proceeds of the sale of his business as money had and received to his use.—HEALING *v.* HEALING, *K.B.D.*, 221.

MANOR:—

*Steward—Custody of court rolls.*—A steward of a manor has, for the purpose of performing the duties of his office, a right to the custody of the court rolls, and, in the absence of misconduct, he possesses this right, even as against the lord.

*Windham* v. *Giubilei*, 40 L. J. Ch. 505, 19 W. R. Dig. 66, followed.

*Rawes* v. *Rawes*, 7 Sim. 624, 5 L. J. Ch. 114, explained and distinguished.—JENNINGS (A SOLICITOR), RE, *Ch.D. Buckley, J.*, 425; [1903] 1 Ch. 906; 72 L. J. Ch. 454; 88 L. T. 387.

MARRIAGE:—

*Colonial marriage—Malta—Evidence of validity—Practice—Matrimonial suit.*—In a matrimonial suit, where there is a practical difficulty in the way of a petitioner adducing the usual evidence of a lawyer who is or has been practising in the courts of the colony where the marriage of petitioner was celebrated, the court may accept the evidence of a gentleman who, not as a mere amateur, but from

his professional research and experience in relation to the marriage laws of the colony in question, is, in the opinion of the court, sufficiently qualified to express an opinion as to the validity of a marriage there celebrated.—WILSON *v.* WILSON, *P.D. & Ad.D.*; [1903] P. 157; 72 L. J. P 53.

MARRIED WOMAN:—

1. *Insurance policy—"For the benefit of his wife and children"—Second wife—Children of second marriage—Participation—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 11.—Where a man effects an insurance policy on his own life "for the benefit of his wife and children," his surviving wife (if any), whether his then living wife or one he may have married after the date of the policy, and his surviving children, whether by his then living wife or any after-taken one, are entitled to participate in the policy moneys.—BROWNE'S POLICY, RE, *Ch.D. Kekewich, J.*, 364; [1903] 1 Ch. 188; 72 L. J. Ch. 85; 87 L. T. 588.

2. *Joint account—Purchase out of money belonging to wife—Gift to husband—Resulting trust—Capital—Income.*—In the case of the receipt by a husband of the separate property of his wife there is no general rule of law that in the case of *corpus* belonging to the wife the *onus* of proof of a gift lies on the husband, while in the case of income the *onus* lies on the wife, and she must establish clearly and conclusively that her husband received the income by way of loan. For this purpose the difference between capital and income is only one of degree and not of principle.

*Alexander* v. *Barnhill*, 21 L. R. Ir. 511, 37 W. R. Dig. 5, discussed.—MERCIER *v.* MERCIER, *C.A.*, 611; [1903] 2 Ch. 98; 72 L. J. Ch. 511; 88 L. T. 516.

MASTER AND SERVANT:—

1. *County court—Employer and workman—Dismissal of action under Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42)—*Application for compensation under Workmen's Compensation Act*, 1897—*Right of appeal from dismissal of action—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-sections* 2, 4.—Where, upon the dismissal of an action under the Employers' Liability Act, 1880, an application is made under section 1, sub-section 4, of the Workmen's Compensation Act, 1897, for an assessment of compensation under that Act, the making of that application does not amount to the exercise of an option on the part of the plaintiff so as to estop him from appealing against the dismissal of the action under the Employers' Liability Act, and the plaintiff is entitled to appeal against both decisions.

*Edwards* v. *Godfrey*, [1899] 2 Q. B. 333, considered.—ISAACSON *v.* NEW GRAND (CLAPHAM JUNCTION), (LIMITED), *K.B.D.*; [1903] 1 K. B. 539; 72 L. J. K. B. 227; 88 L. T. 291.

2. *Employers' liability—Accident—Compensation—"Average weekly earnings"—Irregular employment for over twelve months—Mode of calculation—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37). *First Schedule* 1 (b).—A stevedore's labourer claimed compensation for injuries occasioned to him by an accident which happened on the 28th of November, 1902, while in the employment of a firm of master stevedores. The county court judge found that he was not engaged by the firm for any definite period, but had been from time to time employed by them, and that during the period between the 2nd and 10th of November he was not working for the firm, but that from the 11th to the 28th he was continuously in their employment. He accordingly awarded him compensation calculated on the average of his weekly earnings during the last-named period.

Held, dismissing the appeal, that, notwithstanding the decision of the House of Lord in *Lysons* v. *Knowles & Sons*, 49 W. R. 636, [1901] A. C. 79, the basis upon which the county court judge had assessed his award was right, as the period of continuous employment was sufficiently long to establish a basis for striking an average under the schedule.

*Jones* v. *Ocean Coal Co.*, 47 W. R. 484, [1899] 2 Q. B. 124, approved and followed.—GILES *v.* BELFORD, *C.A.*, 692; [1903] 1 K. B. 843; 72 L. J. K. B. 569; 88 L. T. 754.

3. *Employers' liability—Accident—Compensation—Costs—Taxation—Review—Right of appeal—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1 (4).—An appeal will not lie to the Court of Appeal from the refusal of a county court judge to direct a review of the taxation of costs under an order made under section 1 (4) of the Workmen's Compensation Act, 1897.—KEANE *v.* NASH, *C.A.*; 88 L. T. 790.

4. *Employers' liability—Accident—Compensation—Dependant—Father of deceased in workhouse at time of death—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2, *Schedule I.* (1) (a) (ii.)—The father of a workman who was accidentally killed in the course of his employment was in the workhouse at the time of the death of the deceased. The deceased did not during the last six or seven months of his life contribute towards the maintenance of his father, though before that period he had so contributed. The father applied for compensation under the Workmen's Compensation Act, 1897, as being a dependant, in part dependent upon the earnings of the deceased.

Held, that the county court judge was justified in holding that the applicant was not a dependant.—REES *v.* PENRIKYBER COLLIERY CO., *C.A.*, 247; [1903] 1 K. B. 259; 72 L. J. K. B. 85; 87 L. T. 661.

5. *Employers' liability—Accident—Compensation—"Earnings"—Deductions from wages—Workmen's Compensation Act*, 1897.—From the weekly wages of a collier his employers deducted by agreement sums for cleaning lamps, supply of oil, sharpening picks, and checking weights.

Held, that his earnings under the Act for the purpose of estimating compensation for injury were his full wages without the deductions.—ABRAM COAL CO. *v.* SOUTHERN, *H.L.*; [1903] A. C. 306.

6. *Employers' liability—Accident—Compensation—"Earnings"—Lodging allowance for goods guard—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37). *Schedule I., par.* 1 (a) (*i.*).—A goods guards in in the employment of a railway company received, in addition to his ordinary wages, a certain sum per night for "lodging allowance" when he was obliged to sleep away from home on the company's business. The object of the allowance was to cover out-of-pocket expenses to which the guard was put through having to sleep away from home, and the amount of the allowance was about equal to the reasonable cost of board and lodging for the time covered by the allowance. No inquiry was ever made by the company as to the actual expenses incurred by a guard for board and lodging, and if he boarded and lodged with a friend he would still be entitled to the allowance, and would thus make a profit out of it; but there was no evidence that any guard ever did in fact make any such profit. A guard having been killed by an accident arising

out of and in the course of his employment, his widow claimed compensation under the Workmen's Compensation Act, 1897, as being wholly dependent on his earnings.

Held, that in assessing the amount of compensation the "lodging allowance" must be taken as part of the "earnings" of the deceased man, within the meaning of Schedule I., par. 1 (*a*) (*i.*), to the Act.—SHARP *v.* MIDLAND RAILWAY CO., *C.A.*, 481; [1903] 2 K. B. 26; 72 L. J. K. B. 486; 88 L. T. 545.

7. *Employers' liability—Accident—Compensation—Employment—Accident arising out of and in the course of the employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—A workman employed in a colliery was suspended from work for the day and told to go the bottom of the pit. If he had immediately gone to the bottom of the pit he could not have been taken out of the pit for nearly three hours. Instead of going to the bottom of the pit he went into a "pass-by" and remained sitting there. When he had been there a little more than two hours he was accidentally injured by a fall of mineral. In an arbitration under the Workmen's Compensation Act the county court judge held that the workman was not entitled to compensation, on the ground that, though he was not guilty of serious and wilful misconduct, the accident did not arise out of and in the course of his employment.

Held, that the county court judge was justified in so holding.—SMITH *v.* NORMANTON COLLIERY CO., *C.A.*, 209; [1903] 1 K. B. 204; 72 L. J. K. B. 76; 88 L. T. 5

8. *Employers' liability—Accident—Compensation—Employment—Injuries received by applicant starting engine—No part of applicant's duty to start or stop engine—"Accident arising out of or in the course of" applicant's employment.—Workmen's Compensation Act*, 1897, *s.* 1 (*i.*).—The applicant was employed as a brow girl at the respondents' colliery pit, and her work as such was to pick out rubbish from the coal as it was slowly moved along on a belt to the wagons. It was found as a fact by the county court judge that it was no part of the duty of the girls who did this work to start or stop the engine which worked the band, and that the applicant on the occasion in question was told by the other girls not to touch the engine. The man whose duty it was to start the engine being at the moment absent, the applicant started the engine herself, and her dress catching in the wheel she was drawn in and seriously injured.

Held, by Collins, M.R., and Romer, L.J. (Mathew, L.J., dissenting), that as the county court judge had found as a fact that it was no part of the applicant's duty to stop or start the engine, and as there was evidence to justify such finding, the accident did not arise out of or in the course of her employment with the respondents.

*Per* Mathew, L.J., that there was no evidence to support the finding that it was no part of the applicant's duty to touch the engine.

*Lowe* v. *Pearson*, 47 W. R. 193, [1899] 1 Q. B. 261, followed.—LOSH *v.* RICHARD EVANS & CO., *C.A.*, 243.

9. *Employer's liability—Accident—Compensation—Employment in agriculture—Partly or occasionally employed in other work—Liability of employer for accident which happened at a distance from his premises—Workmen's Compensation Acts*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *and* 1900 (63 & 64 *Vict. c.* 22), *ss.* 1 (*i.*) (3), 2.—A workman employed in agriculture is not debarred from compensation under the Workmen's Compensation Act, 1900, because the accident did not happen "in, on, or about" his employer's premises, as those words of limitation in the Act of 1897 are not applicable to the Act of 1900.—SMITHERS *v.* WALLIS, *C.A.*, 261; [1903] 1 K. B. 200; 72 L. J. K. B. 57; 87 L. T. 556

10. *Employers' liability—Accident—Compensation—Accident in England—Employer domiciled in Scotland—Application for arbitration—Jurisdiction of county court—"District"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule II., clause* 9—*Workmen's Compensation Rules, r.* 15.—Where a workman, resident in England, is engaged by an employer, whose residence and domicil are in Scotland, is injured in the course of his employment by an accident occurring in England, proceedings for compensation under the Workmen's Compensation Act, 1897, may be taken in England, and the judge of the county court within whose district the accident occurs has jurisdiction under clause 9 of the 2nd Schedule of the Act to hear an arbitration for the settlement under the Act of the compensation due to the workman, and services of the necessary notices may be effected by registered post.—REX *v* OWEN, *K.B.D.*, 168; [1902] 2 K. B. 436; 71 L. J. K. B. 770; 87 L. T. 298.

11. *Employers' liability—Accident—Compensation—"Factory"—Machinery used in unloading ship in river—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38, *sub-section* 1—*Factory and Workshop Act*, 1901 (1 *Ed* 7, *c.* 22), *s.* 104—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—By virtue of section 38, sub-section 1, of the Interpretation Act, 1889—which enacts that where any Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted—the reference to the Factory and Workshop Act, 1895, in the definition of "factory" in section 7, sub-section 2, of the Workmen's Compensation Act, 1897, is now to be construed as a reference to section 104 of the Factory and Workshop Act, 1901, which repeals section 23 of the Act of 1895, and extends the definition of "factory" so as to include machinery or plant used in the process of loading or unloading or coaling a ship in a dock, harbour, or canal.—STEVENS *v.* GENERAL STEAM NAVIGATION CO., *C.A.*, 578; [1903] 1 K. B. 890; 72 L. J. K. B. 417; 88 L. T. 543.

12. *Employers' liability—Accident—Compensation—"On or in or about engineering work"—Construction of reservoir—Laying water-pipes—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—A contractor had entered into a contract for the construction of a reservoir and the laying of water-pipes from the reservoir to a town about two miles away. The laying of the pipes was commenced at a point about 600 yards from the reservoir, and the work was continued towards the reservoir. The trench for the pipes had been opened for about 100 yards, and the pipe-track for the rest of the distance to the reservoir had been staked out. A workman who was employed by the contractor in laying the pipes was injured by an accident at a spot between 500 and 600 yards from the reservoir. The reservoir was being constructed by means of machinery driven by steam, but no machinery driven by steam, water, or other mechanical power was used in laying the pipes. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge found that the laying of the pipes was a necessary part of the entire work,

which was an "engineering work" within section 7, sub-section 2, of the Act, and that therefore the workman was at the time of the accident employed on that engineering work.

Held, that there was evidence upon which the county court judge could so find.—ATKINSON *v.* LUMB, *C.A.*, 516; [1903] 1 K. B. 861; 72 L. J. K. B. 460; 88 L. T. 789.

13. *Employers' liability—Accident—Compensation—Review of weekly payment—Termination of incapacity — Jurisdiction of arbitrator — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (12).—Where, in proceedings under the Workmen's Compensation Act, 1897, an arbitration is instituted by the employers, under paragraph 12 of the First Schedule to the Act, for the purpose of ending a weekly payment, on the ground that the incapacity of the workman has ceased, it is the duty of the arbitrator to consider the question when the incapacity ceased. The jurisdiction of the arbitrator is not limited to the making of an award to take effect from the date of the award.—MORTON *v.* WOODWARD, *C.A.*, 54; [1902] 2 K. B. 276; 71 L. J. K. B. 736; 86 L. T. 878.

14. *Employers' liability—Accident—Compensation—"Scaffolding"—Painter's steps—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—An ordinary pair of self-supporting painter's steps, eight feet high, with flat steps and a board on the top for a painter to stand upon to enable him to paint a place out of his reach from the ground may be a "scaffolding" within section 7 of the Workmen's Compensation Act, 1897.

So held by Collins, M.R., and Mathew, L.J., Stirling, L.J., dissenting.—ELVIN *v.* WOODWARD, *C.A.*, 518; [1903] 1 K. B. 838; 72 L. J. K. B. 468.

15. *Employers' liability—Accident—Compensation—Sub-contractor—"Undertaker"—Sub-contractor to find labour only for all plastering work to house—Materials supplied by contractor—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.—The contractor for the building of a house sublet the plastering work to F., who agreed to supply and control the labour only for it, the contractor to find the materials and plant for such work.

One of F.'s workmen, while engaged on the plastering work, met with an accident, and recovered compensation under the Workmen's Compensation Act, 1897, from the contractor.

The contractor appealed from that part of the award so far as it declared that he was not entitled to an indemnity from F.

Held, allowing the appeal, that F. had agreed to execute a substantial part of the work of construction, although only supplying and controlling the labour therefor; that he was consequently an "undertaker" in regard to that part, and that he was bound to indemnify the contractor.

Decisions in *Mason* v. *Dean*, 48 W. R. 353, [1900] 1 Q. B. 770, and *Cooper* v. *Wright*, [1902] A. C. 302, *ante*, p. 12, explained and followed.—WAGSTAFF *v.* PERKS & SON, *C.A.*, 210; 87 L. T. 558.

16. *Employers' liability—Accident—Compensation—Sub-contractor—Indemnity—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.—A sub-contractor who engages to do part of a work on a building may be an undertaker within the meaning of the Workmen's Compensation Act, 1897.

The appellants contracted to erect a building and the respondent agreed with them to construct the roof. In the course of constructing the roof one of the respondent's workmen was injured, and compensation was awarded against the appellants under the Workmen's Compensation Act, 1897.

Held (Lords Brampton and Robertson dissenting), that they were entitled to be indemnified by the sub-contractor under section 4 of that Act.

*Cass* v. *Butler*, 48 W. R. 309, [1900] 1 Q. B. 777, overruled.—COOPER & CRANE *v.* WRIGHT, *H L.*, 12.

17. *Employers' liability—Accident—Compensation—"Workman"—Independent contractor—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7 (2) — A contractor, who enters into an agreement to be paid weekly for the amount of work which he and his own workmen can do, and who meets with an accident in the course of his employment with manufacturers at their works, is not himself a "workman" within the meaning of section 7, sub-section 2, of the Workmen's Compensation Act, 1897.—VAMPLEW *v.* PARKGATE IRON AND STEEL CO., *C.A.*, 691; [1903] 1 K. B. 851; 72 L. J. K. B. 575; 88 L. T. 756.

18. *Indemnity—Amount fixed by agreement—Right to indemnity from person liable—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 6—Section 6 of the Workmen's Compensation Act, 1897, provides that where the injury for which compensation is payable under the Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect of it, the workman may, at his option, "proceed, either at law against that person to recover damages, or against his employer for compensation under this Act . . . and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person."

Held, that the section applied where the compensation was paid under an agreement made between the injured workman and the employer after notice of the accident and of the claim for compensation had been given by the workman to the employer, but before any further proceedings had been taken.—THOMPSON & SONS *v.* NORTH-EASTERN MARINE ENGINEERING CO., *K.B.D.*; [1903] 1 K. B. 428; 72 L. J. K. B. 222; 88 L. T. 239.

See Insurance, 2.

MERGER:—

1. *Investment of trust moneys on mortgage—Conveyance of mortgaged land to* cestui que trust.—In 1864 J. L. A. S. purchased certain land in B., and on the 4th of August, 1864, conveyed this land to the trustees of the will of the testator F. L. S. by way of mortgage. On the 7th of September, 1898, by an indenture made between J. L. A. S. of the one part and E. J. S. of the other part, J. L. A. S. conveyed the said land in B. unto E. J. S. in fee simple subject to the payment of the principal moneys and interest secured by the indenture of mortgage of the 4th of August, 1864. By another indenture of the same date, and made between the same parties, J. L. A. S. released unto E. J. S. his life estate and interest of the residuary estate of the testator J. L. S. Succession duty had not been paid by E. J. S.

Held, that the mortgage debt of £400 had not become merged in the said land in B., but passed by the residuary bequest of the personal estate of E. J. S.—SIMMONS, RE, DENNISON *v.* ORMAN, *Ch.D. Joyce, J.*; 87 L. T. 594.

2. *Lease—Mortgage by sub-demise—Purchase of freehold by lessee—Mortgage of freehold—Entry by*

*mortgagee by sub-demise—Refusal to pay rent—Legal estate—Registered land—Unregistered deed—Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 49—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 20—*Land Transfer Rules*, 1898, *rr.* 106, 107, 110.—The rule of equity that the question of merger must be decided by the intention of the parties applies to the merger of estates as well as to the merger of charges, and since the Judicature Act, 1873, if the circumstances are such that a court of equity would have held that there was no merger in equity, there is now no merger at law.

Accordingly, where a lessee mortgaged his leasehold interest by way of sub-demise; and subsequently purchased the freehold reversion, and then mortgaged to another both the freehold reversion and also the leasehold term, with the intention that the mortgagee of the freehold should have a security on the unincumbered freehold reversion subject to the lease; and afterwards registered himself under the Land Transfer Act, 1897, as proprietor of the premises with a possessory title, and gave a charge thereon to the last-mentioned mortgagee which was also registered,

Held, that there was no merger of the term in the freehold, and that, apart altogether from the registration, the legal estate was vested in the mortgagee of the freehold, who was entitled to re-enter upon the premises under the proviso to that effect in the original lease on non-payment by the mortgagee by sub-demise who had entered into possession of the premises of the rent reserved by the original lease.

The fact that land is on the Land Register does not prevent its being dealt with by unregistered deeds which have the same operation and effect as if the land were unregistered. The registered proprietor deals with the land by virtue of an overriding power, and not by virtue of any estate in him. Consequently, the register of proprietors is not material for the purpose of ascertaining where the legal estate in registered land is, and such legal estate may be transferred by unregistered deeds.

The special powers given to a registered proprietor to create charges in the prescribed manner do not enable him to pass the legal estate by such charges, nor do they exclude the operation and effect of a common law unregistered mortgage.

*Quære*, whether a conveyance of the legal estate is a "stipulation" that may properly be added to a statutory charge.

Decision of Kekewich, J. (71 L. J. Ch. 573, 50 W. R. Dig. 115), reversed.—CAPITAL AND COUNTIES BANK *v.* RHODES, *C.A.*, 470; [1903] 1 Ch. 631; 72 L. J. Ch. 336; 88 L. T. 255.

See also Limitations, Statute of, 4.

METROPOLIS:—

1. *Defective drain—Works specified in detail—Notice of order—Non-compliance—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 82, 85—*Metropolis Management (Amendment) Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 64.—S. being the owner of certain premises, the respondents on the 5th of February served a notice on him under the Public Health (London) Act, 1891, requiring him to abate a certain nuisance, being a defective drain.

On the 19th of February another notice was served requiring him to abate the nuisance and relay the drain.

On the 20th of March the public health committee of the respondents caused a notice to be served on him under the Metropolis Management Acts, 1855 and 1862, that the drain was defective, and requiring him to amend the same and to execute the works that the notice set out in detail. In April S. executed certain repairs to the drain, but not those in the notice of the 20th of March.

On the 18th of June the committee reported to the respondents that they had had the report of the inspector before them and had given directions for the statutory notices to be served on S., and they recommended that a notice be served on the appellant under the Act of 1855 requiring him to execute such works as were necessary to amend the drain which was in bad order, and that in the event of non-compliance proceedings should be taken.

On the 18th of June the respondents by resolution adopted this recommendation, and on the 14th of July a notice was served on S. requiring him to amend the drain, and for that purpose to execute the works that this notice set out in detail.

Held, that the notice of the 14th of July was not a notice of an order, and that S. could not be convicted for non-compliance.—SWINBOURN *v.* HAMMERSMITH BOROUGH, *K.B.D.*; 88 L. T. 597.

2. *Electric lighting—Local authority—Street box—Notice to district surveyor—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii*), *s.* 145.—A street box constructed by an electric lighting company, built of brick under the pavement of the street and large enough to admit a man, is a "building, structure, or work" within section 145 of the London Building Act, 1894, and notice under that section must be given to the district surveyor, even although, under the Order Confirmation Act, under which power is given to construct the box, notice has to be given to the Postmaster-General and the local authority.—CHARING CROSS AND STRAND ELECTRICITY CORPORATION *v.* WOODTHORPE, *K.B.D.*; 88 L. T. 772.

3. *Highway—Improvement—Widening of street—Agreement as to erection of sign-post on edge of footpath.*—The corporation of a metropolitan borough has power, for the purpose of widening a street, to enter into an agreement with the owner of a public-house in the street whereby he is permitted to erect a sign-post on the edge of the footpath.—HOARE & CO. *v.* LEWISHAM CORPORATION, *C.A.*; 87 L. T. 464.

4. "*Litter*"—*Paper scattered in street.*—Paper advertising bills thrown in a thoroughfare may be "litter" within section 60 (3) of the Metropolitan Police Act, 1839.—HILL *v.* DAVIES, *K.B.D.*; 88 L. T. 464.

5. *Management Acts—Drain—Sewer—Drain carrying sewage from one house and rain-water from another house—Metropolis Management Act*, 1855 (18 & 19 *Vict c.* 120), *s.* 250.—A drain used for the drainage of two houses, and not made under an order of any vestry or district board, comes within the definition of "sewer" in section 250 of the Metropolis Management Act, 1855, although so far as one of the houses is concerned it is a drain for rain-water only.

*Holland* v. *Lazarus*, 66 L. J. Q. B. 285, 45 W. R. Dig. 99, approved.—SILLES *v.* FULHAM BOROUGH COUNCIL, *C.A.*, 598; [1903] 1 K. B. 829; 72 L. J. K. B. 397; 88 L. T. 753.

6. *Management Acts—Street—New street—Paving expenses—Owners—Open space abutting on new street—Public body—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.—An open space, which had been dedicated to the public as a common or recreation ground, was, under the provision of certain statutes, regulated and managed by the London County Council, as the successors

of the Metropolitan Board of Works. The effect of the county council's statutory powers was that they could not use the common for any purposes except such as were subordinate to the public purposes to which it had been dedicated. They received rent for a refreshment-house which was erected on the common, and they also received yearly sums in respect of grazing rights and of licences to have gateways opening on the common; but the expenses of regulating and managing the common far exceeded the receipts.

Held, that the county council were not the owners of the common within the definition of "owner" in section 250 of the Metropolis Management Act, 1855, so as to make them liable to contribute to the expenses of paving a new street on which the common abutted.

*Vestry of Fulham* v. *Minter*, 49 W. R. 415, [1901] 1 K. B. 501, overruled.—LONDON COUNTY COUNCIL *v.* WANDSWORTH BOROUGH, *C.A.*, 499; [1903] 1 K. B. 797; 72 L. J. K. B. 399; 88 L. T. 783.

7. *Street—Paving expenses—"Owner"—Building agreement—New street—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.—The owner in fee of land made an agreement with a builder whereby it was agreed that the builder might enter upon the land and should build houses thereon, and that a lease should be granted of each house when erected, and that the builder should in the meantime pay £200 a year (which was not a rack-rent) until the leases were granted, and that "this agreement is intended to operate as an agreement only and not as an actual demise of the premises, or to give the intended lessee any legal interest therein until the leases hereinbefore agreed to be granted shall have been executed." The land had not been used, and no houses had been erected by the builder.

Held, that the builder was not the owner of the land within the meaning of section 250 of the Metropolis Management Act, 1855.

*Holland* v. *Kensington Vestry*, (1867) L. R. 2 C. P. 565, followed.—DRISCOLL *v.* BATTERSEA BOROUGH COUNCIL, *K.B.D.*; [1903] 1 K. B. 881; 72 L. J. K. B. 564; 88 L. T. 795.

8. *Street—Paving expenses—Liability of owner of premises—Action to recover apportioned amount—Demand—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management* (*Amendment*) *Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.—By the joint operation of section 105 of the Metropolis Management Act, 1855, and section 77 of the Metropolis Management (Amendment) Act, 1862, which should be read together, successive owners of houses bounding or abutting on new streets are liable on demand to pay the amount of paving expenses apportioned or charged in respect of their houses, and an action lies for the recovery of such apportioned expenses after demand has been made.

The Statute of Limitations (21 Jac. 1, c. 16), if applicable, does not begin to run in favour of an owner until payment has been demanded from him.—HAMPSTEAD CORPORATION *v.* CAUNT, *K.B.D.*, 700; [1903] 2 K. B. 1; 72 L. J. K. B. 440; 88 L. T. 599.

9. *Street—Reflector light—"Meat or offal or other matter or thing"—Metropolitan Paving Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 65.—Section 65 of the Metropolitan Paving Act, 1817, (*inter alia*) prohibits any person from "hanging out or exposing, or causing or permitting to be hung out or exposed, any meat or offal or other matter or thing whatsoever from any house, buildings, or premises belonging to or occupied by them over any part of either of such pavements or over any area of any houses or other buildings or premises."

Held, that a reflector light fixed by staples in the brickwork of a house over the pavement was not within the section.—WINSBORROW *v.* LONDON JOINT STOCK BANK, *K.B.D.*; 88 L. T. 803.

See Gas, 1, 2; Local Government, 2, 9.

MINES:—

1. *Clay—Compulsory purchase—Mines and minerals—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78, 79.—Clay forming the surface or subsoil, and constituting the "land" compulsorily taken for the purposes of an undertaking, is not a mineral within the meaning of sections 77, 78, or 79 of the Railways Clauses Consolidation Act, 1845.

*Lord Provost of Glasgow* v. *Farie*, (1888) 13 App. Cas. 657, explained.

*Hext* v. *Gill*, (1872) L. R. 7 Ch. 699, and *Jersey* (*Earl*) v. *Neath Guardians*, (1889) 22 Q. B. D. 555, commented on.

*Great Western Railway Co.* v. *Blades*, [1901] 2 Ch. 624, approved.—TODD, BIRLESTON, & CO., AND NORTH-EASTERN RAILWAY CO., RE, *C.A.*; [1903] 1 K. B. 603; 72 L. J. K. B. 337; 88 L. T. 366.

2. *Sale of land—Reservation of mines and minerals—Sandstone lying under surface—Right of purchaser to quarry stone.*—A deed of conveyance upon the sale of a plot of land conveyed the land to the purchaser "except all coal, ironstone, and other mines and minerals (including fireclay) lying or being within or under the lands hereby assured," and it reserved unto the owners of the excepted mines and minerals for the time being full liberty and power to work and get the coal, ironstone, and other minerals by underground working, and to use or allow lessees to use so much of the clay lying within or under the land as might be necessary for making bricks for colliery purposes; and the conveyance of another plot of the land excepted "all mines, beds, and quarries of coal, ironstone, and other minerals (including fireclay)" lying under the land. The purchaser had opened quarries for quarrying and getting certain sandstone as building stone which lay at a considerable depth below the surface.

Held, that the sandstone was included within the reservation of the minerals, and that the purchaser was not entitled to work and get the stone without the leave and licence of the vendors. In such cases the conditions or particulars of sale cannot be referred to for the purpose of explaining the subsequent deed of conveyance. — GREVILLE *v.* HEMINGWAY., *K.B.D.*; 87 L. T. 443.

3. *Trustees—Power to lease.*—A testator settled his real estate, making no mention of mines or minerals, and gave his trustees a general and unrestricted power of leasing any portion of his estate, but no special power of granting mining leases. After the testator's death seams of coal were discovered under a portion of his estate. There had never been any open workings of mines on any part of the estate.

Held, that the trustees might under the power demise unopened mines.—BARKER, RE, WALLIS *v.* BARKER, *Ch.D. Kekewich, J.*; 88 L. T. 685.

See Land Clauses Act, 6; Railway, 5; Settled Land, 8; Water, 2; Will, 28.

MISREPRESENTATION:—

*Unauthorized use of name of another—Untrue representation that another person is connected in business with person making representation—Con-*

*sequent liability of person about whom representation is made—Probability of injury—Interim injunction.*—An injunction will be granted to restrain a person untruly representing that another is his principal or partner, or connected with him in business when there is reasonable probability of injury arising to that other from the misrepresentation.

The defendant, by circulars, advertisements, and the general conduct of his business as a dealer in cycles, was held by the court to have intended the public to believe that the proprietors of a newspaper were either his principals or responsibly connected with him in the sale of his cycles. There was a reasonable probability of the proprietors of the newspaper being exposed to litigation, and perhaps made responsible, if they had not taken steps to disconnect themselves from the defendant.

Held, that the proprietors were entitled to an interim injunction to restrain the defendant until the trial or further order from holding himself out in this manner.—WALTER *v.* ASHTON, *Ch.D. Byrne, J.*, 131; [1902] 2 Ch. 282; 71 L. J. Ch. 839; 87 L. T. 196.

See also Company, 15-17.

MISTAKE.—See Banker, 3; Vendor and Purchaser, 2, 8.

MONEY-LENDER:—

*Harsh and unconscionable transaction—Re-opening—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-section* 1.—A transaction may be "harsh and unconscionable" within the meaning of section 1, sub-section 1, of the Money-lenders Act, 1900, by reason of excessive interest merely, and the standard to be applied is not the same as that applied by a court of equity before the Act.

*Wilson & Co.* v. *Osborn*, [1901] 2 K. B. 110, 49 W. R. Dig. 124, overruled.—DEBTOR, A, RE, THE DEBTOR, EX PARTE, *C.A.*, 370; [1903] 1 K. B. 705; 72 L. J. K. B. 382; 88 L. T. 401.

MORTGAGE:—

1. *Foreclosure order* nisi—*Power of sale—Suspension of power.*—A mortgagee obtained a foreclosure order *nisi* against the mortgagor. Before this order was made absolute the mortgagee sold under his power of sale.

Held, that the foreclosure order *nisi* did not extinguish the power of sale, but suspended the right to exercise it without the leave of the court.—STEVENS *v.* THEATRES (LIMITED), *Ch.D. Farwell, J.*, 585; [1903] 1 Ch. 857; 88 L. T. 458.

2. *Interest—Arrears—Fund in court—Amount of arrears of interest to which mortgagee is entitled—Statutes of Limitations*, 3 & 4 *Will.* 4, *c.* 27, *ss.* 40, 42; *c.* 42, *s.* 3.—The court will pay out a fund in court which is the subject of a mortgage, on the application of a mortgagor or his representatives, only on the same terms as if he or they had brought an action for redemption—that is, on payment of full arrears of interest. Section 42 of 3 & 4 Will. 4, c. 27, applies only to proceedings by the mortgagee, and has no application where he is simply resisting proceedings by the mortgagor.

*Edmunds* v. *Waugh*, 14 W. R. 257, L. R. 1 Eq. 418; *In re Marshfield*, 35 W. R. 491, 34 Ch. D. 721; and *Dingle* v. *Coppen*, 47 W. R. 279, [1899] 1 Ch. 726, approved.

*In re Slater's Trusts*, 27 W. R. 448, 11 Ch. D. 227, disapproved.

Decision of Farwell, J., reversed.—LLOYD, RE, LLOYD *v.* LLOYD, *C.A.*, 177; [1903] 1 Ch. 385; 72 L. J. Ch. 78; 87 L. T. 541.

3. *Mortgagee in possession—Equity of redemption barred—Intestacy of mortgagee—Devolution of mortgaged land.*—Testator, for three years before his death, was mortgagee in possession of freehold land, and died leaving all his real and personal property to his widow for her life, but made no disposition of the remainder expectant upon the widow's decease. The widow, as life tenant, continued in possession of the mortgaged land for many years, and during her possession the mortgagor's equity of redemption in the mortgaged premises became barred by lapse of time. Upon the widow's death, in an action for administration of the estate of the testator, the mortgagee,

Held, that the mortgaged land must be treated as personalty for the purposes of devolution from the mortgagee, and passed as personalty to the next-of-kin of the testator.—LOVERIDGE, RE, DRAYTON *v.* LOVERIDGE, *Ch.D. Buckley, J.*, 232; [1902] 2 Ch. 859; 71 L. J. Ch. 865; 87 L. T. 294.

4. *Portions—Legal charge—Equitable charge—Priority.*—A testator who died in 1851, by his will, dated in 1849, charged all his real estate with the payment of three portions of £5,000 each in favour of the children of each of his three daughters upon their attaining the age of twenty-one years. In an action brought by the testator's son in 1882 for the purpose of clearing the real estate from charges, it was found that in 1880 two of the portions had become raisable, but that the tenant for life of the third portion was still alive.

On the 17th of May, 1882, an order was made directing that the two portions then raisable should be raised by a mortgage of the real estate to a person who was willing to lend the money, such mortgage to be settled by the judge. The mortgage deed, dated the 21st of July, 1883, so settled contained recitals of the title to the portions, and of the proceedings of the action, and was expressed to be made as to all the hereditaments comprised therein "without prejudice to any charge which may be subsisting therein under the said will," but was in other respects in the ordinary form of a mortgage in fee. All the testator's real estate was thereby mortgaged for £10,862. The mortgagee duly paid the money into court, and it was afterwards applied in payment of the two portions of £5,000 to the persons interested in the same, the costs incidental to the transaction, and a small sum for freeing copyholds.

An action was subsequently brought by the mortgagee for the realization of his security and for the purpose of establishing his priority as first mortgagee in respect of the £10,862 advanced by him over the third portion of £5,000 which under the will had yet to be raised out of the same estate, it appearing that the estate would be unable to bear the full burden of all the charges.

Held, that the third portion, although as yet only charged in equity by virtue of the will, ranked *pari passu* with the mortgagee's legal charge sanctioned by the court.—NIGHTINGALE *v.* REYNOLDS, *C.A.*; [1903] 2 Ch. 236; 72 L. J. Ch. 564; 88 L. T. 654.

5. *Receiver appointed on behalf of second mortgagees — Motion by first mortgagee to obtain possession and to discharge the receiver — Back rents in the hands of the receiver — Right of first mortgagee.*—On a motion by the first mortgagee of certain premises to discharge a receiver appointed on behalf of the second mortgagees, it was asked that the receiver should pay to the first mortgagee all rents and profits in his hands. He received certain rents between the notice of motion

and the order thereon giving the first mortgagee possession.

Held, that the first mortgagee was entitled to receive these rents, for he must be considered to be in possession from the date of the notice of motion, and not merely from the date of the order made on the notice of motion.—PRESTON *v.* TUNBRIDGE WELLS OPERA HOUSE, *Ch.D. Farwell, J.*; [1903] 2 Ch. 323; 88 L. T. 53.

6. *Redemption—Clog on equity of redemption—Collateral advantage to mortgagee—Advantage continuing after redemption—Mortgage of shares—Employment of mortgagee as broker.*—Collateral stipulations in a mortgage cease to operate on redemption, so that a mortgage security cannot validly provide that the mortgagee shall obtain any advantage which arises after or goes beyond the time when the principal, costs, and interest are repaid, for such would be a fetter upon the mortgagor's right to redeem.

Where, therefore, a holder of shares in a tea company mortgaged them to secure an advance, and at the same time agreed to use his best endeavours to secure that the mortgagee should always thereafter have the sale of all the company's teas as broker, and the mortgage was paid off.

Held (Lords Shand and Lindley dissenting), that as the bargain between the parties was at an end upon the repayment of the loan, the agreement as as to employing the broker after that time was invalid.

Decision of the Court of Appeal (49 W. R. 593, [1901] 2 K. B. 550) reversed.—BRADLEY *v.* CARRITT, *H.L.*, 636; [1903] A. C. 253; 72 L. J. K. B. 471; 88 L. T. 633.

7. *Redemption—Independent agreement—Once a mortgage always a mortgage—Option to lender to enter into partnership—Sale or mortgage.*—Where mortgagor and mortgagee entered into an arrangement dealing with the equity of redemption of certain property and making certain terms as to a possible partnership,

Held, that as the arrangement was subsequent and independent of the mortgage, and that as there was nothing unconscionable or unfair in the transaction, the agreement was binding.

Judgment of the Court of Appeal (50 W. R 231, [1902] 1 Ch. 53) affirmed.—REEVE *v.* LISLE, *H.L.*, 576; [1902] A. C. 461; 71 L. J. Ch. 768; 87 L. T. 308.

8. *Redemption action—Costs of mortgagee.*—A customer of a bank deposited certain shares with the bank as security for a loan, with a memorandum of deposit. The bank afterwards obtained judgment against her in respect of the debt, when an arrangement was made under which her husband guaranteed payment of part of it by instalments. The bank sued him on his guarantee, and obtained judgment with costs; and, although the wife's debt to them had now been satisfied, they declined to retransfer the shares to her until these costs were paid. In an action by her against the bank to obtain a retransfer of the shares or their value,

Held, that the action was in effect one of redemption; that the costs of the action against the husband were properly incurred, and the wife was bound to indemnify him against them; and that the bank were entitled to the benefit of the indemnity and to retain the shares till payment of the costs of the action against him.—SACHS *v.* ASHBY & Co., *K.B.D.*; 88 L. T. 393.

9. *Redemption action—Security for loan—Stipulation that mortgagee may purchase mortgage security at fixed price within definite time—Clog on equity of redemption.*—A stipulation in a mortgage that the mortgagee shall have the option to purchase the whole or any part of the mortgaged security at a fixed price within a definite time is invalid as a clog on the equity of redemption. The rule against clogging an equity of redemption applies as much to a mortgage by a company of its debenture stock as to other mortgages.

Decision of Kekewich, J. (50 W. R. 601, [1902] 2 Ch. 479), affirmed.—JARRAH TIMBER, &c., CORPORATION *v.* SAMUEL, *C.A.*, 439; [1903] 2 Ch. 1; 88 L. T. 106.

10. *Registration of deeds—Equitable mortgage—Deposit of title-deeds—Antecedent debt—Priority—6 Anne Ir. c. 2, ss. 3, 5.*—A customer of a bank having overdrawn his account undertook by letter to deposit a title-deed of an Irish estate as security. He deposited the title-deed with the bank, who did not register the charge. The customer afterwards mortgaged the estate to the appellants, who registered their charge without notice of the prior charge.

Held, that the customer's letter amounted to an agreement to create an equitable charge upon the estate and ought to have been registered under 6 Anne Ir. c. 2, and that in default of registration it ranked after the mortgage to the appellants.—FULLERTON *v.* PROVINCIAL BANK OF IRELAND, *H.L.*; 1903 A. C. 309.

See Bankruptcy, 10, 11; Contract, 6; Fixtures, 2; Inland Revenue, 7; Limitations, Statute of, 2; Ship, 23, 24, 25; Trustee, 11; Vendor and Purchaser, 9.

*NE EXEAT REGNO*:—

*Practice—Writ—Non-compliance by trustee with order to pay money into court—Evidence of actual receipt—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4 (3).—The circumstances under which the court will allow a writ *ne exeat regno* to issue must be such as would justify the issue of a writ of attachment, and in addition the evidence as to the intention of the defendant to leave the country must be direct and unequivocal.—UNDERWOOD, RE, *Ch.D. Joyce, J.*, 335.

NEGLIGENCE:—

1. *Action for personal injury—Invitation to travel on engine—Duty to take reasonable care—Liability for negligence of servants.*—Held, on the facts, that the defendant must be taken through his servant to have permitted the plaintiff to ride on the engine, and that his liability was that of a person who undertakes the carriage of another gratuitously; that the duty in such a case is that the care exercised must be reasonable under the circumstances, that there was evidence of want of due care on the part of the defendant's servant, and that the plaintiff was entitled to judgment.—HARRIS *v.* PERRY, *C.A.*; [1903] 2 K. B. 219.

2. *Liability of railway company—Intervening act of third party—Effective cause of damage.*—A railway company is not responsible for injury to a person using a highway caused by a brake-van which the interference of trespassers has sent running down an inclined siding on to the highway, where the danger of such interference as a probable cause of injury to persons using the highway was not known to the company, and where independently of such interference the brake-van was in a position and condition not at the time dangerous.—MCDOWALL *v.* GREAT WESTERN RAILWAY, *C.A.*; 72 L. J. K. B. 652; 88 L. T. 825.

3. *Lift accident—Servant injured—Lack of knowledge of danger by both master and servant—Defect in*

*lift—Deduction by jury from plan—Liability.*—Where a lift, defective through the absence of an inner gate, has become dangerous owing to cleaning with oil by the order of a fellow servant given with the sanction of the master, and there is a neglect to give the servant working the lift proper directions as to its working, the master will be liable if such servant working the lift is injured, even although the danger is not known to the master or his superintendent, and is not known to the servant so injured. Where a plan of a lift is put in, but no evidence as to defective construction is given, the jury are entitled to form their own opinion as to the construction of such lift.—LLOYD *v.* WOOLLAND BROTHERS, *K.B.D.*; 87 L. T. 73.

4. *Premises in dangerous state of repair—Key to view given by house agent—Invitation—Owner's liability for accident.*—Landlord held liable for injury caused to a stranger through the front doorsteps giving way, who had obtained a key to look over the premises, which were to let, from the house agent.—WRIGHT *v.* LEFEVER, *C.A.*, 149.

See Contract, 7; Corporation, 5; Railway, 6; Sale of Goods, 2; Ship, 20, 26; Solicitor, 10.

NEW SOUTH WALES, LAW of:—

1. *Civil servant—Additional years of service need not be continuous—Terms of special leave allowing respondent to cross-appeal without petition—Costs—New South Wales Civil Service Act*, 1884, *s.* 48—*Construction.*—Where an officer within the meaning of the New South Wales Civil Service Act, 1884, held office as a civil servant from 1857 to 1861, then was employed by the Government from 1861 to 1880 as a licensed surveyor but not as an officer as aforesaid, then as an officer from 1880 to 1896, when he was superannuated,

Held, that the years of service from 1857 to 1861 were additional years within the meaning of section 48, entitling him to a superannuation allowance in respect thereof. There was nothing in the Act to show that the service in respect of which allowance was provided must be continuous.

Special leave granted on special terms as to costs, reserving to respondent a right to cross-appeal without petition to that effect.—WALKER *v.* SIMPSON, *P.C.*; [1903] A. C. 208; 72 L. J. P. C. 58; 88 L. T. 306.

2. *Crown Lands Acts*, 1884, 1889, 1895—*Licence fees—Reappraisement — Forfeiture for non-payment of fees—Crown Lands Amendment Act*, 1891.—The holder of an "occupation licence" of Crown lands under the Crown Lands Acts of New South Wales, who has applied for a reappraisement of the lands held by him under such licence, is not liable to pay licence fees at the former rate pending such reappraisement, and cannot be held in default for not doing so, and the Crown has no power to refuse to renew the licence on that ground.

Judgment of the court below reversed.

A grant of an occupation licence is within the words "contract for the purchase or leasing of Crown lands" in the interpretation clause of the Crown Lands Amendment Act, 1891 (55 Vict. No. 1.).—O'KEEFE *v.* MALONE, *P.C.*; [1903] A. C. 365; 88 L. T. 644.

3. *Land and Income Tax Assessment Act*, 1895, *s.* 11, *sub-section* (v.)—*Charitable purpose—Exclusive use—Exemption.*—Certain glebe lands were vested in trustees by Crown grant for the purposes of promoting religion and education in New South Wales. Under these powers the trustees granted building leases of part; the remainder were waste lands and not physically occupied or used for any purpose. The rents were applied, as authorized, for purposes of the trust connected with a church.

Held, that the lands were not "occupied or used exclusively for or in connection with public charitable purposes, churches, &c.," within the meaning of section 11, sub-section (*v.*), of the Land and Income Tax Assessment Act, 1895, and were not therefore exempt from assessment.—COMMISSIONERS OF TAXATION *v.* TRUSTEES OF ST. MARK'S GLEBE, *P.C.*, 33; [1902] A. C. 416; 71 L. J. P. C. 99; 86 L. T. 629.

NEW ZEALAND, LAW of:—

1. *Probate duty—Exemption—Widow absolutely entitled under husband's will to residuary estate—Power of appointment.*—A testator by his will left all his residuary real and personal estate upon trust for his wife for life for her sole use and benefit absolutely; and after her decease for such person or persons as she should by deed or will appoint, and, in default of appointment, to certain persons and objects mentioned in his will. The widow, in exercise of the power of appointment, appointed the residuary trust funds to herself absolutely, subject to her life interest therein.

Held, that by the Deceased Persons Estates Duties Acts, 1881 and 1885 (No. 41 of 1881 and No. 53 of 1885), the duty payable was made a charge upon the property as from the date of the death, and that the subsequent appointment passed the property subject to the liability to pay duty; and, further, that the widow did not become absolutely entitled to the property under the will, so as to be entitled to exemption from duty under section 18 of the Act of 1885.—JACKSON *v.* COMMISSIONER OF STAMPS, *P.C.*; [1903] A. C. 350; 72 L. J. P. C. 68; 88 L. T. 480.

2. *Prohibited goods, forfeiture of, by innocent holder—New Zealand Patents, Designs, and Trade-Marks Act*, 1889, *No.* 12, *ss.* 89, 104—*Construction.*—Matchboxes, belonging to the respondents, stamped "New Zealand" but filled with London matches, thus bearing a false trade description, were seized on arrival in New Zealand as contraband. It was conceded that there was no fraudulent intention, or any intention to transgress the law of the colony.

In an action against the appellant contesting the legality of the seizure,

Held, that under sections 89 and 104 of the New Zealand Patents, Designs, and Trade-Marks Act, 1889, reproducing the Imperial Merchandize Marks Act, 1887, ss. 2, 16, the seizure must be upheld as of goods whose importation was prohibited. The only remedy was under section 267 of the Customs Laws Consolidation Act, 1882, by means of an application to the Governor.—COMMISSIONER OF TRADE *v.* BELL & Co., *P.C.*; [1902] A. C. 563; 71 L. J. P. C. 109; 87 L. T. 156.

NUISANCE:—

*Notice to abate served on adjoining owners—Intercommunication of drainage system for the two houses—Work to that part of the drain that served both houses done by plaintiff—Claim against defendant for half of the expenses of this work—Rights of parties inter se—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 104.—The plaintiff and the defendant were the owners of adjoining houses which were drained by a system that met under the plaintiff's premises, and from that point the sewage of both houses passed along a single pipe into the main sewer.

Separate notices were served by the local authority on the owners to abate a nuisance on their respective premises. The plaintiff had the

necessary work done, including the connecting of the defendant's drain to the common connection with the sewer. This operation benefited the defendant, and the plaintiff claimed to be repaid half the expense of this part of the work.

The county court judge decided that the defendant was not liable.

Held (dismissing the plaintiff's appeal), that there was no legal responsibility on the defendant, either by statute or at common law, to indemnify the plaintiff, and that the plaintiff could not recover. —REEVE *v.* SADLER, *K.B.D.*, 603; 88 L. T. 95.

See Landlord and Tenant, 19; Public Health, 3, 4.

PARTNERSHIP:—

1. *Article empowering a partner to nominate and introduce a new partner—Refusal of other partners to accept nominee — Remedies of nominee.* — Under partnership articles a partner was entitled to nominate and introduce into the firm, for the whole or any part of his share, a son or any other male person. The partner having nominated his son by writing addressed to the other partners, they refused to accept the son as a partner, and the father accordingly brought an action claiming a declaration that the son was duly nominated and introduced into the firm.

Held, on the facts, that the son was validly nominated and introduced, and that under these circumstances the remedy did not lie in damages only, but that the son, though not entitled to specific performance, was entitled to other equitable relief as having become a partner in equity.

Discussion by Stirling, L.J., as to the relief afforded to partners by courts of equity.—BYRNE *v.* REID, *C.A.*, 52; [1902] 2 Ch. 735; 71 L. J. Ch. 830; 87 L. T. 507.

2. *Assignment of share—Agreement between partners to pay each other salaries—"Management or administration of partnership business"—Partnership Act,* 1890 (53 *&* 54 *Vict. c.* 39), *s.* 31.—If, after the assignment by a partner of his share in the partnership, the partners in good faith agree to give themselves salaries, such an act is an act done in "the management or administration of the partnership business," and cannot, under section 31 of the Partnership Act, 1890, be called in question by the assignee of such share.—GARWOOD, RE, GARWOOD *v.* PAYNTER, *Ch.D. Buckley, J.*, 185; [1903] 1 Ch. 236; 72 L. J. Ch. 208.

3. *Liability of estate of deceased partner—"Obligation"—Goods ordered before but delivered after death —Partnership Act,* 1890 (53 *&* 54 *Vict. c.* 39), *s.* 9.—An action for goods sold and delivered will not lie against the personal representative of a deceased partner to recover the price of goods ordered by the partnership before but not delivered till after the death of the partner.—BAGEL *v.* MILLER, *K.B D.*; [1903] 2 K. B. 212; 72 L. J. K. B. 495; 88 L. T. 769.

4. *Practice—Partners—Judgment against firm—Execution—Liability as member of firm—Holding out—Issue—Ord.* 48A, *r.* 8.—A writ was issued against H. & Co., and served under ord. 4A, r. 3, at the principal place of business of the defendant firm on the person having the control or management of the business there. An appearance was entered in the name of H. H., sued as H. & Co. The plaintiff, having obtained judgment, took out a summons under ord. 48A, r. 8, asking that an issue might be ordered to be tried to determine whether S. M. H. was liable to have execution levied against him on the judgment.

Held, that one of the questions to be tried in the issue ought to be whether S. M. H. had held himself out as a partner in the defendant firm.—DAVIS *v.* HYMAN, *C.A.*, 598; [1903] 1 K. B. 854; 72 L. J. K. B. 426; 88 L. T. 284.

See Principal and Agent, 3.

PATENT:—

1. *Amendment of specification—Petition for revocation presented during proceedings for amendment—Jurisdiction of comptroller—Patents, Designs, and Trade-Marks Act,* 1883 (46 *&* 47 *Vict. c.* 57), *ss.* 18 (10), 19—*Patents, Designs, and Trade-Marks Act,* 1888 (51 *&* 52 *Vict. c.* 50), *s.* 5.—A patentee applied under section 18 of the Patents, &c., Act, 1883, for leave to amend his specification by way of disclaimer. After the application had been made, but before the comptroller had given his decision, the defendants in this action presented a petition for revocation of the patent. The comptroller subsequently granted the patentee leave to amend. The patentee brought this action to restrain the defendants from infringing his patent as amended The defendants pleaded that the patent had not been duly amended, on the ground that the presentation of their petition had ousted the comptroller's jurisdiction to hear and determine by virtue of section 18 (10) of the Act of 1883, as amended by section 5 of the Act of 1888, unless leave was first obtained from the court under section 19 of the Act of 1883.

Held, that the application to amend having, in the first place, been properly made at a time when no action for infringement or proceeding for revocation was pending, could be proceeded with and adjudicated upon by the comptroller without leave of the court, notwithstanding that a petition for revocation had been presented before final adjudication, and that liberty to amend the specification of the patent had been duly given.—WOOLFE'S PATENT, RE, *Ch.D. Kekewich, J.*, 121; affirmed [1903] 1 Ch. 18.

2. *Infringement—Action relating to numerous separate patents—Joinder of causes of action—Prejudice, embarrass, or delay fair trial of action—Limitation to a few of the patents.*—The plaintiffs brought an action for the alleged infringement by the defendants of twenty-three different letters patent, all of which related to the manufacture of the same chemical substance. A summons was taken out by the defendants asking that the plaintiffs might be ordered to give a further and better statement of the nature of their claim, and further particulars of breaches specifying which of the twenty-three letters patent therein mentioned they relied on as having been infringed by the defendants; and (or) that an order should be made limiting the trial of the action in the first instance to such of the twenty-three letters patent as to the court might seem just.

Held, that the defendants ought not to be embarrassed by claims based upon so large a number of different letters patent; but that the plaintiffs' claim should be limited to such three of the letters patent as they might select.—SACCHARIN CORPORATION *v.* WILD, *C.A.*; [1903] 1 Ch. 410; 72 L. J. Ch. 270; 88 L. T. 101.

3. *Infringement — Action relating to numerous separate patents—Joinder of causes of action—"Prejudice, embarrass, or delay fair trial of action"—Limitation of claim—"In the first instance"—Patents, Designs, and Trade-Marks Act,* 1883 (46 *&* 47 *Vict. c.* 57), *s.* 29, *sub-sections* 2, 3—*Ord.* 18, *rr.* 1, 8, 9—*Ord.* 19, *r.* 27.—Where an action is brought for the alleged infringement of numerous

different letters patent all relating to the same process of manufacture, the order limiting the number of letters patent to be sued upon should not be qualified by the words "in the first instance."

*Saccharin Corporation (Limited)* v. *Wild & Co.*, 88 L. T. Rep. 101, [1903] 1 Ch. 410, explained.

Order of Farwell, J., varied. — SACCHARIN CORPORATION *v.* WHITE, *C.A.*; 88 L. T. 850.

4. *Infringement—Service out of the jurisdiction—Foreign manufacturers soliciting orders in England—Using, exercising, or vending invention*—Primâ facie *evidence of breach within the jurisdiction.*—A foreign company owning English letters patent for the manufacture of certain articles commenced an action against another company, also domiciled abroad, for alleged infringement of those letters patent. Subsequently the plaintiffs obtained an order for service upon the defendants out of the jurisdiction. That order the defendants moved to discharge. It was admitted that the defendants had by their agents solicited from persons in England orders for articles to be executed and delivered abroad; but it was contended that this did not amount to using, exercising, or vending the invention claimed by the plaintiffs' letters patent.

Held, that the evidence before the court showed information coming from perfectly trustworthy persons which pointed to infringement by the defendants of the plaintiffs' letters patent within the jurisdiction; that the Legislature had not imposed upon the court the duty of trying the action before giving leave for service on the defendants out of the jurisdiction in order to have the parties before the court; that if there was *primâ facie* evidence the necessary conditions had been fulfilled that there had been a breach within the jurisdiction; and that there were sufficient facts to raise the question which the court was not bound at present to finally decide—viz., that the acts of the defendants amounted to infringements. — BADISCHE ANILIN UND SODA FABRIK *v.* CHEMISCHE FABRIK VORMALS SANDOZ, *C.A.*; 88 L. T. 490.

5. *Prolongation — Insufficiency of accounts — Practice.*—The accounts presented to the committee on an application for an extension of a patent must be intelligible and complete, shewing what remuneration the patentee has actually received. He cannot be allowed, except perhaps in very special circumstances, to supplement them by oral evidence.—WUTERICH'S PATENT, RE, *P.C.*; [1903] A. C. 206; 72 L. J. P. C. 60; 88 L. T. 306.

PERPETUITY:—

1. *Appointment — Personal estate — Remoteness — "Possibility on a possibility."*—The old rule against "a possibility on a possibility," though applicable to legal limitations of real estate—namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person, as purchasers—does not apply to personal estate; as regards limitations of personal estate the ordinary rule against perpetuities is the only rule applicable.—BOWLES, RE, AMEDROZ *v.* BOWLES, *Ch.D. Farwell, J.*, 124; [1902] 2 Ch. 650; 71 L. J. Ch. 822.

2. *Remoteness—Devise to son of M. for life with remainders to such son's issue—Son* en ventre sa mère *—Relation back.*—For the purpose of the rule against perpetuities an infant *en ventre sa mère* is to be treated as a living person, whether such assumption is to the advantage of the infant or not.

A. devised her real estate to trustees upon trust to pay the income to her daughter M. for life, and, after her death, by way of equitable contingent remainders (in the events which happened) to the third son of M, born or to be born, for life, and after his death for his first and other sons successively in order of seniority in tail male. A. died in 1880. S. T., the third son of M., was then *en ventre sa mère.* He was born in 1881. In 1902 S. T., acting on the assumption that the limitations subsequent to his own life estate were void for remoteness, took out a summons against the trustees of the will for a declaration that, on the true construction of the will, and in the events which had happened, he had, on attaining the age of twenty-one years, become entitled as tenant in tail male in possession to the real estate so devised.

Held, affirming the decision of Buckley, J. (*ante*, p. 395, [1903] 1 Ch. 874), that the limitations did not transgress the rule against perpetuities, and that the sons of S. T. took valid estates in tail male in remainder.—WILMER, RE, MOORE *v.* WINGFIELD, *C.A.*, 609; 72 L. J. Ch. 670

See Will, 25, 28.

POLICE:—

*Pension — "Annual pay" — Special allowance—Police Act*, 1890 (53 & 54 *Vict. c.* 45), *s.* 1, *Schedule I.*—By the Police Act, 1890 a constable is entitled after completing a certain time of service, to a pension, to be calculated "according to the amount of his annual pay at the date of his retirement."

Held (affirming the judgment of the court below), that a special allowance paid to a constable in addition to his ordinary pay, in respect of permanent special duty, was not "annual pay" within the meaning of the Act, and could not be taken into account in calculating the amount of the retiring pension to which he was entitled.—UPPERTON *v.* RIDLEY, *H.L.*; [1903] A. C. 281; 72 L. J. K. B. 535; 88 L. T. 642.

POLICY.—See Inland Revenue, 6.

POOR LAW:—

1. *Law of Scotland—Wife deserted—Acquiring settlement.*—Under the Scotch law, where a husband deserts his wife she cannot acquire a settlement for herself; the fact of the desertion cannot avail to alter the liability of the husband's parish to support his wife and children.—RUTHERGLEN PARISH COUNCIL *v.* GLASGOW PARISH COUNCIL, *H.L.*, 65; [1902] A. C. 360; 86 L. T. 607.

2. *Rating—Appeal to special sessions—Notice of appeal to parish council—Parochial Assessment Act*, 1836 (6 & 7 *Will.* 4, *c.* 96). *s.* 6—*Local Government Act*, 1894 (56 & 57 *Vict. c* 73), *s.* 6, *sub-section* 1; *s.* 52, *sub-section* 5.—In all cases where an appeal is made under section 6 of the Parochial Assessment Act, 1836, to special sessions against a poor rate made in a rural parish having a parish council, it is, since the passing of the Local Government Act, 1894, a condition precedent that notice of appeal should have been given to the parish council.—REX *v.* TEWKESBURY JUSTICES, *K.B.D.*, 285; [1903] 1 K. B. 39; 72 L. J. K. B. 41; 87 L. T. 583.

3. *Rating—Rateable value—Waterworks—Intake from river—Sum paid for right to take water—Assessment.*—A waterworks company had the right by statute to take a certain amount of water from a river by means of an intake where there was a building containing appliances for measuring the water passing through the intake into a channel communicating therewith. The company were required by statute to pay to the conservators of the river certain sums for the right to take the water.

Held, that, in rating the intake, beyond the

ordinary value of the land with the building on it its enhanced value in respect of its special fitness for taking water from the river and the user made of it for that purpose must be taken into account, but that the sums paid for the water were not elements in its rateable value.

Judgment of the Divisional Court (49 W. R. 619, [1901] 2 K. B. 620) reversed.—NEW RIVER CO. *v.* HERTFORD UNION, *C.A.*, 49; [1902] 2 K. B. 597; 71 L. J. K. B. 827; 87 L. T. 360.

4. *Settlement—Irremovability—Patient in hospital—Poor Law Removal Act*, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.—The word "hospital" in section 1 of the Poor Law Removal Act includes any institution where patients are medically treated. Therefore where an epileptic was sent by his friends to a home, whose object was to cure patients mainly by outdoor exercise and recreation,

Held, that it was a "hospital" within the meaning of the section, and that residence for seven years in the home did not give the patient a settlement in the union where the home was situate.—ORMSKIRK UNION *v.* CHORLTON UNION, *K.B.D.*, 190; [1903] 1 K. B. 19; 71 L. J. K. B. 989; 87 L. T. 446.

See Bastardy, 2; Local Government, 16; Rating, 4, 5.

PORTIONS.—See Mortgage, 4.

POWER:—

1. *Appointment—General power to appoint by will—Security for loan—Covenant to appoint—Priority—General debt—Liability of appointed fund.*—Where there is a general power to appoint by will only, an appointment by will made in favour of a creditor in pursuance of a covenant in a mortgage in consideration of money lent to the donee of the power during his lifetime will not give that creditor priority over the other creditors of the donee's estate.—LAWLEY RE, ZAISER *v.* LAWLEY, *C.A.*, 150; [1902] 2 Ch. 799; 71 L J. Ch. 895; 87 L. T. 536.

2. *Appointment—Appointment to two objects—Subsequent appointments amongall objects equally—Substitution—Election—Forfeiture on assigning or attempting to assign—Settlement—Assignment to trustees—Trusts for sole benefit of settlor—Power to charge expenses.*—£7,000 was settled on trust for a husband and wife during their respective lives, and after their death as they or the survivor should appoint among objects. The husband and wife, by two deeds, irrevocably appointed one-seventh to each of two objects. After the death of the husband, the wife, by two deeds, irrevocably appointed the whole of the £7,000 among all the objects equally. On the death of the wife,

Held, that no case of election had arisen; that on the construction of the four deeds it was evident that the donee intended the £7,000 to be divisible in equal shares, and, that, consequently, it was so divisible.

*England* v. *Lavers*, 15 W. R. 51, L. R. 3 Eq. 63, explained and followed.

*In re Ashton*, 46 W. R. 138, [1897] 2 Ch. 574, distinguished.

Property was appointed to an object of a power for a life, with a forfeiture clause in case he should assign, charge, or otherwise dispose or attempt to dispose of his life interest. By the object's marriage settlement he assigned his life interest, together with other property, to trustees, and appointed them his attorneys to receive it. The property settled was charged with expenses management. The trusts of the property settled were, during his life, for his sole benefit.

Held, that his life interest was not forfeited.—TANCRED'S SETTLEMENT, RE, SOMERVILLE *v.* TANCRED, *Ch.D. Buckley, J.*, 510; [1903] 1 Ch. 715; 72 L. J. Ch. 324; 88 L. T. 164.

3. *Appointment—Real estate—Legal estate in trustees of instrument creating power—Execution—Devise to trustees of will on trust for sale and appointment of proceeds among objects.*—The principle of *Kenworthy* v. *Bate*, 6 Ves. 793, that a power of appointing real estate authorizes a devise to trustees for sale and an appointment of the money produced by the sale, applies to a case where the legal estate is vested in the trustees of the instrument creating the power.

A deed contained a limitation of real estate to the use of trustees upon trust to convey the same to such issue of the donee of the power, and "for such estate or estates, manner, and form" as she should by will appoint.

Held, that the power was well exercised by a devise by the donee, of the real estate to trustees of her will upon trust for sale and division of the proceeds among objects of the power.—REDGATE, RE, MARSH *v.* REDGATE, *Ch.D. Buckley, J.*, 216; [1903] 1 Ch. 355; 72 L. J. Ch. 204.

4. *Appointment—Settled land—Lease by appointor after exercise of power by will—Lease with premium—"Capital money"—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 24, 27—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-section* 5—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 4.—Real estate was settled for A. H. B. for his life, and after his death for his children as he should by will appoint, and in default of appointment for his children generally as therein provided. A. H. B. appointed part of the estate to one son and part to another, and afterwards granted leases under the Settled Land Act, 1882, of parts of the appointed property and received large premiums, which were paid to trustees of the settlement and invested.

Held, that the appointments did not include the premiums, for the will of A. H. B. showed no intention of dealing with them, and therefore they went as in default of appointment under the settlement.

Decision of the Court of Appeal (*sub. nom. Beddington* v. *Beddington, In re Moses*, [1902] 1 Ch. 100. 50 W. R. Dig. 131) affirmed.

*Gale* v. *Gale*, 4 W. R. 277, 21 Beav. 349, approved.—BEDDINGTON *v.* BAUMANN, *H.L.*, 383; [1903] A.C. 13; 72 L. J. Ch. 155; 87 L. T. 658.

5. *Determination—Intention of donor that power should continue—Absolute vesting of estate—Incapacity of person entitled.*—The question as to when a power of sale given to trustees becomes extinguished is a question of the intention of the donor of the power. Accordingly, where the beneficial interest in trust property has vested absolutely, but a conveyance of the property from the trustees has not been called for, the trustees' power of sale continues to exist in every case where this appears to have been the intention.

The reversion to property, held by trustees upon trusts for a lunatic for his life and with wide discretionary powers, became vested in the lunatic.

Held, that, nevertheless, the trustees were entitled to exercise their power of sale.—JUMP, RE, GALLOWAY *v.* HOPE, *Ch.D. Swinfen Eady, J.*, 266; [1903] 1 Ch. 129; 72 L. J. Ch. 16; 87 L. T. 502.

6. *Jointure—Validity of exercise—No disentailing deed—Statute—Private Act—Construction—Application of later Act to earlier.*—By a private Act of

Parliament passed in 1835 certain manors and estates were settled upon tenants in tail, with a proviso that they should not alien, bargain, give or sell the same, nor do any other thing to the hurt or disinheritance of their heirs, but only for the jointure of a wife, or for term of life of a husband, or for term of life of any other person or for years or at will after the custom of the manor, yielding the true and ancient rent, but that all other acts contrary to the true intent of the Act should be void. A tenant in tail who died in 1902 purported to exercise the power of jointuring in favour of his widow by a codicil,

Held, that on the construction of the Act neither fine nor recovery nor any disentailing assurance was necessary to the exercise of the power, and that it was well exercised by testamentary disposition.—BOLTON ESTATES ACTS, RE, *C.A.*; 72 L. J. Ch. 605; 88 L. T. 851.

7. *Lease to donee of power and others—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38)—*Covenant to pay rent—Validity of lease—Lease to trustee for donee.*—A lease granted by a donee of a power of leasing to himself or to himself and others is *ipso facto* void.

*Semble*, except in the case of certain powers of ancient creation, where uniform practice since their creation has been held to show that a special construction must be put on the power, a lease by a donee of a power to a trustee for himself is void.

*Bevan* v. *Habgood*, 8 W. R. 703, 1 Joh. & H. 222, discussed.

A tenant for life purported to grant a lease under the Settled Estates Act, 1877, to a firm in which he was himself a partner; the lease contained covenants for a payment of rent, &c., by the "lessees," who were defined as being the donee and his partners and their executors, administrators, and assigns.

Held, that the lease was void; first, because in fact the rent received was not the best obtainable; secondly, because there was during the life of the tenant for life no enforceable covenant; thirdly, because the lease was to the donee himself with others.—BOYCE *v.* EDBROOKE, *Ch.D. Farwell, J.*, 424; [1903] 1 Ch. 836; 72 L. J. Ch. 547; 88 L. T. 344.

See Settlement, 4; Vendor and Purchaser, 4, 11.

PRACTICE:—

1. *Appeal—House of Lords—New trial—Entering judgment for the defendant—Appellate Jurisdiction Act*, 1884, *r.* 4.—Where the House of Lords comes to the conclusion that there is no evidence to go to a jury in an action, they will order judgment to be entered for the defendant, and not send the case for a new trial; and this will be done though there is no cross-appeal on the defendant's part.—IBO SYNDICATE *v.* WYLER, *H.L.*, 320; 87 L. T. 83.

2. *Appeal* in formâ pauperis—*Appeal to Privy Council without leave—New South Wales, Law of.*—It is a rule of general, if not universal, application that the Judicial Committee of the Privy Council will not entertain a petition for leave to prosecute an appeal *in formâ pauperis*, where the court below has power to grant leave on the usual conditions, unless leave has been applied for within due time to the court from which it is proposed that the appeal should be brought.—WALKER *v.* WALKER, *P.C.*, 658; [1903] A. C. 170; 72 L. J. P. C. 36; 88 L. T. 133.

3. *Appeal—Jurisdiction*—Certiorari.—Under the Appellate Jurisdiction Act, 1876, and the Irish Judicature Act, 1877, no appeal lies to the House of Lords in cases in which there was no appeal before the passing of those Acts, and consequently there is no appeal from the Irish Court of Appeal in a case of *certiorari*.—REX *v.* BARTON, *H.L.*; 87 L. T. 82.

4. *Appeal—Order whether final or interlocutory—Order to try preliminary question of liability—Action dismissed—Appeal to Court of Appeal—Rules of the Supreme Court, ord.* 58, *rr.* 3 *and* 15.—In an action for breach of contract the judge at chambers made the following order: "It is ordered that the action be transferred to the non-jury list. Questions of liability and breach of contract only to be tried. Rest of case (if any) to go to the official referee."

At the trial the judge made an order dismissing the action on the ground that there was no binding contract, and judgment was entered for the defendants. From this order the plaintiff appealed.

Held, that the appeal must be treated as an appeal from a final order, and not as from an interlocutory order.

*Salaman* v. *Warner*, 39 W. R. 547, [1891] 1 Q. B. 734, not followed.

*Shubrook* v. *Tufnell*, 30 W. R. 740, 9 Q. B. D. 621, preferred.—BOZSON *v.* ALTRINCHAM URBAN COUNCIL, *C.A.*, 337; [1903] 1 K. B. 547; 72 L. J. K. B. 271.

5. *Commission to examine witnesses—Fees and expenses of examiner—Order for commission on application of one party—Witnesses examined on behalf of both parties—Liability of party obtaining order to pay all fees and expenses to examiner—Ord.* 37, *r.* 50.—The party who obtains an order for the examination of witnesses before an examiner, which gives liberty to the other parties to examine witnesses, may properly be ordered under ord. 37, r. 50, to pay to the examiner all his fees and expenses of the examination, including those on account of the examination of witnesses on behalf of the other party.—LINLEY *v.* HOULDER, *C.A.*; 88 L. T. 829.

6. *Compromise—Authority of counsel—Reference of action—Limitation of authority to agree to terms.*—When restrictions are placed by a client upon his counsel's authority to compromise or to agree to certain terms, and consent is given by counsel, disregarding those restrictions, such consent is not binding on the client, even in the case of the other side being unaware of them.

Where, therefore, counsel agreed to a reference, without providing for a special condition imposed by his client and unknown to the opposite party, the order for preference was set aside and a new trial ordered.

Decision of the Court of Appeal (50 W. R. 487, [1902] 1 K. B. 838) reversed.—NEALE *v.* GORDON-LENNOX, *H.L.*, 140; [1902] A. C. 465; 71 L. J. K. B. 939; 87 L. T. 341.

7. *Costs—Court of Appeal—Witness not called—Taxing-master's discretion—R. S. C.*, 1883, *ord.* 58, *r.* 4; *ord.* 65, *r.* 27 (29).—Where special leave to adduce certain evidence before the Court of Appeal had not been obtained, and a witness who was present to give this evidence was not called upon, the taxing-master held that he had discretion under R. S. C., 1883, ord. 65, r. 27 (29), to allow the costs of this witness.

Held, that there was nothing on which the taxing-master could exercise his discretion, and that the costs of the witness should be disallowed.—LEEDS FORGE CO. *v.* DEIGHTON'S PATENT FLUE CO., *Ch.D. Farwell, J.*, 380; [1903] 1 Ch. 475; 72 L. J. Ch. 294; 87 L. T. 711.

8. *Costs—Notices after summons for directions—*

*Rules of Supreme Court*, 1883, *Appendix N*, 51 — *Ord.* 65, *r.* 38.—The Rules of the Supreme Court, Appendix N, item 51, apply to notices taken out after a summons for directions had been issued.—MACGUARE *v.* MILLIGAN, *Ch.D. Swinfen Eady, J.*, 74; [1903] 1 Ch. 145; 72 L. J. Ch. 87; 87 L. T. 676.

9. *Costs—Payment into court—Other issues raised.*—In an action for trespass and wrongful distraint the defendants, in addition to raising certain defences, paid a certain sum of money into court with a denial of liability. The jury found a verdict against the defendants for a less sum than that paid in.

Held (although the defendants were entitled to the costs of the action), that the plaintiff, in addition to his costs up to the time of payment into court, was entitled to the costs of the other issues raised by the defendants.—RIDOUT *v.* GREEN, *K.B.D.*; 87 L. T. 679.

10. *Costs—Taxation—Case stated by Commissioners of Income Tax—Costs of preparing and settling case—Allowance as between Crown and subject—Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 59—*Ord.* 65, *r.* 27, *regulation* 29.—Where, on the hearing of a case stated by Commissioners of Income Tax under section 50 of the Taxes Management Act, 1880, the court allows costs to the successful party, he is entitled on taxation to be allowed the costs incurred by him in preparing and settling the case.

*Scottish Union and National Insurance Co.* v. *Smiles*, 16 Ct. Sess. Cas., 4th series, 624, not followed.—MANCHESTER CORPORATION *v.* SUGDEN, *C.A.*, 627; [1903] 2 K. B. 171; 88 L. T. 679.

11. *Costs—Taxation—Chancery Division—Apportionment—R. S. C.*, 1883, *ord.* 65, *r.* 2.—Plaintiffs in an action claimed an injunction against defendants restraining them from interrupting an access to the plaintiffs' premises, and they also claimed damages for trespass. Defendants paid £60 into court in lieu of damages for trespass. Plaintiffs failed on the first issue, and accepted the sum of £60 paid into court as satisfaction of the second issue. The court dismissed the first part of the action without costs, but the defendants were ordered to pay the costs of the second part of the action. The taxing-master allowed the plaintiffs all the general costs of the action, so far as related to the issue upon which the plaintiffs were successful. The defendants objected that the order of the court involved an apportionment of the general costs of the action, and that if it had been intended that the plaintiffs were to recover the whole of the general costs the order would have directed the defendants to pay the plaintiffs "their costs of this action except so far as such costs have been increased by the issue upon which the plaintiffs have been unsuccessful." The taxing-master, in reply, referred to the addition to ord. 65, r. 2, in R. S. C., 1902, and stated that this rule gave effect to the established practice of the King's Bench Division.

Held, that the effect of the addition to ord. 65, r. 2, was to give the judge power to make an apportionment of the costs in the action. The practice in the Chancery Division had not been altered, and remained as it was laid down in *Jenkins* v. *Jackson*, 39 W. R. 242 [1891] 1 Ch. 89.—TODD *v.* NORTH-EASTERN RAILWAY CO., *Ch.D. Farwell, J.*, 333; 88 L. T. 112.

12. *Costs—Taxation—Compensation under Lands Clauses Act—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 52—*Lands Clauses (Taxation of Costs)* 1895 (58 & 59 *Vict. c.* 11)—*Supreme Court of Judicature (Officers) Act*, 1879 (42 & 43 *Vict. c.* 78)—*Ord.* 65, *r.* 27 (25).—The Chancery taxing-masters have now, by virtue of their being amalgamated with the Central Taxing Office, under rules made in January, 1902, and passed pursuant to the Supreme Court of Judicature (Officers) Act, 1879, all the powers previously possessed by masters of the Supreme Court.

Held, therefore, that a Chancery taxing-master was entitled to tax the costs of a compensation case under the Lands Clauses Act, 1845.

*Owen* v. *London and North-Western Railway*, 16 W. R. 125. L. R. 3 Q. B. 54, considered.—COVINGTON *v.* METROPOLITAN DISTRICT RAILWAY CO., *K.B.D.*, 428; [1903] 1 K. B. 231; 72 L. J. K. B. 93; 87 L. T. 649.

13. *Costs—Taxation—Instructions for originating summons—Discretion of taxing officer—Rules of the Supreme Court, Appendix N, No.* 65, *ord.* 65, *rr.* 8, 27, *sub-rules* 29, 37—*Practice Notes on Taxation of Costs settled by the Masters in Hilary Sittings*, 1902.—In taxing the costs for instructions for an originating summons the taxing officer is not bound by the limit of £1 1s. in R. S. C., Appendix N, No. 65, but has a discretion to allow a larger amount under ord. 65, r. 27, sub-rule 29.

*McIver & Co.* v. *Tate Steamers (Limited)*, 50 W. R. 642, [1902] 2 K. B. 184, discussed and followed.—ERMEN, RE TATHAM *v.* ERMEN, *Ch.D. Farwell, J.*, 475; [1903] 2 Ch. 156; 72 L. J. Ch. 492; 88 L. T. 352.

14. *Costs — Taxation — Two defendants jointly represented—Judgment for one defendant and against the other—Plaintiff liable to pay half the costs of the defence — Practice.* — Where two defendants are jointly represented by the same solicitor, and judgment and costs is given in favour of one defendant and against the other, the successful defendant is, in the absence of any agreement between him and his co-defendant as to how their costs are to be borne *inter se*, entitled to recover from the plaintiff half the costs of the defence.—BEAUMONT *v.* SENIOR, *K.B.D.*; [1903] 1 K. B. 282; 72 L. J. K. B. 141; 88 L. T. 234.

15. *Costs—Trial by jury—Successful defendant—Gaming Act*, 1892 (55 & 56 *Vict. c.* 9)—*Defendant's right to costs — "Good cause."*—A statement of defence contained a plea based on the Gaming Act, 1892. At the trial of the action before a judge and jury this plea was admitted by the plaintiff to be a good defence to the action; and thereupon, without any evidence being called, the judge directed the jury to find for the defendant, and he gave judgment accordingly, but without costs. The defendant appealed from so much of the judgment as deprived him of costs.

Held, that there was nothing before the judge which could constitute "good cause" for depriving the defendant of his right to costs under ord. 65, r. 1.—GRANVILLE *v.* FIRTH, *C.A.*; 72 L. J. K. B. 152; 88 L. T. 9.

16. *Discovery—Several defendants—Discovery by one defendant—Deposit—Inspection by co-defendant—R. S. C.*, 1883, *ord.* 31, *rr.* 12, 14-18, 26.—Where one of several defendants has obtained discovery from the plaintiff on payment of the usual deposit, it is competent for the court to order the production to another defendant of such documents relating to the matters in question between the plaintiff and that particular defendant as the plaintiff has admitted in his affidavit to the first defendant to be in his possession or power, without any

further affidavit of documents, on the terms that, notwithstanding the order, the plaintiff may be at liberty to withhold on oath or seal up documents not relating to the matter in issue between the plaintiff and that particular defendant.

*Moore* v. *Peachey* 39 W. R. 592, [1891] 2 Q. B. 707, discussed.—PARDY'S MOZAMBIQUE SYNDICATE *v.* ALEXANDER, *Ch D. Kekewich, J.*, 295; [1903] 1 Ch. 191; 72 L. J. Ch. 104; 88 L. T. 11.

17. *Evidence—Perpetuation of testimony—Right of action—Legitimacy Declaration Act*, 1858 (21 & 22 *Vict. c.* 93), *ss.* 1, 8—*R. S. C.*, 1883, *ord.* 37, *rr.* 35, 36.—In an action to perpetuate testimony the plaintiff is not entitled as of right to an order for the examination of witnesses, although the action is properly brought within the terms of ord. 37, r. 35. The court has a discretion as to whether it will make the order or not, and the fact that the matter in controversy can be made the subject of immediate judicial investigation is a fact which the court will take into consideration in exercising that discretion.—WEST *v.* SACKVILLE, *C.A.*, 625; 72 L. J. Ch. 649; 88 L. T. 814.

18. *Parties—Title to sue—Contract entered into on behalf of a foreign State*—There is no such rule as that the monarch or other titular head of a foreign sovereign State is the only person who can sue here in respect of the public property or interest of that State.

The Spanish Minister of Marine in Madrid and two other persons brought an action in the Court of Session against the respondents for damages for failure to deliver warships within the time stipulated by contract. The parties to the contract were described as "The Chief of the Spanish Royal Navy Commission," and "the Commissary of the Commission (mentioning names) both in the name and representation of his Excellency the Spanish Minister of Marine in Madrid, hereinafter called the Spanish Government on the one part," and the respondents (a shipbuilding company in Scotland) on the other part.

Held, reversing the decision of the Second Division of the Court of Session, (1901) 4 F. 319, that the Spanish Minister of Marine for the time being was entitled to maintain the action though he was not Minister of Marine at the date of the contract.—CASTANEDA *v.* CLYDEBANK ENGINEERING AND SHIPBUILDING CO., *H L*; [1902] A. C. 524; 71 L. J. P. C. 94; 87 L. T. 339.

19. *Trustee—Claim—Plaintiff suing as trustee—Unliquidated debt—Right of set off—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24 (2) (3)—*R. S. C.*, 1883, *ord.* 19, *r.* 3.—Where a plaintiff sues as trustee all defences which could be raised against the person on whose behalf he is suing can be set off by way of defence by the defendant to the extent of the claim.—BANKES *v.* JERVIS, *K.B.D.*, 412; [1903] 1 K B. 549; 72 L. J. K. B. 267; 88 L. T. 20.

PRINCIPAL AND AGENT:—

1. *Auctioneer—Indemnity—Act done by auctioneer in course of his employment—Damages awarded against him on mistaken view of facts.*—The plaintiff, an auctioneer, was instructed by the defendants to put up to auction in Paris a thoroughbred mare named Pentecost, which they represented as having been then for the first time imported into France. The plaintiff thereupon advertised the mare for sale. There was another mare of the same name entered in the French Stud-book, and the owner of this mare brought an action in the French courts against the present plaintiff, alleging that the true mare Pentecost, of which he was the owner, had been previously imported into France. The owner of the mare recovered judgment against the present plaintiff, who was condemned to pay damages.

In an action by the plaintiff against the defendants for an indemnity in respect of the damages he had suffered,

Held, that there was evidence that the mare sent by the defendants to the plaintiff was the true mare Pentecost, and that, consequently, the plaintiff had no right of action against the defendants, as the damages recovered in the French courts against the plaintiff were not in consequence of any act done by him in pursuance of his employment by the defendants, but in consequence of the mistake made in the French courts as to the identity of the mare.—HALBRONN *v.* INTERNATIONAL HORSE AGENCY, *K.B D.*, 622; [1903] 1 K. B. 270; 72 L. J. K. B. 90; 88 L. T. 232.

2. *Fraud of agent—Sale of goods—Conduct of principal enabling agent to commit the fraud—Estoppel.*—The appellants, who were timber merchants, instructed a dock company to honour transfers or delivery orders signed by their confidential clerk. The clerk by means of orders signed by him in fraud of the appellants had timber transferred into a fictitious name, and then sold and transferred the timber in this fictitious name to the respondents. In an action by the appellants against the respondents to recover damages for the conversion of the timber,

Held, that the appellants were not precluded by their conduct from setting up the unauthorized action of their agent, for no representation was made by them or on their behalf to the respondents; also, that the goods were stolen by the clerk, therefore the respondents acquired no title to the timber and were consequently liable.

Decision of the Court of Appeal (reported 49 W. R 673, [1901] 2 K. B. 697) reversed.—FARQUHARSON *v.* KING, *H.L.*, 94; [1902] A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810.

3 *Partnership—Liability of firm for wrongful act of partner—Scope of authority—Act done in course of business—Illegal means—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 5, 10.—The defendant firm, which consisted of two partners, H. and S., carried on business as grain merchants, the whole management being under the control of H. It was in the course of the firm's business to obtain by legitimate means information as to contracts made by competitors in business. H. bribed a clerk of the plaintiff, who carried on a competing business, to give him access to the plaintiff's books, and thereby break his contract of service with the plaintiff. In an action to recover damages from the firm for the wrongful act of H.,

Held, that the firm was liable.—HAMLYN *v.* HOUSTON & CO., *C A.*, 99; [1903] 1 K. B. 81; 72 L. J. K. B. 72; 87 L T. 500.

4. *Power of attorney—Forged signature—Transfer of stock—Stockbroker—Warranty of authority—Liability—Indemnity.*—Any person purporting to act as agent impliedly warrants the authority he professes to act under, so that, should the supposed authority turn out to be invalid or forged, he renders himself liable to make good the loss occasioned to those he has misled; and this is so even when he honestly believes his authority to be genuine. A stockbroker, therefore, executing a transfer of stock at the Bank of England under a forged power of attorney which he honestly

believed to be good, must indemnify the bank for the consequential loss thereby occasioned them.

*Collen* v. *Wright*, 6 W. R. 123, 8 E. & B. 647, approved.

Decision of Court of Appeal (50 W. R. 340, [1902] 1 Ch. 610) affirmed.—STARKEY *v.* BANK OF ENGLAND, *H.L.*, 513; [1903] A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244.

5. *Secret commission — Custom.* — If an agent conducts business in carrying out negotiations between his principal and a person whose interests are adverse to his principal, he cannot receive a commission from the person with whom he is negotiating without the knowledge of his principal, and any custom wide enough to cover such a case will not be upheld by the court.

*Semble*, that even in the case of a broker who merely introduces the vendor to the purchaser, such a custom could not be upheld.—BARTRAM *v.* LLOYD, *K.B.D.*; 88 L. T 286

6 *Underwriter—Scope of authority—"For and on behalf" of principal—Contract for agent's sole interest—Liability of principal—Guarantee policy.*—Where an agent who is authorized to make contracts "for and on behalf of" his principals makes a contract purporting on the face of it to be on behalf of the principals, which in fact is for his own interest and not for his principals, such contract is not, apart from holding out or ratification, binding upon the principals.—HAMBRO *v.* BURNAND, *K.B.D.*, 652.

PROBATE:—

1. *Citation—Administration, with will annexed—Specific legatee—Limited grant—Probate Act*, 1857 (20 & 21 *Vict. c.* 77) *s.* 73 —The court, without requiring citation of next-of-kin, made a limited grant of administration, with will annexed, under section 73, to the sole beneficiary named in the will.

*In the Goods of Jenny Watson*, (1858) 1 Sw. & Tr. 110, followed.—BALDWIN, IN THE GOODS OF, *P.D. & Ad.D* ; [1903] P. 61; 72 L J. P. 23; 88 L. T. 565.

2. *Codicil—Unattested document—Incorporation—Future document—Reference in will—No reference in codicil.*—By her will a testatrix directed her trustees to give to such of her friends as might be named in a book of memorandum that would be found with her will the various articles specified in the same. At the time of the execution of the will there was no such book or memorandum in existence. Subsequently a memorandum book was drawn up which was in fact found with the will of the testatrix after her death. There was a codicil to the will, but no reference was contained in it to the memorandum book. The codicil was with the will and the memorandum book. The book was often referred to by the testatrix after she had executed her will and codicil.

Held, as the book was not in existence at the date of the execution of the will, and as no reference was made to it in the codicil, it could not be admitted to probate.—ANN CAROLINE SMART, IN THE GOODS OF, *P.D. & Ad.D.*; [1902] P. 238; 71 L. J. P. 123; 87 L. T. 142.

3. *Foreign domicil—Administration—Will—Grant to foreign administrators—Executors passed over—Practice—Belgium.*—The court will follow the grant of the foreign domicil, unless the administrators appointed by the foreign court are, by the law and practice of this country, personally disqualified from taking a grant here.

Thus, where a testator died domiciled in Belgium, leaving a will and codicil in English form appointing executors, and also leaving a Belgian will, the court made a grant of administration with all three documents annexed in favour of two persons who had been appointed administrators of the deceased's estate abroad, in accordance with the law of the domicil.—MEATYARD, IN THE GOODS OF, *P.D. & Ad.D.*; [1903] P. 125; 72 L. J. P. 25.

4 *Foreign marriage—Validity—Domicil—Marriage ceremony performed by minister not of the same religious community as one of the contracting parties—Argentine Code.*—A marriage between a member of the Church of England and an Episcocopalian Methodist is good according to Argentine law, although only celebrated once and at a Methodist Episcopal church by a minister who was not an ordained minister of the Church of England. —LIGHTBODY *v.* WEST, *C.A.*; 88 L. T. 484.

5. *Fresh grant—Mistake of solicitor—Draft of will in possession of testatrix—Opportunity for reading over—Execution—Want of knowledge and approval—Elimination of words.*—A solicitor received instructions from a testatrix as to her will, but mistook the extent of her interest in certain landed estates. The draft of the will was sent to the testatrix for her approval, retained by her for a considerable time, and then returned by her to the solicitor with certain alterations. In the draft the testatrix purported to devise "an undivided moiety of and in" certain estates, which was not the full extent of her interest. The will was duly executed containing these restrictive words. The court having found, as a fact, that, in spite of her retention of the draft and the alterations made therein, the testatrix did not know and approve of the restrictive clause as drawn, a fresh grant of probate of the will was decreed with the words "undivided moiety of and in" omitted.—BRISCO *v.* BAILLIE HAMILTON, *P.D. & Ad.D.*; [1902] P. 234; 71 L. J. P. 121; 87 L. T. 746.

6 *Lost will—Contents of draft—Codicil.* — The court declined to grant probate of a draft will which was alleged to be incorporated in a subsequent codicil, or alternatively to the will itself, on the ground that it was not proved that at the time the codicil was executed there was any will in existence.

*In the Goods of Elizabeth Watkins*, L R. 1 P. & D. 19, 14 W. R. P & M. Dig. 10 considered.—EYRE *v.* EYRE, *P.D & Ad D.* 701; [1903] P. 131; 72 L. J. P. 45; 88 L T. 567.

7. *Mistake in will—Clerical error—Rectification—Striking out words.*—When it is clear that a word has been inserted into a will by mistake in the process of copying, the court will cause such word to be struck out.—VAUGHAN *v* CLERK, *P.D. & Ad.D.*; 87 L. T. 144.

8. *Sureties—Special circumstances — Sureties dispensed with—Administration.*—While the court has no power to give leave to a proposed administratrix to carry on the deceased's business, it may, under special circumstances and for good cause shown, allow her a free hand in the administration, by dispensing with sureties to the administration bond, and by accepting the personal bond of the proposed administratrix for the administration of the estate according to law.—CORY, IN THE GOODS OF, *P.D. & Ad.D.*; [1903] P. 62; 72 L. J. P. 24; 88 L. T. 566.

9. *Will—Nomination paper—Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 25, *sub-sections* 1, 2.—The court admitted as a valid will a nomination paper executed by a member of a co-operative society which was registered under

the Industrial and Provident Societies Act, 1893, although it was invalid as a nomination paper, because the deceased's credit with the society stood at a greater sum than £100, in contravention of section 25, sub-section 1, of the Act.—BAXTER, IN THE GOODS OF, *P.D. & Ad.D*, 302; [1903] P. 12; 72 L. J. P. 2; 87 L. T. 748.

10. *Will—Several sheets of paper—Destruction of two—Effect—Substitution of other sheets—Execution—Signatures—Clause of revocation—Intention—Intestacy.*—A testator left a testamentary document in the form of a will, which was apparently duly executed, and consisted of five sheets of paper fastened together.

The fact was, however, that the first two sheets were executed in the year following the execution of the last three, and were not part of the document as originally executed. There was no evidence as to the contents of the two that were missing. The two that had been substituted contained the ordinary commencement, followed by a revocation clause, and were signed by the testator in the presence of the same two witnesses who had before attested the others.

Held, that the destruction of the first two sheets of the original will effected a revocation of the three that remained.

Held, further, that the signing by the testator of the two substituted sheets in the presence of the witnesses was not intended to make them operate as his will, and that the result was an intestacy.—LEONARD *v.* LEONARD, *P.D. & Ad.D*; [1902] P. 243; 71 L. J. P. 117; 87 L. J. 145.

See also Limitations, Statute of, 3.

PUBLIC HEALTH:—

1. *Buildings—Building plans — Bye-laws—Repeal of by new bye-laws—Approval of plan under old bye-laws—Part of work carried out under old bye-laws—Right to complete work according to approved plan—"Work commenced" before date of new bye-laws.*—Upon a summons against a builder for unlawfully erecting a building without complying with new bye-laws, the justices found that the building was not "work commenced" before the new bye-laws, and convicted the builder.

Held, that the approval of the plans of the building scheme and of the proposed terrace of houses and the carrying out of part of the work under the plans did not confer an absolute right to complete the work in accordance with the plans and bye-laws then in force, and did not entitle the builder to say that because some of the work had been commenced before the repeal of the bye-laws, a building commenced after such repeal was "work commenced" before such repeal, so as to exempt him from the operation of the new bye-laws; that the question whether work had been commenced or not within the meaning of the repealing bye-law is a question of fact for the justices, and that there was evidence before them upon which they could properly find that the building was not work commenced, and that the builder was properly convicted. —WHITE *v.* SUNDERLAND CORPORATION, *K.B D.*; 88 L. T. 592.

2. *Building bye-laws—Repeal of by new bye-laws—Plan showing a number of houses—Deposit and approval of plan under old bye-laws—Commencement of part of the work after date of new bye-laws—Necessity for fresh deposit of plan—Commencement of the "work specified in such plan"—Estoppel.*—Section 27 of the Harrogate Corporation Act, 1893, provided that the deposit with the corporation of any plan of any building should be null and void if "the execution of the work specified in such plan" should not be commenced within three years, and that a fresh deposit of plans should, unless the corporation should "otherwise determine," be requisite. In 1894 a builder deposited a plan in accordance with the building bye-laws then in force, showing thereon a number of houses proposed to be erected. Some of the houses were commenced within the three years from the deposit; two were both commenced and completed after the three years and a certificate given in respect of the same. In 1901 the old bye-laws were repealed by new bye-laws, except as to any work commenced before the date of the new bye-laws, or any work not so commenced but of which plans should have been approved before such date. After these new bye-laws came into force the builder commenced to erect a stable which was one of the buildings shown on the plan. The corporation objected on the ground that the plan did not comply with the new bye-laws.

Held, that the plan approved in 1894 was not one plan merely for the whole of the buildings shown thereon, but was really a number of separate plans for each building, and that if the work of any particular building shown on the plan were not commenced within the three years of the deposit of the plan, the deposit would with regard to such building be null and void under section 27; and consequently, that the particular portions of the work which were not commenced until after the date of the new bye-laws did not fall within either of the exceptions of the new bye-laws, and that the new bye-laws therefore applied to such portions of the work.

Held, further, that the fact that the corporation had without objection allowed two of the houses to be commenced and completed after the plan had become void by the lapse of the three years, and had given a certificate in respect thereof, did not create an estoppel against the corporation or show that they had "otherwise determined" that a fresh deposit of plans was not requisite.—MAYOR, &c., OF HARROGATE *v.* DICKINSON, *K.B.D.*; 88 L. T. 299.

3. *Nuisance—Overcrowding—Order to inspect—Evidence — Form of order — House — School.* — "House" in section 91 of the Public Health Act, 1875, includes a day school. Where, under section 102, an application is made to a justice for an order to enter premises where a nuisance is alleged to to exist, such justice may consider whether there are reasonable grounds for suspecting there is a nuisance, and may receive evidence as to the true state of the facts. If a justice makes an order for the officer to enter to inspect such order ought to be made in reference to a particular subject-matter. —WIMBLEDON DISTRICT COUNCIL *v.* HASTINGS, *K.B.D.*; 87 L. T. 118.

4. *Nuisance—Power of local authority to enter premises—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 102, 306.—It is not competent for the representatives of a district council exercising powers with regard to nuisances under the Public Health Act, 1875, to enter upon premises and inspect them without first requesting the leave of the owner. They must apply for admission, and if they are refused, obtain an order to admit from the justices under section 102 of the Act.—CONSETT URBAN COUNCIL *v.* CRAWFORD, *K.B.D.*, 669; [1902] 2 K. B. 183; 72 L. J. K. B. 571; 88 L. T. 836.

5. *Sanitary authority—Sewer—Right to drain into sewer—Action for a declaration.*—The owners of certain land of about 186 acres in extent proposed to lay it out as building land, and to erect a large number of houses thereon. They had a plan pre-

pared showing sewers of different dimensions from 9in. to 18in. in diameter, and claimed that as owners of the premises they were entitled to connect their sewers with the sewer of the G. District Council, which was only 12in. in diameter. The G. District Council said that the construction of such a series of sewers was outside section 22 of the Public Health Act, 1875, and that, if the owners insisted on arbitration, the G. District Council would raise this objection at every stage. A writ was then issued asking for a declaration that the plaintiffs were entitled to connect their proposed sewers with the sewer of the defendants, and for an injunction to restrain the defendants from obstructing the connection. The case came on upon a notice for trial without witnesses, but without any consent, and by agreement it was treated as a motion for judgment. The claim to an injunction was not argued.

Held, that, although there is jurisdiction under ord. 25, r. 5, to make a declaratory order, the jurisdiction is one to be exercised with extreme caution; that, as no portion of the estate had been built on and no drains or sewers constructed, it was inexpedient to make a declaration that the plaintiffs had a legal right to connect their sewers when made with that of the defendants.—FABER *v.* GOSWORTH URBAN COUNCIL, *Ch.D. Swinfen Eady, J.*; 88 L. T. 549.

RAILWAY:—

1. "*Accommodation works*"—*Level crossing—Extent of right of user—Grant of easement—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 16, 68-76.—A railway company's line severed an owner's land and crossed on the level a tram-line of the owner by which goods and traffic from the owner's land and coals from a colliery not on his land were conveyed to a neighbouring port. The railway company, when purchasing the premises, entered into an agreement, dated the 13th of March, 1868, with the owner that they would construct and maintain, "for the accommodation of the owners and occupiers for the time being of the lands adjoining the railway," certain works, including a level crossing for the tram-line. The defendant, the owner's successor in title, afterwards claimed to be entitled to convey over the level crossing goods and traffic brought on to her land from other places, whether situate on her estate or not.

Held, that the defendant was not entitled to use the level crossing for the purpose of conveying goods and traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at, or previously to, the date of the agreement of the 13th of March, 1868, or as since enjoyed by the defendant or her predecessors in title, if, owing to acquiescence or otherwise, such subsequent enjoyment was binding on the plaintiff company.

*Dictum* of Fitzgibbon, L.J., in *Great Northern Railway Co.* v. *M'Alister*, [1897] 1 Ir. R. 587, at p. 605, approved.—GREAT WESTERN RAILWAY CO. *v.* TALBOT, *C.A.*, 312; [1902] 2 Ch. 759; 71 L. J. Ch. 835; 87 L. T. 405.

2. *Carriage of merchandize—Rates—Sidings provided by trader—Rebate for station or service terminals—Jurisdiction of commissioners.*—The Railway and Canal Traffic Act, 1894, by s. 4, provides that "whenever merchandize is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandize as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate." The plaintiffs received from and delivered to the defendant company large quantities of merchandize at a siding belonging to the plaintiffs, in respect of which the company did not provide any station accommodation or perform any terminal services at that siding. They were charged the same rate as were charged to other traders for similar traffic, in respect of which the company did provide station accommodation and perform service terminals; and they claimed an allowance or rebate under section 4 of the Act. The Railway Commissioners decided that a rebate should be made. Sir Frederick Peel decided upon the ground that the rebate could be ordered, whether any charge for station or service terminals was in fact included in the rate or not; and Wright, J., expressed an opinion to the same effect. But Wright, J., and Lord Cobham both decided that a charge for station or service terminals was in fact included in the rate.

Held, that, as the majority of the commissioners had decided that the rebate should be made upon the ground that a charge for station or service terminals was in fact included in the rate, the appeal would not lie.—VICKERS, SONS, & MAXIM *v.* MIDLAND RAILWAY, *C.A.*; 87 L. T. 665.

3. *Contract of carriage—Conveyance of goods by passenger train—Collection and delivery—Inclusive charge for carriage and collection of goods—Special Act—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 90.—A schedule of the statutory maximum rates and charges authorized to be taken by a railway company for the conveyance of goods contained a provision that the company should not be under obligation to carry non-perishable goods by passenger train. The company announced to the public their willingness to carry tailors' clothing by passenger train at a "collected and delivered" rate specified in a scale of charges which they published. The plaintiffs, who were common carriers at Bristol, sent parcels of tailors' clothing from Bristol to Southampton by the company's passenger train, having themselves collected the goods at Bristol and handed them over to the company at their passenger station. The plaintiffs paid to the company, under protest, the scale charge; and brought an action against them for money had and received, claiming to be entitled to a rebate from the defendants in respect of the collection of the goods at Bristol.

Held, that the plaintiffs were not entitled to any rebate, and that the action was not maintainable.—STONE *v.* MIDLAND RAILWAY CO., *K.B.D.*; [1903] 1 K. B. 741; 72 L J. K. B. 377; 88 L. T. 92.

4. *Exercise of statutory powers—Unreasonableness.*—The defendants were authorized by statute to carry out certain works in connection with their undertaking, and were in the habit of carrying on work on the site of a proposed station by night as well as by day. The plaintiff, who occupied a house close to this site, brought an action to restrain the defendants from working at night, alleging that such work rendered his house uninhabitable, and was a vexatious and unreasonable abuse by the defendants of their statutory powers. He also claimed damages. This was a

summons under ord. 25, r. 4, to strike out the plaintiff's statement of claim as disclosing no cause of action, on the ground that no action would lie for mere unreasonableness in the exercise of a statutory power. The court refused to hear the application in this form, stating that it was only to be used when actions were clearly frivolous and vexatious. By consent it was arranged to treat the summons as amended so as to be an application to try a preliminary point of law under ord. 25, r. 2.

Held, that, upon the assumption that working at night was unreasonable and rendered the plaintiff's house uninhabitable, a good cause of action was disclosed. The fact that compensation could be obtained under section 68 of the Land Clauses Consolidation Act, 1845, did not exclude the regulating and restraining jurisdiction of the court.—ROBERTS *v.* CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY, *Ch.D. Farwell, J.*; 87 L. T. 732.

5. *Minerals under railway—Owner desiring to work minerals—Purchase and compensation—Act under which land purchased repealed by later Act—Saving by later Act of rights accrued under earlier Act.*—When the surface of land has been sold under the provisions of a special Act which lays down certain terms with respect to the minerals and the purchase thereof, and that Act is repealed by a later statute which enacts a different set of conditions less favourable to the surface owner in respect of the minerals, but also provides that the repeal is not to annul or prejudice any purchase or sale made under the earlier statute, the rights and obligations of the parties with respect to the sale of the minerals or compensation for the same are regulated by the earlier and not by the later legislation.—LONDON AND NORTH-WESTERN RAILWAY *v.* WALKER, *H.L.*: [1903] A. C. 289; 72 L. J. K. B. 578; 88 L. T. 705.

6. *Negligence—Train in motion—Shutting door without notice—Injury to passenger.*—B., being a passenger from D. to U., at L., some people getting into the carriage, he put his hand in the doorway. While the train was moving, the door was banged to by a servant of the defendant company without any notice or warning, and B.'s hand was injured.

Held, that there was no evidence of negligence on the part of the company.—BENSON *v.* FURNESS RAILWAY CO., *K.B.D.*; 88 L. T. 268.

7. *Passenger—Fare—Travelling beyond station to which ticket is taken—Fare for whole distance more than sum of intermediate fares—Right of company to charge difference between fare paid and the through fare.*—The defendant, who intended to travel from Huddersfield to Manchester, took a ticket only to Stalybridge, an intermediate station. The fare from Huddersfield to Manchester was 2s. 3d., and to Stalybridge 1s. 6d., and the fare from Stalybridge to Manchester 7d. At Stalybridge the collector took defendant's ticket and demanded 9d., being the difference between the fare which the defendant had paid and the through fare from Huddersfield to Manchester. This the defendant refused to pay, but tendered 7d., the local fare between Stalybridge and Manchester. This was not accepted, but he was permitted to proceed by the same train to Manchester. By the regulations printed in the company's time-tables a passenger using a ticket for any other station than that for which it was issued was liable to pay the difference between the sum actually paid and the fare between the stations from and to which he travelled; and passengers could not re-book at an intermediate station by the same train. In an action by the company to recover 9d.,

Held, that the conditions were part of the contract, and the defendant was bound to pay the difference between the sum he had paid and the through fare from Huddersfield to Manchester.—LONDON AND NORTH-WESTERN RAILWAY *v.* HINCHCLIFFE, *K.B.D.*, 556; [1903] 2 K. B. 32; 72 L. J. K. B. 530; 88 L. T. 800.

RATING:—

1. *Appeal from special sessions—Jurisdiction of quarter sessions over costs before special sessions—Poor rate—Parochial Assessments Act,* 1836 (6 *&* 7 *Will.* 4, *c.* 96), *s.* 6.—Where, upon an appeal from special sessions under section 6 of the Parochial Assessments Act, 1836, the quarter sessions allow the appeal, the quarter sessions have jurisdiction to set aside the order of the special sessions, giving costs to the successful party at the special sessions, and also to order that the unsuccessful party at the special sessions shall be paid the costs incurred by him at the special sessions.—REX *v.* CORNWALL JUSTICES, *K.B.D.*; [1903] 2 K. B. 178; 72 L. J. K. B. 622; 88 L. T. 775.

2. *Lease of tolls—Occupation of bridge—Liability of lessee.*—By a lease the Y. Corporation demised to P. for three years, in consideration of a yearly rent, the tolls and toll-house of the S. bridge. There were certain reservations in favour of the corporation, and P. covenanted to pay the rent, rates, and taxes in respect of the bridge, toll-house, &c.—PERCY *v.* HALL, *K.B.D.*; 88 L. T. 830.

3. *Occupation—General district rate—Exemption on ground of non-occupation—House used in summer months—Furniture removed during winter months—Fittings left in house—Intention of returning to house.*—The respondent took a lease of a house and furnished it for the purpose of receiving boarders. She did not reside in the house, and in December, 1900, she removed from the house all her furniture and effects, except certain fixtures, fittings, and things which she had hired from the previous tenant. She intended to return to the house in the following summer, and in May she returned and refurnished the house, but, with the exception of the fittings and things left therein, the house was empty from December, 1900, to May, 1901. The respondent claimed exemption from a general district rate for the period from December, 1900, to May, 1901, on the ground that during that period the house was "unoccupied" within the meaning of section 211, sub-section 2, of the Public Health Act, 1875.

Held, that the proper inference of law was that the respondent had the beneficial occupation of the house during the whole of the period, and was therefore not entitled to the exemption in section 211, sub-section 2, of the Act in favour of unoccupied premises, but was liable to the rate for the whole period.—GAGE *v.* WREN, *K.B.D.*; 87 L. T. 271.

4. *Poor rate—Canal—No beneficial occupation.*—By an Act of George III. the appellants were authorized to make a canal and they were to be rated in respect of the lands taken in pursuance of the Act in the same proportion as other lands lying near were or should be rated and as they would be rateable in case the same were the property of individuals in their natural capacity. Coal being worked near a portion of the canal, it began to subside and had to be closed and could not be used.

Held, that this portion was rateable as if it were open for canal traffic and in fact being so used.—GLAMORGANSHIRE CANAL CO. *v.* MERTHYR TYDFIL UNION, *K.B.D.*; 88 L. T. 85.

5. *Poor rate—Exemption—Premises used for Crown purposes—Police residence with cell.*—Certain premises were formerly the lodge of an old prison now pulled down. They were occupied by two members of the county constabulary, and were formerly used as a police station with two cells. The premises are now used for the residence of two constables and their families, and one of the cells is still retained for the detention of prisoners. A certain weekly sum is deducted from the pay of the constables as rent in respect of their occupation of part of the premises. No police books are kept there, and charges are not taken there. The whole of the premises are subject to the inspection of the Government inspector of police, but no inspection had been made for six years, though they were yearly inspected by the county surveyor.

Held, that the premises were not exempt from the poor rate, as being used for police purposes.—MONMOUTH OVERSEERS *v.* MONMOUTHSHIRE COUNTY COUNCIL, *K.B.D.*; 87 L. T. 65.

6. *School—"Voluntary school"—Exemption from rates—Voluntary Schools Act*, 1897 (60 *Vict. c.* 5), *s.* 3.—A building maintained and used as an institution for the maintenance and education of orphan and fatherless girls, daughters of soldiers and sailors, who receive an elementary and religious education and practical instruction for domestic service, and who reside in such building, is not a building used exclusively or mainly for the purposes of the school-rooms, offices, or playground of a voluntary school, so as to be exempt from rates by virtue of section 3 of the Voluntary Schools Act, 1897.—PATRIOTIC FUND COMMISSIONERS *v.* WANDSWORTH BOROUGH, *K.B.D.*; 88 L. T. 865.

See Poor Law, 2, 3.

RECEIVER.—See Mortgage, 5.

SALE OF GOODS:—

1. *Implied warranty—Sale of specific chattel—Sale for "particular purpose"—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-section* 1.—The plaintiff, who was a draper, went to the shop of the defendant, who was a chemist, and asked him for an indiarubber hot-water bottle for the use of his wife, who was suffering from cramp. The defendant, who did not himself manufacture hot-water bottles, showed the plaintiff a bottle, and upon being asked whether it would stand boiling water, he said that it would not, but that it would stand hot water. The plaintiff bought the bottle, and while his wife was using it it burst and scalded her. In an action to recover damages for breach of warranty, the jury found that the bottle when sold was not fit for use as a hot-water bottle, and that this was the cause of its bursting.

Held, by Walton, J., and the Court of Appeal, that there was an implied warranty that the bottle was fit for the particular purpose for which it was required within section 14, sub-section 1, of the Sale of Goods Act, 1893, the purchaser having in the circumstances made known that purpose to the seller, so as to show that he relied on the seller's skill or judgment.—PREIST *v.* LAST, *C.A.*, 678; [1903] 2 K. B. 148.

2. *Negligence—Dangerous goods—Knowledge of vendor—Duty of vendor to purchaser—Warranty of fitness—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 14.—Where the vendor of a tin containing disinfectant powder knew that it was likely to cause danger to a person opening it, unless special care was taken, and the danger was not such as presumably would be known to or appreciable by the purchaser, unless warned of it,

Held, that, independently of any warranty, there was cast upon the vendor a duty to warn the purchaser of the danger.

Where one of the rules of a co-operative society stated that no warranties were given with goods sold by the society, except on the written authority of one of the managing directors or the assistant manager,

Query, whether the rule had the effect of excluding the implied warranty that an article sold for a particular purpose is fit for that purpose.—CLARKE *v.* ARMY AND NAVY CO-OPERATIVE SOCIETY (LIMITED), *C.A.*; [1903] 1 K. B. 155; 72 L. J. K. B. 153; 88 L. T. 1.

3. *Warranty—Implied warranty—Purchase by description—Merchantable quality—Sale of beer by retail in public-house—Purchase in reliance on good name of particular beer—Beer containing arsenic—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-section* 2.—The plaintiff was in the habit of drinking beer in the defendant's public-house, where H.'s beer was sold exclusively. Having been poisoned by arsenic contained in the beer, he brought an action for breach of an implied warranty on the sale of the beer that it was fit to drink. The jury found that the plaintiff did not buy the beer in reliance on the skill or judgment of the defendant, but because he preferred that particular beer and in reliance on the good name of H.'s beer.

Held, that, though there was no implied warranty under sub-section 1 of section 14 of the Sale of Goods Act, 1893, there was an implied warranty under sub-section 2 that the beer was of merchantable quality; for on the finding of the jury the sale of the beer must be taken to have been a sale by description.—WREN *v.* HOLT, *C.A.*, 435; [1903] 1 K. B. 610; 72 L. J. K. B. 340; 88 L. T. 282.

SATISFACTION:—

*Marriage settlement—Covenant to pay trustees specific sum—Failure to comply—Policies effected under Married Women's Property Act*, 1870, *s.* 10.—To ascertain the intention as to satisfaction, the position at the time the transaction said to be a satisfaction took place must be looked at, and not merely the actual result.—CARTWRIGHT, RE, CARTWRIGHT *v.* CARTWRIGHT, *Ch.D. Kekewich, J.*, 666; [1903] 2 Ch. 306; 72 L. J. Ch. 622; 88 L. T. 854.

SCHOOL:—

*Endowed school—Scheme by commissioners—Effect—Abrogation of old statutes.*—A scheme for the government of an endowed school framed by the commissioners under the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), abrogates all pre-existing statutes except so far as they may be expressly preserved by such scheme.—DEAN AND CHAPTER OF CHESTER *v.* BISHOP OF CHESTER, *H.L.*; 87 L. T. 618.

SCHOOL BOARD:—

*Establishment of pupil teachers' centres—Buildings separate from elementary schools—Higher education—Power to expend rates on such centres—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75).—A school board, though it may give instruction to pupil teachers in non-elementary subjects so long as such instruction is given in public elementary schools, has no power to establish at the expense of the rates pupil teachers' centres in separate buildings. The establishment of such centres amounts to the

establishment of non-elementary schools, and falls within the decision in *Rex* v. *Cockerton*, 49 W. R. 433, [1901] 1 K. B. 726.—DYER *v.* LONDON SCHOOL BOARD, *C.A.*, 34; [1902] 2 Ch. 768; 72 L. J. Ch. 10; 87 L. T. 225.

SCOTLAND, LAW of:—

*Feu-contract—Construction—Stipulation for additional rent for ground "on which buildings shall be erected."*—Land, which then consisted of a mansion-house and grounds, was let upon a contract by which a feu-duty (or rent) of £5 an acre was reserved, and, it being in the contemplation of the parties that the land might eventually come to be used as building land, a provision was inserted for an additional duty "for every square pole of the said piece of ground on which buildings shall be erected," with an exception in the case of additions to the mansion-house, or the building of a lodge. Other buildings were afterwards erected on the land.

Held, that the additional duty was only payable for land on which buildings were actually erected, and not for land accessory to such buildings, though it might be incapable of separate occupation. —MCFARLANE *v.* STIRLING-MAXWELL, *H.L.*; 87 L. T. 554.

See Conflict of Laws, 4; Judgment, 1; Poor Law, 1.

SEQUESTRATION:—

*Practice*—Chose in action—*Banker—Customer—Dealings with customer's account after notice of writ of sequestration against customer.*—Mere notice of a writ of sequestration does not bind a *chose in action* in the hands of a third party.

A defendant in an administration action was ordered to pay a sum of £136 odd into court to the credit of the action. Failing to do so, a writ of sequestration was issued against him on the 20th of May, 1902. The sequestrators attended at the defendant's bank on the same day and gave notice of the writ, and demanded payment to themselves of the amount (which consisted of £204 odd) standing to defendant's credit at that date. The bank undertook not to deal with defendant's account pending consultation with their solicitors. Notwithstanding the undertaking, the defendant was permitted to draw on his account, and on the 22nd of May his balance was reduced to £137 odd. On the 22nd of May the sequestrators gave formal notice in writing of the writ to the bank, and took out a summons asking that the bank might be ordered to pay to them the amount standing to the defendant's credit in the books of the bank on the 20th of May, 1902.

Held, that an order could not be made for the full sum of £204 standing to defendant's credit at the bank on the 20th of May, but an order was made, without costs, for the amount standing to defendant's credit at the bank on the 22nd of May, 1902.—POLLARD, RE, POLLARD *v.* POLLARD, *Ch.D. Joyce, J.*, 111; 87 L. T. 61.

See Bankruptcy, 19.

SETTLED LAND:—

1. *Apportionment — Authorized security — Loss—Period of account — Tenant for life and remainderman — Hotchpot.* — Where an authorized security becomes insufficient and there is a partial loss of capital and income, the account necessary to apportion the amount realized between life tenant and remainderman must be taken from the date when it was first ascertained that the security was insufficient up to the date of realization, the life tenant bringing all income received during that period into hotchpot.—PHILLIMORE, RE, PHILLIMORE *v.* HERBERT, *Ch.D. Swinfen Eady, J.*; [1903] 1 Ch. 942; 72 L. J. Ch. 591; 88 L. T. 765.

2. *Capital money—Improvement—Additions with a view to letting—Structural additions—Electric light installation—Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict.* c. 69), *s.* 13 (ii.).—The word "additions" in section 13 (ii.) of the Settled Land Act, 1890, means structural additions.

The installation of electric light in a mansion-house, though necessary to enable the place to be let, is not an addition to the house within the meaning of the section, and therefore cannot be paid for out of capital moneys.

*In re Freake's Settlement*, 50 W. R. 237, [1902] 1 Ch. 97, overruled.

*In re Gaskell's Settled Estates*, 42 W. R. 219, [1894] 1 Ch. 485, and *In re Clarke's Settlement Trusts*, 50 W. R. 585, [1902] 2 Ch. 327, approved.—BLAGRAVE'S SETTLED ESTATES, RE, *C.A.*, 437; [1903] 1 Ch. 560; 72 L. J. Ch. 317; 88 L. T. 253.

3. *Compound settlement—Appointment of trustees —Solicitor for tenant for life as trustee of settlement —Settled Land Act*, 1882, *s.* 2, *sub-sections* 1, 8; *s.* 38.—The trustees of a compound settlement cannot be validly appointed, under section 2 (8) of the Settled Land Act, 1882, trustees, for the purposes of the Settled Land Acts, by a declaration to that effect contained in a document forming one of the documents composing the compound settlement, to which document some of the beneficiaries interested under the settlement are not parties nor bound by its provisions; and consequently, notwithstanding such declarations, trustees for the purposes of the Settled Land Acts would have to be appointed by the court.

The general rule that the court will not appoint the solicitor of the tenant for life a trustee of the settlement will only be departed from when it can be shown that his appointment will be more beneficial than that of any other person.

The rule laid down in *In re Kemp's Settled Estates*, 31 W. R 930, 24 Ch. D. 485, followed.—SPENSER'S SETTLED ESTATES, RE, *Ch.D. Byrne, J.*, 262; [1903] 1 Ch. 75; 72 L. J. Ch. 59; 88 L. T. 158.

4. *Compound settlement—Resettlement—New life estate "in restoration and continuance of" former life estate—Appointment of trustees for the purposes of the Settled Land Acts—Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *ss.* 2, 20, 22, 40—*Settled Land Act*, 1890 (53 & 54 *Vict.* c. 69), *s.* 4.—In 1850, under a will, lands were settled to the use of A. for life, with remainder to B. in tail, and A. was thereby empowered to create a jointure rent-charge for his wife. In 1872 A. by deed charged the lands with a jointure for his wife. In 1895 A. and B. by a disentailing assurance conveyed the lands to such uses as A. and B. should jointly appoint, and by a deed of resettlement of even date they appointed the lands to the use of A. for life "in restoration and continuance of his former life estate under the will," with remainder to B. in fee; and by this deed of resettlement persons were appointed to be trustees of the deed of resettlement, and were also thereby expressed to be appointed trustees thereof "for all the purposes of the Settled Land Acts." A. contracted to sell the lands as tenant for life under the Settled Land Acts. Upon objection taken by the purchaser,

Held, that the only settlement under which A. could exercise the statutory power of sale under the Settled Land Acts was the "compound settle-

ment," consisting of the will, the jointure deed, the disentailing deed, and the deed of resettlement; that no trustees of such compound settlement for the purposes of the Settled Land Acts in fact existed; and that unless and until such trustees were appointed or a consent given to have the purchase-money paid into court, the vendor could not make a good title to the purchaser.—CORNWALLIS-WEST AND MUNRO'S CONTRACT, RE, *Ch.D. Farwell, J.*, 602; [1903] 2 Ch. 150; 72 L. J. Ch. 499; 88 L. T. 351.

5. *Exchange of easements—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 5.—An exchange of easements, apart from any exchange or partition of land, is authorized by the Settled Land Act, 1890, s. 5.—BRACKEN'S SETTLEMENT, RE, *Ch.D. Swinfen Eady, J.*, 411; [1903] 1 Ch. 265; 72 L. J. Ch. 101; 87 L. T. 743.

6. *Sale—Life estate—Merger—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 50.—Where a tenant for life has parted with his life estate in an undivided share of the property to remaindermen, and he continues to be beneficially entitled to the remaining portion, the whole property is still settled land, and he can make a title to the entirety with the consent of the assignees.

*In re Mundy and Roper's Contract*, 47 W. R. 226, [1899] 1 Ch. 275, considered.—BARLOW'S CONTRACT, RE, *Ch.D. Swinfen Eady, J.*, 399; [1903] 1 Ch. 382; 72 L. J. Ch. 214; 88 L. T. 84.

7. *Tenant for life—Annuitants entitled to rents and profits of land—Tenant for life, persons having together the powers of a—Settlement—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sections* 5, 6; *s.* 58, *sub-section* 1 (*ix.*).—A testator devised his residuary real and personal estate to trustees upon trust to pay out of the rents and profits several life annuities to persons specified, and directed that if in any year there should be a surplus of the income of his residuary real and personal estate over the total amount of the annuities, the trustees should divide the same between such of the annuitants as should be living in shares proportionate to the amount of the annuities to which they should be then entitled.

Held, that as the annuitants for the time being were, between them, entitled to the entire rents and profits of the residuary real estate, they were persons having together the powers of a tenant for life under section 58 of the Settled Land Act, 1882.—BENNET, RE, BENNET *v.* BENNET, *Ch.D. Kekewich, J.*; [1903] 2 Ch. 136; 72 L. J. Ch. 524; 88 L. T. 683.

8. *Tenant for life—"Opened" mines—Colliery—Seams of coal not actually worked—"Mineral estate"—Intention of settlor.*—A testator who died in June, 1897, devised all his real estate to the use of his trustees in trust for the plaintiff for life, with remainder to his first and other sons in tail male, with remainder to each of his brothers in seniority for life and their sons successively in tail male, with remainder to his own right heirs for ever. The testator gave his personal estate to other persons. The testator expressly empowered his trustees at their discretion to carry on so long as they should think proper his mining, manufacturing, and other businesses, and to increase or diminish any such businesses or his capital therein, or otherwise to deal with and manage the same as they in their absolute discretion should think proper. The will did not exempt the persons thereby made tenants for life of the real estate of the testator from impeachment for waste. Part of the real estate was the freehold portion of a mining estate known as the S. Colliery. The testator purchased that property, which was in part leasehold, in 1894 as a going concern. The colliery was being worked when the testator purchased it. The coal and ironstone therein lay in eight seams. Two of the seams had not been actually worked, though a cross-heading passed through one of them. The testator, since he purchased the property, had expended a large sum in providing new machinery, and had put working capital to a larger amount into the business. The question was, whether the plaintiff was entitled, as tenant for life under the will, to work for his own benefit all seams of coal and ironstone comprised in the freehold portion of the colliery.

Held, that the whole course of dealing with the property indicated an intention on the part of the owner to treat all the seams as mines which were opened; that, therefore, all the eight seams of coal, including the two which had not been actually worked, were to be treated as opened at the time of the testator's death; that this view was confirmed by the words of the will, which not only showed that all the seams were treated as one commercial entity, but also got over the difficulty arising from the fact that the freehold and leasehold parts were differently dealt with in the will, a conclusion which was fortified by the powers thereby conferred on the trustees.—CHAYTOR *v.* TROTTER, *C.A.*; 87 L. T. 33.

9. *Trustees with power to manage and to appoint and pay servants—Trust to permit A. to reside—Tenant for life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s* 2, *sub-section* 5; *s.* 58, *sub-section* 1 (*ix.*).—A testatrix devised certain mansion-houses to trustees, and directed them to permit A. at any time and from time to time during her life to reside therein. The trustees were directed to keep the mansion-houses in a fit state for residence, and for this purpose to appoint and pay servants, who were to be Protestants and Welsh-speaking.

Held, that A. had the powers of a tenant for life under the Settled Land Acts.

Judgment of Swinfen Eady, J. (*ante*, p. 89, [1902] 2 Ch. 679), affirmed.—LLANOVER (LADY), RE, HERBERT *v.* FRESHFIELD (No. 1), *C.A.*, 418; [1903] 2 Ch. 17; 72 L. J. Ch. 406; 88 L. T. 652.

See Power, 4, 7.

SETTLEMENT:—

1. *Marriage settlement—Construction—Children—Wife's next-of-kin—Words "died intestate and without ever having been married."*—By a marriage settlement the trust property was settled, in default of children attaining a vested interest and in default of appointment, for such person or persons of the blood and kindred of H. S. as under the statute for the distribution of the estates of intestates would have been the next-of-kin of the said H. S. in case she had died intestate and without ever having been married.

Held, on the construction of the settlement, that the issue of the marriage were excluded by the words "without ever having been married."—SMITH, RE, WILKINS *v.* SMITH, *Swinfen Eady, J.* 217; [1903] 1 Ch. 373; 72 L. J. Ch. 184; 87 L. T. 740.

2. *Marriage settlement—Trust for persons who would have been entitled as wife's next-of-kin if wife had survived husband—Survivorship of husband—Time for ascertaining next-of-kin.*—Under the ultimate trust in a marriage settlement trustees were directed to hold certain funds "in trust for the person or persons who, under the statutes made

negligence, fault, or error of judgment on the part of the pilot, captain, sailors, or other servants of the owners in the management or navigation of the vessel, or otherwise."

Held, that the shipowners were not liable for damages done to the goods, as the word "otherwise" referred, not to the "management or navigation of the vessel," but to the receiving and delivery of the cargo, and that although the damage was due to the negligence of the stevedores in the discharge of the cargo, it was an "accident" within the meaning of the clause, as the negligence was not wilful.—"TORBRYAN," THE, *P.D. & Ad.D.*; [1903] P. 35; 72 L. J. P. 14; 87 L. T. 656.

9. *Charter-party—Demurrage—Load as customary always afloat—Draught insufficient to complete loading—Obstacles to loading caused by charterer—Lay days.*—By a charter-party a ship was to proceed to B. or as near thereto as she could safely get, and there load as customary, always afloat, at such wharf, jetty, or anchorage as the charterers' agent might direct, a certain cargo. Owing to her draught the ship could not have loaded fully at the berth at the jetty, but according to the custom of the port she would be moved when partly loaded from the jetty to an anchorage to complete loading.

Held, that the lay days did not begin to run until the ship was at the jetty or anchorage the charterers' agent directed, and that the fact that she could not fully load there made no difference and did not prevent the charterers requiring her to come to the jetty and claiming that the lay days did not commence until she was at the jetty. If a ship is prevented from going to the loading place which the charterer has a right to name by obstacles caused by the charterer or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load and would but for such obstacles and engagements begin to load at such place.—AKTIESELSKABET INGLEWOOD *v.* MILLAR'S KARRI AND JARRAH FORESTS (LIMITED), *K.B.D.*; 88 L. T. 559.

10. *Charter-party—Discharge of cargo—Demurrage—"As fast as steamer can deliver"—"According to custom of port."*—By charter-party it was agreed that a steamer should proceed to a named port, and there deliver a cargo of timber "to be discharged with customary steamship dispatch, as fast as the steamer can deliver . . . according to the custom of the port," with an exception in respect of delay caused by a strike or lock-out.

The ship duly arrived at the port, and was ready to deliver the cargo, but delivery was delayed by the crowded state of the dock to which she was ordered. There was evidence that she could not have been discharged more quickly, under the circumstances, elsewhere in the port, and that the consignees had used all reasonable means to procure the discharge.

Held (affirming the judgment of the court below), that they had performed their obligation under the charter-party, and were not liable for demurrage.—HULTHEN *v.* STEWART, *H.L.*; 88 L. T. 702.

11. *Charter-party — Exceptions — Fire — Applicability to charterer.*—The exception of fire in a charter-party enures for the protection of the charterer as well as the shipowner.—NEWMAN & DALE STEAMSHIP CO. AND BRITISH, &c., CO., RE, *K.B.D.*; [1903] 1 K. B. 262; 72 L. J. K. B. 110; 87 L. T. 614.

12. *Charter-party—Freight—Lien of shipowner on sub-freight.*—A lien on sub-freight given by a charter-party to a shipowner as security for the payment to him of the hire of the ship can only be exercised before such sub-freight has been paid to the charterer or his agent. and, therefore, when once the sub-freight has been so paid the shipowner has no right, by virtue of his lien, to follow the sub-freight.—TAGART, BEATON, & CO. *v.* FISHER, *C.A.*, 599; [1903] 1 K. B. 391; 72 L. J. K. B. 202; 88 L. T. 451.

13. *Charter-party—Freight—Option to pay freight on weight delivered or intake weight—Time to exercise option.*—By the terms of a charter-party cargo was to be delivered "on payment of freight at the rate of 6s. 3d. per ton delivered or intake weight less 2 per cent. at charterers' option." The shipowners not having required the charterers to declare their option as soon as the cargo was delivered, the latter elected to pay on the intake weight less 2 per cent.

Held, that the charterers could elect to pay the lesser—*i.e.*, the intake freight, as they were not bound to exercise their option until the time for payment of the freight had arrived, the shipowners having waived their right to require the charterers to declare their option as soon as the cargo had been delivered.—"DOWLAIS," THE, *C.A.*, 88

14. *Charter-party—Seaworthiness—Insufficiency of coal—Charterers to provide coal.*—A charter-party for a round voyage was made subject to conditions, one of which was that the charterers should provide and pay for all coal. The vessel started on one of the stages of the voyage with an insufficient quantity of coal on board, whereby she was rendered unseaworthy. The insufficiency resulted not from any failure on the part of the charterers to supply coal required by the captain, but from failure on the part of the chief engineer to estimate correctly the quantity of coal in the ship's bunkers when she started. In an action by the charterers against the shipowners to recover damages for breach of warranty of seaworthiness,

Held, that the plaintiffs were entitled to recover, because the above condition did not relieve the shipowners from their obligation to take care that the vessel had sufficient coal on board by placing the question of the supply of coal in the discretion of the charterers; and, secondly, because, even if the charterers had any discretion in the matter, they were prevented from exercising it properly by the default of the defendants' servants.—MOLIVER & CO. *v.* TATE STEAMERS, *C.A.*, 393; [1903] 1 K. B. 362; 72 L. J. K B. 253; 88 L. T. 182.

15. *Collision—Article 28 of the Regulations for Preventing Collisions at Sea*, 1897.—Under article 28 of the Regulations for Preventing Collisions at Sea, 1897, the duty imposed on steam vessels which are in sight of one another under way, of indicating by signals on the whistle any course which a vessel intends to take, such course being authorized or required by the rules, is not limited to the case of vessels in narrow waters, but the word "authorized" is to be widely interpreted.—"USKMOOR," THE, *P.D. & Ad.D.*, 93; [1902] P. 250; 71 L. J. P. 103; 87 L. T. 55.

16. *Collision—Assessment of damage—Value of vessel where no market value.*—Where a vessel has been totally lost and there is no market value for her at the time immediately preceding her loss, the real test as to what she was worth is, What was her value to her owners as a going concern at the time she was lost?—"HARMONIDES," THE, *P.D. & Ad.D.*, 303; [1903] P. 1; 72 L. J. P. 9; 87 L. T. 448.

17. *Collision—Compulsory pilotage—Belgian law.*

—Article 228 of the Code de Commerce, Livre II., Titre VIII., De L'Abordage, enacts that "if the collision be caused by the default of any person, all the damages are borne by the ship on board of which the default has been committed. The presence of a pilot on board is no defence to this liability." The court construed that to mean that, whether the pilot is on board or not, it makes no difference as to the responsibility of the owners if damage is caused in consequence of the negligence of those in charge of the ship.—"DALLINGTON," THE *P.D. & Ad.D.*, 607; [1903] P. 77; 72 L. J. P. 17; 88 L. T. 128.

18. *Collision—Fog—Fog signal forward of beam—Duty to stop engines—Regulations for Preventing Collisions at Sea*, 1897, *art.* 16—*Statutory presumption of fault—Foreign vessel outside limits of territorial jurisdiction—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-section* 4; *s.* 424.—A British and a Dutch steam vessel came into collision, during a dense fog, in the English Channel six miles off Dungeness. The owners of the British vessel admitted liability for an infringement of the collision regulations; but the owners of the Dutch vessel denied liability on the ground, *inter alia*, that though the whistle of the other vessel was heard forward of the beam, their vessel was going so slow, and the fog signal so far off, that their master thought it better to wait, before stopping his engines, until he heard the whistle again.

Held, by Bucknill, J., that the Dutch vessel was to blame for not stopping, which omission in fact contributed to the collision, and no circumstance had been shown for disobeying the positive direction contained in the second paragraph of article 16 of the Regulations for Preventing Collisions at Sea, 1897, that "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines . . ."—"KONING WILLEM I.," THE, *P.D. & Ad.D.*; [1903] P. 114; 72 L.J. P. 28; 88 L. T. 807.

19. *Collision—Fog—Moderate speed.*—The power of stopping in a short space is one of the circumstances which ought to be taken into consideration in deciding whether a vessel is proceeding at a moderate speed or not; but article 15 of the Regulations for Preventing Collisions at Sea is imperative, and therefore if the court is of opinion that in fact a vessel was not going at a moderate speed in a fog under the existing circumstances, the fact that she could stop very quickly, or that a slower rate of speed would lead to unhandiness or loss of position, will not exempt her from liability should a collision occur.—OCEANIC STEAM NAVIGATION CO. *v* WATERFORD STEAMSHIP CO., *H.L.*; 88 L. T 303.

20. *Collision—Negligence—Contributory negligence.*—The steamship *F.*, proceeding down the River Thames, against the tide, committed a breach of bye-law 47 of the Thames Bye-laws in neglecting to wait at B. point until the steamship *O. G.*, which was coming up with the tide, and which at the time was turning in the river preparatory to entering the West India Dock, had passed clear. A collision occurred.

Held, that although *The O. G.* was to blame for not keeping a proper look-out, and conducting the turning without proper care, *The F.* was also to blame for hindering the manœuvres of *The O. G.* by not obeying the rule, and so contributing to the collision.—"OVINGDEAN GRANGE," THE, *C.A.*; [1902] P. 208; 71 L. J. P. 105; 87 L. T. 15.

21. *General average loss—General average adjusters—Loss of time freight.*—The words "all loss" in the well-known passage in Lawrance, J.'s, judgment in *Birkley* v. *Presgrave*, 1 East 220, at p. 228, relating to a general average sacrifice, ought not to be extended so as to include losses which are the result of accidental circumstances affecting the loser, and are not losses which the other persons interested ought in ordinary course to be treated as concerned with.

The practice of general average adjusters of not allowing in general average, loss of time freight which is the result of detention for repair of damage caused by a general average sacrifice is in accordance with legal principles, and is rightly left out of consideration.—"LEITRIM," THE, *P.D. & Ad.D.*, 158; [1902] P. 256; 71 L. J. P. 108; 87 L. T. 240.

22. *Loading coal—Trimming charges—Self-trimmer—Jurisdiction of Trimming Committee.*—Held, that the Trimming Committee at Cardiff had jurisdiction to decide that a ship was a self-trimmer, and that their decision was final.—"SWINDON," THE, *C.A.*, 119.

23. *Mortgage—Action in foreign country—Staying proceedings in this country for declaration as to priorities—R. S. C.*, 1883, *ord.* 25, *r.* 5.—On default being made under a mortgage of a British ship, the mortgagees, the plaintiffs, took possession and chartered her to a port in France, where she and her freight were arrested by the defendants, who were British subjects and who claimed for necessaries supplied the ship, and judgment by default being obtained in England was made "executory" in France. The mortgagees intervened in France, and also commenced separate actions against them and against the mortgagors asking for judgment, declaring that they, as mortgagees in possession, were entitled to the ship and her freight in priority to the mortgagors and to the defendant's claiming for necessaries.

The Court held that the action against the defendants, who claimed for necessaries, was not vexatious, and ought not to be stayed; but that the action against the mortgagors ought to be stayed.

*Brooking* v. *Maudslay, Son, & Field*, 36 W. R. 664, 38 Ch. D. 636, followed.—"MANAR," THE, *P.D. & Ad.D*, 687; [1903] P. 95; 72 L. J. P. 41.

24. *Mortgage—Assignment of freight—Freight due and payable before possession taken—Interpleader.*—Balance of freight was earned and became due and payable on the 17th of June, 1902, in respect of a cargo carried by a vessel. The sum so due was assigned by the shipowners to the plaintiff. The defendants, who were mortgagees of the vessel under a mortgage deed dated the 11th of October, 1900, took possession of the vessel on the 14th of August, 1902. The freight, which had become due on the 17th of June, 1902, remained unpaid at the date when the defendants, as mortgagees, took possession of the vessel.

Held, that as the freight became due and payable before the defendants, as mortgagees, took possession, the plaintiffs were entitled to the sum so due.—SHILLITO *v* BIGGART, *K.B.D.*, 479; [1903] 1 K. B. 683; 72 L. J. K. B. 294; 88 L. T. 426.

25. *Mortgage—Shares in ship—Agent receiving profit—Notice by mortgagee—Periodical distributions of profits by agent.*—E. was the mortgagee of certain shares in two ships. The profits were received by Messrs. B., A., & Co., who made periodical distributions, once a year in March, amongst the persons entitled. E. gave notice in November of the mortgage.

Held, that E. was only entitled to the freight earned and received by Messrs. B., A., & Co. after the notice, and that before that date the mortgagor was entitled, as the fact that the agents only accounted to the persons entitled at stated periods made no difference.—ESSARTS *v.* WHINNEY, *C.A.*; 88 L. T. 191.

26. *Negligence—Damage to vessel lying in berth—Liability of wharf owners.*—The plaintiffs' vessel, which was found to be in a fit condition to take the ground for the purpose of unloading a cargo of iron ore, was damaged through straining, by reason of her lying on an uneven bottom in the defendant's wharf.

The Court held the defendants to blame in not keeping the berth in a fit and proper condition to receive the vessel, and held the plaintiffs entitled to recover such damages as were assessed by the registrar and merchants—"VILLE DE ST. NAZAIRE," THE, *P.D. & Ad.D.*, 590.

27. *Practice—Writ—Service out of the jurisdiction—Collision outside territorial waters—Action against owners of English tug and foreign tow—Proper party—Action properly brought—Ord.* 11, *r.* 1 (g).—A collision occurred outside British territorial waters between an English steamship and a French sailing ship which was in tow of an English tug. The owners of the French ship commenced an action against the owners of the English steamer in the French court. The owners of the English steamer then commenced an action *in personam* in the Admiralty Division against the owners of the French ship and the owners of the tug, and, having served the writ on the owners of the tug, obtained leave to issue a concurrent writ and serve notice thereof on the owners of the French ship out of the jurisdiction. The owners of the French ship, after obtaining judgment by default in the French action, and compelling the owners of the English steamer to give security in the nature of bail in order to avoid the arrest of their vessel, took out a summons asking that the order giving leave to serve notice of the writ out of the jurisdiction might be discharged.

Held, that the order ought not to be discharged, for the action was properly brought against the owners of the tug as well as against the owners of the tow, and the owners of the tow were proper parties to the action; and the order was not the less rightly made because the cause of action arose out of the jurisdiction.

Decision of Barnes, J. (*ante*, p. 271), affirmed.—"DUC D'AUMALE," THE, *C.A.*, 332; [1903] P. 18; 72 L. J. P. 11; 87 L. T. 674.

28. *Salvage—Constructive acceptance of service.*—The defendants' barque, with three tugs in attendance, was lying moored outside the entrance to the Alexandra Dock at Hull waiting to enter, when a steamer coming out of the dock, owing to a rope fouling her propeller, was driven by wind and tide down on to the barque, which in turn was forced on to the Hebbles Sand. The two tugs in attendance on the steamer towed that vessel clear of the barque, and thereby the three tugs in attendance on the barque were enabled to pull that vessel off the sand. In a salvage suit commenced by the five tugs against the owners of the barque,

Held, by Bucknill, J., that the three tugs which were in attendance on the barque were entitled to salvage, as their services, for the time being, were outside their towage contract, but that the claim against the barque made by the two tugs in attendance on the steamer must be disallowed, as there was no evidence from which a constructive acceptance of their services by the master of the barque could be inferred within the principle laid down in *The Vandyck*, 5 Asp. M. L. C. 17.—"EMILIE GALLINE," THE, *P.D. & Ad.D.*; [1903] P. 106; 72 L. J. P. 39; 88 L. T. 743.

29. *Salvage—Extortionate agreement.*—A sailing vessel dragged her anchors in a gale of wind towards another vessel. In answer to signals made by the former vessel a tug came out, but her master refused to put a rope on board unless paid £1,000. This sum the master eventually agreed to give, and the vessel was towed away. In an action brought by the tug against both sailing ships, claiming £1,000 against one and salvage against the other,

Held, in the one case, that the agreement must be set aside as inequitable, and £200 was awarded to the plaintiffs, and in the other that the action must be dismissed.—"PORT CALEDONIA" THE, *P.D. & Ad.D.*; [1903] P. 184; 72 L. J. P. 60.

30. *Salvage—Information by one person leading to a salvage service by another person—Lifeboat crew.*—The coxswain of a lifeboat, whilst endeavouring with his crew to put off to a vessel in distress, sent a telegram for the assistance of tugs. The owners of the tugs had, however, previously heard of the position of the vessel, and were already despatching their tugs. In an action of salvage,

Held, by Bucknill, J., that, though a person may hold the position of a salvor who does nothing more than give information, outside his duty, of such a nature as to be the cause of acts subsequently done by others which are salvage services, the claim in the present case failed, as the telegram sent by the coxswain of the lifeboat was not in fact the cause of the tugs going out to the rescue of the vessel.

The onus is upon the crew of a lifeboat, going out to save life, to shew that they have rendered services entitling them to be regarded as property salvors.—"MARGUERITE MOLINOS," THE, *P.D. & Ad.D.*; [1903] P. 160; 72 L. J P. 56.

31. *Salvage—Standing by—Attempting to tow—Services rendered at request—Principles upon which awards made.*—A steamship, valued at £27,000, from Philadelphia to Bremen, with a part cargo of petroleum, belonging to the owners of the steamship, of the value of £7,578, the rest naphtha valued at £7,000, and freight at risk £1,743, became disabled so that she could not steer when about 1,000 miles from Falmouth. After making some progress to the eastward, she was fallen in with by steamship No. 1, the master of which agreed to attempt to get her to Fayal; but, owing to very bad weather, after standing by and steering her for a few miles, he left the disabled vessel. She was then picked up by steamship No. 2, and towed 265 miles, when, owing to damage to the machinery of the salving vessel and the hawser parting, the disabled steamer was lost sight of. Steamship No. 3 then came up; but after a difficult towage of about twelve miles, left her owing to being short of feed for the horses she was carrying. Steamship No. 4 then established communication with her, and towed her 468 miles to Falmouth, being accompanied by steamship No. 5, which belonged to the same owners as the disabled vessel, and acted as a standby in case of emergency. In consolidated actions of salvage by the owners, masters, and crews of the five steamships,

Held, by Bucknill, J., that steamship No. 1 was entitled to £800 by way of payment for work done in standing by and, at request, attempting to tow within the principle laid down in *The Benlarig*

(1888) 14 P. D. 3; that steamship No. 2 was entitled to a salvage award of £2,500 for having, within the principle laid down in *The Atlas*, (1862) Lush. 518, and *The Camellia*, (1883) 9 P. D. 27, meritoriously contributed to the ultimate safety of the disabled vessel, the award being fixed at a lower standard than that to which the principal salvor was entitled, as the part taken by this salvor by itself would not have produced the successful result; that steamship No. 3 was, on similar grounds, and as having brought the disabled steamer within sight of the principal salvor, entitled to an award of £800; that steamship No. 4, having towed the disabled steamer into a port of safety, was entitled, as the principal salvor, to an award of £4,000; whilst the owners of steamship No. 5 were entitled, as against the naphtha cargo, to an award of £300, and her master and crew, as against ship, cargo, and freight, to an award of £150, making a total of £8,550.—"AUGUST KORFF," THE, *P.D. & Ad.D.*; [1903] P. 166; 72 L. J. P. 53.

32. *Seaman—"Distressed seaman" — "Sufficient evidence"—Merchant Shipping Acts*, 1894 (57 & 58 *Vict. c.* 60), 1898 (61 & 62 *Vict. c.* 44).—The owners of a vessel which had been wrecked paid the shipwrecked crew the balance of wages due to them. Some of the crew were maintained and provided with a passage to the United Kingdom by the Governor of South Australia, acting by the Marine Board of South Australia, on behalf of the Crown. The wages paid were in excess of the expense thus incurred.

The Board of Trade, on behalf of the Crown, under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 193, sued the shipowners to recover the expenses so incurred.

Held, that such seamen were "distressed seamen" within the meaning of the Merchant Shipping Acts, 1894 and 1898, and that the possession of wages was immaterial; "sufficient evidence" in section 193, sub-section 3, of the Merchant Shipping Act, 1894, means conclusive evidence.—BOARD OF TRADE *v.* SAILING SHIP GLENPARK, *K.B.D.*, 554; 88 L. T. 693.

33. *Seaman—Injury in service of ship—Medical expenses after being brought back to home port—Liability of shipowner—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 207, *sub section* 1.—By section 207, sub-section 1, of the Merchant Shipping Act, 1894, "If the master of, or a seaman or apprentice belonging to, a ship receives any hurt or injury in the service of the ship, the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the master, seaman, or apprentice until he is cured, or dies, or is brought back, if shipped in the United Kingdom, to a port of the United Kingdom, or if shipped in a British possession to a port of that possession, and of his conveyance to the port, and in case of death the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages."

Held, that the words "until he is cured, or dies, or is brought back," qualify the liability of the shipowner to pay the expense of providing the necessary surgical and medical advice and attendance and medicine for the injured seaman as well as the expenses of his maintenance, and that therefore the shipowner's liability in respect of both ceases upon the injured seaman being brought back to a home port.—ANDERSON *v.* RAYNER, *C.A.*, 369; [1903] 1 K. B. 589; 72 L. J. K. B. 292; 88 L. T. 313.

34. *Wages—Victualling allowance—Maritime lien—Shipwrights — Possessory lien — Priorities.*—An allowance of money made to the crew of a vessel in consideration of their finding their own provisions is part of their wages, and they have a maritime lien in respect of it. The maritime lien of the crew for their wages takes priority of the possessory lien of shipwrights up to the time when the vessel is put into the hands of the shipwrights for repairs, and the fact of the master and crew being on board the vessel while repairs are being done does not oust the possessory lien of the shipwrights. Where a contract has been entered into to do certain repairs the repairers have a possessory lien for the work they have done, although they have not completed all the repairs they contracted to do.—"TERGESTE," THE, *P.D. & Ad.D.*; [1903] P. 26; 72 L. J. P. 18; 87 L. T. 567.

35. *Wages and disbursements — Foreign ship — Maritime lien*—Lex fori—*Priorities.*—In an action by the master of a ship for wages and disbursements, *lex fori* applies and not the *lex loci contractus*, and a foreign master has a maritime lien for his wages up to the date of the arrest of the ship. Section 167 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), applies to all vessels, British and foreign, and gives the master of a foreign ship the same rights and remedies as the master of a British ship.—"TAGUS," THE, *P.D. & Ad.D.*; [1903] P. 44; 72 L. J. P. 4; 87 L. T. 598.

SOLICITOR:—

1. *Attachment—Delivery of bill—Service of order—Form of notice of motion—R. S. C.*, 1883, *ord* 44, *r.* 2.—An order had been made on a solicitor for delivery of bill on a client's petition within a certain period. The period therein fixed was extended by a later order, but that order was not drawn up nor served upon the solicitor. On a motion to attach the solicitor,

Held, that the order extending the time should have been drawn up and served on the solicitor, and this not having been done, that the motion failed.—SEAL, A SOLICITOR, RE, *Ch.D. Byrne, J.*, 164; [1903] 1 Ch. 87; 72 L. J. Ch. 58; 87 L. T. 731.

2. *Client—Agency—Solicitor's power as agent to compromise actions.*—A solicitor has a general power to compromise an action on behalf of his lay client, provided (*a*) he acts reasonably and *bonâ fide*, and (*b*) than he is not restrained by any express prohibition; and this rule applies equally to the solicitor on the record acting as agent for the solicitor of the lay client.—NEWEN (DECEASED), RE, *Ch.D. Farwell, J.*, 297; [1903] 1 Ch. 812; 72 L. J. Ch. 356; 88 L. T. 264.

3. *Costs—Taxation—Action in Mayor's Court—Certificate awarding costs on higher scale—Taxation of costs of unsuccessful party's solicitor—Mayor's Court Rules (Fees and Costs)*, 1890, *r.* 13.—In an action in the Mayor's Court to recover a sum of £40 the plaintiff recovered judgment, and the judge who tried the action gave a certificate, under rule 13 of the Mayor's Court Rules (Fees and Costs), 1890, awarding the plaintiff costs on the scale applicable where £50 or over was recovered. The solicitor, who acted for the defendant in the action, delivered to the defendant a bill of costs, which included his costs of the action in the Mayor's Court and also costs in other matters, such as conveyancing, in which he had acted for the defendant. The defendant obtained a common order to tax the bill in the High Court, and the master taxed that part of the bill which related to the costs of the action

in the Mayor's Court upon the scale where £50 or over was claimed.

Held, that the effect of the order of the judge of the Mayor's Court was to take the action for all purposes out of the lower scale and to place it in the higher scale, and that, therefore, the taxing-master was right.—BRIGGS (JAMES) & SON, RE, *C.A.*, 577; [1903] 2 K. B. 156.

4. *Costs—Taxation—Disbursement—Money paid to "Security for Costs Account"—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.—Moneys paid by a solicitor on behalf of a client to the "Security for Costs Account" in respect of discovery and interrogatories are not payments which the solicitors are bound to make either by law or custom. Consequently they cannot be treated as "disbursements" within section 37 of the Solicitors Act, 1843, but must go into the cash account as money lent by the solicitor to his client.

Decision of Kekewich, J. (50 W. R. 629), reversed. —BUCKWELL & BERKELEY, RE, *C.A.*, 21; [1902] 2 Ch. 596; 71 L. J. Ch. 713; 87 L. T. 215.

5. *Costs—Taxation—Parliamentary agents—Bill of costs for work done by solicitor as parliamentary agent—Jurisdiction to tax—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.—A bill of costs of a parliamentary agent, who is also a solicitor, if it relates exclusively to work done by him as a parliamentary agent, cannot be taxed in the High Court under section 37 of the Solicitors Act, 1843.—BAKER, LEES, & Co., RE, *C.A.*, 246; [1903] 1 K. B. 189; 72 L. J. K. B. 136; 87 L. T. 662.

6. *Costs—Taxation— Time limit — Extension of time—Jurisdiction of taxing officer—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*R. S. C.*, 1883, *ord.* 65, *r.* 27, *regulation* 57.—The direction in an order of course for taxation of a bill delivered more than one month and less than twelve months, on the client's application, that "the said master is to make his certificate in a month, unless the said master shall think fit to extend the time to enable him to make his certificate, or this order is to be of no effect," is not a direction by the court or a judge which deprives the taxing officer of the jurisdiction given to him by regulation 57 of rule 27 of order 65, and consequently the taxing-master can grant an extension of time for the taxation on an application made after the expiration of the month limited by the order. Time limits, however, whether prescribed by section 37 of the Solicitors Act, 1843, or by the rules of the court, ought not to be lightly disregarded; and therefore such an extension of time should not be made as of course, but only if it appears to the taxing officer to be required by the justice of the case.—MACINTOSH, DIXON, & Co., RE, *C.A.*, 659; 72 L. J. Ch. 609; 88 L. T. 820.

7. *Costs—Taxation—Trustees' bill.*—An order was obtained by *cestui que trust* to tax a solicitor's bill delivered to the trustees.

The tenant for life of one moiety of certain trust funds had died on the 22nd of June, 1902, upon which that moiety became divisible among three persons.

Two of the beneficiaries wished to take their shares *in specie*, but the third wished to have his share realized and a mortgage thereon paid off.

The taxing-master had disallowed the costs of transfer, of attendance to pay off the mortgage, and also costs charged in anticipation for attending the beneficiaries' solicitors, and handing them cheques and transfers.

These latter costs had been included to prevent the necessity of delivering a supplemental bill, but the taxing-master thought that he had no power to allow them.

Held, that the trustees must be allowed their reasonable and proper costs of dividing the estate irrespective of the way in which the costs would ultimately be borne, as this taxation was under section 39 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73).

Held, also, that the solicitor might include reasonable and proper charges which would be incurred in a final division by way of anticipation. —MILES, RE, *Ch D. Swinfen Eady, J.*; 88 L. T. 863.

8. *Fiduciary relationship—Gift by client to solicitor —Purchase by solicitor from client—Competent and independent advice—Avoiding deeds as against solicitor and upholding gifts to client's children in same deeds.* —W., being at the same time under considerable financial liabilities, executed in 1900 two deeds settling property in favour of his children, B. and N., and his solicitor, C. The deeds were settled in C.'s office, but were, before execution, inspected and explained to W. by another solicitor, A. In 1901 W. executed a further deed, by which he assigned all his property in favour of B. and N. and C., they covenanting to pay him an annuity. This deed was prepared by another solicitor, T., but C. made alterations in it before execution.

Held, on the evidence, that W. had not competent and independent advice on either occasion, and that all the deeds must therefore be set aside as against C., and that the deed of 1901 must be set aside altogether; but that the deeds of 1900 ought not to be set aside so far as they conferred benefits on W.'s children, B. and N.

The rule laid down by Lord Eldon in *Hatch* v. *Hatch*, 9 Ves. 292, applied.

Observations of Farwell, J., in *Powell* v. *Powell*, [1900] 1 Ch. 243, 48 W. R. Dig. 168, as to the duty of a solicitor advising a client who wishes to confer a gift on a person in a fiduciary relation, approved.

The conditions necessary for the upholding of gifts by a client to his solicitor and purchases by a solicitor from his client respectively, discussed.

Order of Kekewich, J., varied.—WRIGHT v. CARTER, *C.A.*, 196; [1903] 1 Ch. 27; 72 L. J. Ch. 138; 87 L. T. 624.

9. *Misconduct—Report of committee to court—Dismissal of charge—Right of complainant to be heard in person—Solicitors Act*, 1888 (51 & 52 *Vict c.* 65), *s.* 13.—By section 13 of the Solicitors Act, 1888, an application to strike the name of a solicitor off the rolls, or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to and heard by the Committee of the Incorporated Law Society, who shall embody their finding in the form of a report to the court, "provided that any person who but for this Act would have been entitled to apply to the court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply, although the committee is of opinion that there is no *primâ facie* case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report of the committee before the court."

Held, that an application to the court under the proviso in the above section must be made by counsel.—A SOLICITOR, RE, LAW SOCIETY, EX PARTE, *C.A.*, 561; [1903] 2 K. B. 205; 72 L. J. K. B. 643.

10. *Negligence — Action for negligence against solicitor—Death of solicitor—Survival of cause of action against executor*—Actio personalis moritur cum personâ —An action by a client for damages for the alleged negligence of a solicitor while acting upon the client's retainer does not die with the solicitor, but survives, and may be maintained against the personal representative of the deceased solicitor.—DAVIES *v.* HOOD, *K.B.D.*; 88 L. T. 19.

11. *Permitting unqualified person to use solicitor's name in actions, &c.—Finding that the statutory offence was proved—No jurisdiction to inflict less than statutory punishment—"Shall and may be" struck off the roll—Solicitors Act,* 1843 (6 *&* 7 *Vict. c.* 73), *s.* 32.—By section 32 of the Solicitors Act, 1843, if any solicitor knowingly permits his name to be used in any action for the profit of any unqualified person, or does any act to enable an unqualified person to practise as a solicitor, the solicitor "shall and may be" struck off the roll.

Where a solicitor is charged under the above section, and the charge is established,

Held, that the court has no power to inflict a less punishment than striking the solicitor off the roll.

*In re Kelly*, 43 W. R. 191, [1895] 1 Q. B. 180, considered and followed.—BURTON AND BLINKHORN, RE, *K.B.D.*, 668; [1903] 2 K. B. 300.

12. *Remuneration—Purchase and re-sale—Scale fee — Negotiation — Commission to agent—"Completing" conveyance—General order under Solicitors' Remuneration Act,* 1881 (44 *&* 45 *Vict. c.* 44), *Schedule I., Part I., r.* 11.—In order to earn the scale fee for negotiating a purchase or a sale, a solicitor must arrange it—that is to say, must substantially do all the negotiations connected therewith, and not merely be one of a group of persons who negotiate; he must also show that no commission has been paid to another agent in respect of the negotiation.

*In re Withall*, 39 W. R. 529, [1891] 3 Ch. 8, followed.

In order to earn the scale fee for completing a purchase or sale, he must do all the work specified in the schedule, so far as the contract requires it to be done. Where there is a purchase and a re-sale of the whole of the purchased property, and the conveyance is from the vendor to the ultimate purchaser, the solicitor is not entitled to such a scale fee.

*In re Read*, 42 W. R. 601, [1894] 3 Ch. 238, distinguished.

*In re Baillie & Co.*, 15 Times L. R. 277, followed. —ROMAIN, RE, *Ch.D. Buckley, J.*, 346; [1903] 1 Ch. 702; 72 L. J. Ch. 309; 88 L. T. 125.

13. *Treasury solicitor—Acting for individual—Costs—Duly qualified solicitor—Revenue Solicitors Act.* 1828 (9 *Geo* 4, *c.* 25), *s.* 1—*Solicitors Acts*, 1843 (6 *&* 7 *Vict. c.* 73), *ss.* 2, 47, *and* 1874 (37 *&* 38 *Vict. c.* 68), *s.* 12—*Treasury Solicitor Act*, 1876 (39 *&* 40 *Vict. c.* 18)—*Stamp Act.* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 43, *sub-section* 3.—Where the solicitor to the Treasury acts, under the direction of the Crown, for a private individual, he is to be deemed to be a duly qualified solicitor for all purposes, though he is not on the roll of solicitors and has not taken out a certificate authorizing him to practise as such.—REX *v.* CANTERBURY (ARCHBISHOP), *C.A.*, 277; [1903] 1 K. B. 289; 72 L. J. K. B. 188; 88 L. T. 150.

See also Estoppel, 1; Landlord and Tenant, 15.

STAMP DUTY.—See Inland Revenue.

STOCK EXCHANGE:—

1. *Bankruptcy — Receiving order — Stockbroker — Default on Stock Exchange—Administration of assets by Stock Exchange assignee—Right of Stock Exchange creditor to petition in bankruptcy.*—A member of the London Stock Exchange having become a defaulter, a Stock Exchange creditor, who has come in and has received dividends under the administration of the defaulter's assets by the official assignee of the Stock Exchange, and has also recovered judgment in an action for his debt, can maintain a petition in bankruptcy against the defaulter, founded on the balance of the judgment debt after deducting the dividends which he has received and for which he must give credit.

The Stock Exchange *cessio bonorum* does not operate as an accord and satisfaction or a release of the defaulter's debts.—MENDELSSOHN, EX PARTE, MENDELSSOHN, RE, *C.A.*; [1903] 1 K. B. 216; 72 L. J. K. B. 106; 87 L. T. 721.

2. *Default of broker—Liquidation—Completion by jobber with broker's customers—Right of jobber to sue broker for differences.*—A broker, who was a member of the London Stock Exchange, was declared a defaulter, there being then due from him to a jobber £986 in respect of the purchase and sale of shares. A further sum of £281 became due on the closing of the broker's accounts at the hammer prices. The broker's customer completed the transactions with the jobber on the next settling day and paid him the sums due, but by the rules of the Stock Exchange the jobber had to account for £281 of the amount so received to the official assignee of the Stock Exchange, who was carrying out the liquidation of the broker's estate. The jobber brought an action against the broker to recover the two sums of £986 and £281. At the date of the trial the liquidation was still proceeding, and the jobber had been paid a dividend.

Held, that the action was maintainable, and that the jobber could recover the amount claimed less the amount of the dividend received.

Judgment of Mathew, J. (50 W. R. 106, [1901] 2 K. B. 844), affirmed.—RATCLIFF *v* MENDELSSOHN, *C.A.*, 3; [1902] 2 K. B. 653; 71 L. J. K. B. 984; 87 L. T. 422.

STOP ORDER.—See Assignment, 2.

TELEGRAPH:—

*Telephone company—Licence to provide telephonic communication in exchange area—New licence to local authority in respect of same area—Continuance of powers to lay down underground wires acquired by company by agreement with local authority—"For the duration thereof"—Telegraph Act,* 1899 (62 *&* 63 *Vict. c.* 38), *s.* 3 (1).—Sections 3 (1) of the Telegraph Act, 1899—which provides, under certain circumstance, for the continuance of powers acquired by an existing company by agreement with the local authority before the passing of the Act to lay down underground wires in an exchange area, in the event of a new licence being granted to the local authority or to another company in respect of the same exchange area—applies only to the case where the powers of the company are in existence at the date of the grant of the new licence. Accordingly, where the local authority by virtue of a clause contained in the agreement conferring the powers has duly determined those powers before the date of the grant of the new licence, the section does not operate to continue them.

The words in the section, "those powers shall continue for the period specified in the new licence for the duration thereof," refer to the duration of the powers, and not to the duration of the new licence.

Assuming, therefore, that the powers of the company are in existence at the date of the grant of the new licence, they will be continued, not during the duration of the new licence, but during the period (if any) which the new licence specifies for their continuance.—NATIONAL TELEPHONE CO. *v.* KINGSTON-UPON-HULL CORPORATION, *Ch.D. Buckley, J.*, 617.

TITLE DEEDS:—

*Custody—Will—Land purchased by equitable tenant for life, under power, with moneys belonging to personal estate—Lien of trustees on land to secure purchase-moneys.*—A testator gave real and personal property in trust to accumulate rents and profits during the minority of H., who was to be (and in fact was) let into possession on attaining twenty-one as tenant for life. A private Act authorized land to be purchased by the court at the instance of a tenant for life of full age, and to be paid for out of the personalty. The moneys so paid were to be deemed a debt from the real to the personal estate, which debt was to be held by the trustees as part of the personalty and secured by a lien on the purchased land. Subject to such lien the purchased land was to be settled on the trusts of the will.

Held, that, as to land so purchased, the trustees, so long as their lien existed, were entitled to the custody of the title deeds.—WHEELER *v.* TOOTELL, *Ch.D. Swinfen Eady, J.*, 693.

See Trustee, 9.

TOLLS:—

1. *Bicycle—Carriage hung on springs—5 Geo. 4, c. cxiv. s. 78.*—By a private Act of Parliament passed in the reign of George IV. the defendants were empowered to levy tolls (*inter alia*) for every coach, chariot, hearse, chaise, berlin, landau and phaeton, gig, whiskey, car, chair, or coburg, and for every other carriage hung on springs, the sum of sixpence for each wheel, and for each horse or other beast of draught drawing the same the sum of twopence.

Held, by Wright, J., that a bicycle which had a saddle hung on springs was a carriage hung on springs within the meaning of the section, but that the section only referred to carriages drawn by horses or other beasts of draught, and that therefore a bicycle ridden over the bridge was not chargeable within the section.

Held, by the Court of Appeal that a bicycle did not come within the class of carriage in respect of which the Act gave power to levy a toll.

*Cannan* v. *Earl of Abingdon*, 48 W. R. 470, [1900] 2 Q. B. 66, commented on.—SIMPSON *v.* TEIGNMOUTH AND SHALDON BRIDGE CO., *C.A.*, 545; [1903] 1 K. B. 405; 72 L. J. K. B. 204; 88 L. T. 117.

2. *Bicycle—"Sledge, drag, or such-like carriage"—39 Geo. 3, c. xxviii., s. 11.*—By section 11 of 39 Geo. 3, c. xxviii. the owners of a bridge across the Severn were empowered to take the following, amongst other, tolls for passage over the bridge: "For every coach, chariot, landau, berlin, hearse, chaise, calash, chair, or other such-like carriage," a certain sum, according to the number of horses drawing it; "for every sledge, drag, or such-like carriage, the sum of 6d."

Held, that a bicycle was not a "such-like carriage" to a sledge or drag, and was not therefore chargeable with a toll of 6d.—SMITH *v.* KYNNERSLEY, *C.A.*, 548; [1903] 1 K. B. 788; 72 L. J. K. B. 357; 88 L. T. 449.

TRADE-MARK:—

1. *Label—Words "trade-mark" printed on part only of label—Misleading label—Removal from register—Innocent deception.*—There is no general rule that whenever the words "trade-mark" appear on a label they must be intended to refer solely to the particular part of the label on which they are placed.

To justify the removal of a trade-mark from the register, on the ground that it is calculated to deceive, it must be shown that it is reasonably calculated to injure some person, and is not a mere innocent deception which would injure no one.

*In re Apollinaris Co.'s Trade-Marks*, [1891] 2 Ch. 186, 39 W. R. Dig. 237, distinguished.

Decision of Kekewich, J. (86 L. T. 186, 50 W. R. Dig. 170), reversed.—BASS, RATCLIFF, & GRETTON'S TRADE-MARKS, RE, *C.A.*, 86; [1902] 2 Ch. 579; 71 L. J. Ch. 779; 87 L. T. 408.

2. *Infringement—Registration—Meaning of "distinctive device"—Mark in common use in the trade—Non-user as a trade-mark—Bonâ fide intention to use.*—A trade-mark consisting of the head and shoulders of the picture known as Gainsborough's "Duchess of Devonshire" was registered by the plaintiffs in January, 1892, in class 38, for "hats, bonnets, and similar head coverings." It was alleged that the defendant, who also carried on a millinery business, had infringed the plaintiffs' trade-mark by affixing to his premises, while in the course of erection, a board upon which there was a painted reproduction of the duchess; that he had also exhibited the same mark upon posters and advertisements in connection with his business, and that he used boxes for delivering millinery, &c., and notepaper containing reproductions of the plaintiffs' trade-mark. The defendant alleged that he had for seven years past or thereabouts used representations of the duchess in various ways in connection with his business as a milliner. It was proved that the picture in question had from the year 1876 been in common use in the hat and millinery trade as an ornamentation upon various papers, circulars, &c., used by milliners in their business. The plaintiffs had never used the trade-mark on the actual goods supplied by them, but they had often used it on labels affixed to the boxes in which the goods were delivered to customers as well as on bills, receipts, &c. The defendant had used the mark which constituted the alleged infringement in a similar manner.

Held, that, in 1892, when the trade-mark was registered, it was not "distinctive" or capable of distinguishing the goods of the plaintiff as his manufacture or selection from the goods of all other persons; that it was not therefore capable of registration, and that it must be expunged from the register.

*Semble*, that, in order to justify the removal of a trade-mark from the register on the ground of non-user, it must be shown either (*a*) that at the date of registration there was no *bonâ fide* intention to use it, and that it has never in fact been used; or (*b*), if there was a *bonâ fide* intention to use and actual user for a short time, there has been actual abandonment over a long period of time.—LOUISE & CO. *v.* GAINSBOROUGH, *Ch.D. Farwell, J.*; 87 L. T. 591.

3. *Old mark—Registration—Lapse—Re-registration—Action for infringement—Motion to expunge—Delay—Costs—Application for certificate that right to mark has come in question in an action—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 77*a*, 79, *and Patents, &c., Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 10, 18.—Words, &c., to be registered under section 64, sub-section 3 (*ii.*), of the Patents, &c., Act, 1883, amended by the

Patents, &c., Act, 1888, must not merely have been "special and distinctive" at some previous time, but must be so at the date of registration.

*Quære*, whether a word which has been applied to an article because it is apt to describe that article can be distinctive of manufacture or sale by a particular person.

The jurisdiction to order a trade-mark to be struck out of the register is given for the protection of the public and not of the applicant only. Accordingly an application for this purpose will not be refused for delay (or other conduct) on the part of the applicant, unless such delay has made it unduly hard for the respondent to produce evidence. But an applicant who, with knowledge of the registration, has delayed unduly will not, if successful, get his costs.

The question whether there is such a resemblance between two designs, or names, or the get-up of two articles, or the like, as is calculated to deceive customers, is not to be determined by the testimony of the witnesses, but is a question for the judge himself, viewing the exhibits or considering the names, in the light of the evidence as to the circumstances in which they are used.

*London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135, 49 W. R. Dig. 144, considered.

When the plaintiff and the defendant in an action have each succeeded in part and failed in part, and there is likely to be great difficulty and dispute in apportioning the different items of costs as between the different issues, the judge at the trial will order the costs to be taxed as a whole and paid by the parties in such proportions as he may think fit.

A certificate, under section 77*a* of the Patents, &c., Act, 1883, that the right to the exclusive use of a trade-mark has come in question in an action, will not be given when the right, though put in issue, has not been investigated in such a manner as to enable the court to form an opinion about it. —BOURNE *v.* SWAN & EDGAR, *Ch.D. Farwell, J.*, 213; [1903] 1 Ch. 211; 72 L. J. Ch. 168; 87 L. T. 589.

4. *Registration—Dormant mark—Entire class—Use of mark in respect of part of class—Assignment—Limitation of use of mark to part of goods in class—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 90,—The register of trade-marks may be rectified by excluding from the specification of good in respect of which a mark is registered, goods in regard to which at the time of registration there was no actual employment of such mark nor any intention to employ the same, although the person registering the trade-mark may have sold such goods under other marks.—HART'S TRADE-MARK, RE. *Ch.D. Byrne, J.*, 107; [1902] 2 Ch. 621; 71 L. J. Ch. 869; 87 L. T. 426.

TRADE NAME:—

*Corsets—"Erect Form"—Printed as a scroll—Imitation—Descriptive name—Fanciful name—Calculated to mislead—Evidence.*—The plaintiffs were manufacturers of corsets in the United States, and in March, 1901, introduced a certain class of their corsets into the United Kingdom. These corsets were designated in the advertisements relating to them, upon the boxes in which they were sold, and, generally, as "W. B. Erect Form Corsets," the words "Erect Form Corsets" being printed in special fancy type in the manner of a scroll. For the letters "W. B." were shortly afterwards substituted the words "America's Leading," printed in ordinary type. About the month of October, 1901, when the plaintiffs had effected sales of their corsets to a substantial amount in the United Kingdom, and such corsets had acquired some reputation therein, the defendant company resolved to make use of the term "Erect Form Corsets" in connection with goods of their own manufacture; and, in fact, did so use that term, printing it in the form of a scroll like that adopted by the plaintiffs, and placing the company's trade-mark, the letters "C. B.," sometimes before and sometimes both before and after the scroll. The defendant company had previously advertised in the trade journals stating what they proposed to do.

Held, that, although it was to be taken that the conduct of the defendant company had not misled persons in the trade generally, yet such conduct was calculated to cause the corsets of the defendant company to be mistaken for the plaintiffs' by those who had been the ultimate purchasers of the plaintiffs' corsets, and by those who for any reason desired to purchase corsets of the same manufacture; and an injunction granted to restrain the defendant company, their servants and agents, from selling or causing to be sold any corsets not of the plaintiffs' manufacture under the name of "Erect Form Corsets" without distinguishing such corsets from the plaintiffs' corsets.—WEINGARTEN *v.* BAYER, *Ch.D. Joyce, J.*; 88 L. T. 168.

TRADE UNION:—

1. *Action by member—Rules—Restraint of trade—Illegal society.* Under the rules of the Amalgamated Society of Tailors, some of which were in restraint of trade, it was provided by rule 32 that if a member acted contrary to the interests of the society or its rules he was to be fined or expelled.

Held, that the society was an illegal one, and that an action would not lie against it at the suit of one of its members.—CULLEN *v.* ELWIN, *K.B.D.*; 88 L. T. 686.

2. *Application of funds contrary to rules—Action for injunction by individual member of union—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4, *sub-section* 3.—Where a trade union, formed for the purpose (among others) of providing benefits for members, and registered under the Trade Union Act, 1871, were proposing to apply funds of the union to purposes not sanctioned by its rules, and in contravention of essential provisions of those rules, which defined the nature and objects of the union, and the trustees of the union were acquiescing in the application of the funds as aforesaid.

Held, that an action was maintainable by an individual member of the union for an injunction to restrain such a misapplication of the funds, inasmuch as it was not a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members within the meaning of the Trade Union Act, 1871, s. 4, sub-section 3.

By one of the rules of a trade union provision was made for the weekly allowance of strike pay to members, who were "permitted to cease work by the sanction of the association in accordance with the rules." A cessation of work by members of the union having taken place without the sanction of the association, its sanction was afterwards obtained for the continuance of that cessation as from a date subsequent to its original commencement.

Held (by Vaughan Williams, Stirling and Mathew, L.JJ., Stirling, L.J., doubting), that the rule did not authorize the union to allow weekly strike pay to the strikers subsequently to the sanction of the association being obtained as aforesaid.

By one of the rules of a trade union provision

was made for the allowance of weekly strike pay in cases where members were "thrown out of employment" in consequence of any action legally taken by the union. Members of the union, who had been employed at a colliery, and who had struck of their own accord, and not in consequence of any action taken by the union, failed in an attempt made by them some time afterwards to obtain re-employment at the colliery, which failure was alleged to have been in consequence of action taken by the union.

Held, that the rule could not be applied to their case, because they could not be said to have been "thrown out of employment" within its meaning. —HOWDEN *v.* YORKSHIRE MINERS' ASSOCIATION, *C.A.*; [1903] 1 K. B. 308; 72 L. J. K. B. 176; 88 L. T. 134.

3. *Inducing breach of contract—Illegal means—Bona fides.*—By an indenture of apprenticeship a firm of stonemasons contracted to teach the plaintiff, who was twenty-five years of age, the trade of a mason. By becoming parties to the rules of the the defendant trade union the firm had contracted not to take apprentices over sixteen years of age. In order to compel the firm to comply with this latter contract the defendants threatened to withdraw the workmen employed by the firm if the plaintiff was taught the trade of a mason; and in consequence of this the firm broke their contract with the plaintiff.

Held, that the plaintiff was entitled to maintain an action against the defendants, for the defendants had knowingly and for their own ends procured the commission of an actionable wrong, and had procured it by the use of illegal means, and it was immaterial that they seemed to have acted in good faith and in the best interests of their society.

Judgment of the Divisional Court (50 W. R. 619, [1902] 2 K. B. 88) varied.—READ *v.* FRIENDLY SOCIETY OF STONEMASONS, *C.A.*, 115; [1902] 2 K. B. 732; 71 L. J. K. B. 994; 87 L. T. 493.

4. *Master and workman—Procuring breach of contract of service—Whether malice essential to illegality.* —It is not unlawful for workmen to induce their fellow-workmen to break a contract of service if it be done *bonâ fide* and without any desire to injure the master.

In 1901 the South Wales Miners' Federation issued a manifesto ordering the men to stop work on certain days known as "stop days." This action occasioned great damage to the masters, but was induced by the workmen's *bonâ fide* belief that the price of coal would be thereby raised. In an action for damages by the masters,

Held, that no action would lie, as it was an essential element of an action in respect of procuring a breach of contract that actual malice should be proved against the defendant.—GLAMORGANSHIRE COAL CO. *v.* SOUTH WALES MINERS' FEDERATION, *K.B.D.*, 59; [1903] 1 K B. 118; 71 L. J. K. B. 1001; 87 L. T. 232.

TRAMWAY:—

1. *Interference with gas mains and service pipes —Arbitration — Jurisdiction of arbitrator.* —An arbitrator appointed to determine a difference arising under section 30 of the Tramways Act, 1870, has jurisdiction to order gas mains already laid down to be lowered, so that any new service pipes might be carried horizontally underneath the concrete bed of the tramway; and he further can order such gas mains to be moved laterally to such a distance as to enable access to be obtained to them without interference with the concrete bed.—ILFORD GAS CO. AND ILFORD URBAN COUNCIL, RE, *K.B.D.*; 88 L. T. 236.

2. *Liability of company to keep their portion of the roadway in proper condition—Sanding slippery road —Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 28.—The Tramways Act, 1870, s. 28, requires the tramway company to maintain and keep in good condition and repair that portion of the road for which they are responsible, with such materials and in such manner as the road authority should direct. The tramway company (as required) laid its portion of the road with granite blocks, which became worn and consequently dangerous in certain states of the weather. An accident occurred through the company neglecting to lay down sand on its portion of the road, which would have counteracted the slippery nature of the surface.

Held, that the company was liable.—DUBLIN UNITED TRAMWAYS CO. *v.* FITZGERALD, *H.L.*, 321; [1903] A. C. 99; 72 L. J. P. C. 52; 87 L. T. 532.

3. *Local authority—Purchaser of part—"Lands, buildings, works, materials, and plant suitable to and used" for undertaking.*—By section 43 of the Tramways Act, 1870, a local authority is empowered under certain circumstances to purchase compulsorily the tramways within its district "upon terms of paying the then value . . . of the tramways and all lands, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district." Where part of the tramways within a local authority's district already belonged to the authority, but were worked by the promoters of the rest of the tramways within the district jointly with such promoters' part, on the local authority purchasing the promoters' part, it is bound under section 43 to take all the lands, works, materials, and plant used by the promoters for the joint working of the whole system as lands, works, materials, and plant of the promoters suitable and used by them for the purposes of" the the part of the tramways belonging to the promoters.—MANCHESTER CARRIAGE AND TRAMWAYS CO. AND THE MANCHESTER CORPORATION, RE, *K.B.D.*; 87 L. T. 504.

4. *Notice to purchase—Right to possession—Injunction.*—A tramway had been worked by a tramway company as a horse tramway. The tramway within the city of M. belonged to the corporation, but had been leased to the company until the 30th of November, 1902. The tramway outside the city belonged to the company. The local authority gave notice to purchase under section 43 of the Tramways Act, 1870, and the amount of the purchase money was to be ascertained by arbitration. The arbitrator made his award in the form of a special case, awarding different amounts: If the local authority was compelled to purchase the whole plant and stock of the company a much larger amount was payable than if the local authority was only bound to take over a proportion of the stock and plant bearing the same proportion to the whole stock and plant of the company that the tramway without the city bore to the whole tramway the company formerly worked. The local authority claimed to be entitled to take possession of the line of the company before the purchase money had been finally ascertained.

Held, that, even if there had been a concluded agreement, it was impossible to say that property contracted to be sold could be treated as sold without payment of the purchase money, and that an injunction must be granted restraining the defend-

ants from taking or retaining possession of the plaintiffs' property.—MANCHESTER CARRIAGE AND TRAMWAYS CO. *v.* MANCHESTER CORPORATION, *Ch.D. Swinfen Eady, J.*; 87 L. T. 678.

5. "*Substantial commencement*" *of works — Notice in* London Gazette—"*Conclusive evidence*"—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 18).—A notice purporting to be published by the Board of Trade in the *London Gazette* to the effect that the works of a tramway have not been substantially commenced, though made conclusive evidence of such non-commencement by section 18 of the Tramways Act, 1870, is not the only admissible evidence of such non-commencement.

"Substantial commencement" in the same section means the execution of physical works. Such preliminary steps as the buying of land for the erection of buildings and the entering into contracts for the supply of machinery and cars do not amount amount to a substantial commencement within the section.

*In re Dudley and Kingswinford Tramways*, 42 W. R. 126, disapproved.

Decision of Swinfen Eady, J., reversed.—ATTORNEY-GENERAL *v.* BOURNEMOUTH CORPORATION, *C.A.*, 129; [1902] 2 Ch. 714; 71 L. J. Ch. 730; 87 L. T. 252.

TREASURE-TROVE:—

*Crown — Prerogative — Charter — Franchise.*—In 1896, in the course of ploughing a field near the shore of Lough Foyle, certain gold articles, all lying together in a space of about nine inches, were discovered at a depth of about eighteen inches beneath the surface of the field. The articles, which were probably made between A.D. 200 and A.D. 400, were of considerable value and of a miscellaneous description, including the model of a boat and a hollow collar, inside of which were concealed several plaited chains. The articles were purchased privately by the Trustees of the British Museum.

On a claim by the Crown for delivery up of the articles as being treasure-trove,

Held, (1) that the true inference to be drawn from the above circumstances was that the articles were originally intentionally concealed for the purpose of security, and, therefore, were, *primâ facie*, treasure-trove; (2) that the onus lay upon the defendants to adduce satisfactory evidence to displace this *primâ facie* inference, and that the defendants had failed to do so.

Held, further, that a grant by charter from the Crown of lands, together with all "franchises," did not by the word "franchises" pass the right to treasure-trove.—ATTORNEY-GENERAL *v.* BRITISH MUSEUM, *Ch.D. Farwell, J.*, 582; 88 L. T. 858.

TRUSTEE:—

1. *Accounts—Disallowance—Payment of voluntary school rate—"Fair and reasonable" payment.*—A payment of a mere voluntary subscription by a trustee cannot be allowed in his account, but where such payment, although in one sense voluntary, is made reasonably and in the honest belief that it will benefit the estate, either as saving a future compulsory payment of larger amount or as being fairly and reasonably necessary under the circumstances of the estate, it may be allowed.—HOW *v.* WINTERTON (EARL), *Kekewich, J.*, 262.

2. *Assignment—Priority—Reversionary trust fund —Notice to one of several trustees—Death of trustee who had notice.*—In a contest for priority between assignees of a reversionary interest in a trust fund where one only of several trustees has notice of an assignment and dies, a subsequent assignee who gives notice of his assignment to the then existing trustees is entitled to priority over the prior assignee.

So held on the authority of *Timson* v. *Ramsbottom* (1837) 2 Keen 35, 44 R. R. 183.—PHILLIPS' TRUSTS, RE, *Ch.D. Kekewich, J.*; [1903] 1 Ch. 183; 72 L. J. Ch. 94; 88 L. T. 9.

3. *Breach of trust—Following trust moneys—Banking account.*—When the private money of a trustee and that which he holds in a fiduciary capacity have been mixed in the same banking account, from which various payments have been from time to time made, then, in order to determine to whom any remaining balance, on any investment paid for out of the account, ought to belong, the trustee must be debited with all sums that have been withdrawn and irrecoverably applied to his own use, and the trust money be debited with any sums taken out and properly invested; and the order of priority in which the withdrawals and investments have been made is immaterial.—OATWAY, RE, HERTSLET *v.* OATWAY, *Ch.D. Joyce, J.*; [1903] 2 Ch. 356; 72 L. J. Ch. 575; 88 L. T. 622.

4. *Breach of trust—Rate of interest on trust moneys.* —If a trustee employs trust money in trade, he must account for the profits, or, at the option of the *cestui que trust*, he must account for trade interest at 5 per cent.—DAVIS, RE DAVIS *v.* DAVIS, *Ch.D. Farwell, J.*, 8; [1902] 2 Ch. 314; 71 L. J. Ch. 539; 86 L. T. 523.

5. *Investments — Corporation, Stock issued by— Authorized investment—Stock of municipal borough— Limit of population—Returns of last census—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 1 (*m*).—In the returns of the census, made in April, 1901, it is stated that the population of the borough of Bournemouth was 47 003. But in a note at the foot of the page it is stated that by an order of the Local Government Board, which came into operation on the 9th of November, 1901, the borough was extended so as to embrace two specified urban districts and parts of two other parishes, and that the figures at the date of the census were for Bournemouth 59,762.

Held, that under section 1 (*m*) of the Trustee Act, 1893, trustees were authorized to invest in stock issued by the corporation.

Decision of Joyce, J., reversed.—DRUITT RE, DRUITT *v.* DEHLER, *C.A.*; [1903] 1 Ch. 446; 72 L. J. Ch. 441; 88 L. T. 483.

6. *Investment—Unauthorized change of—Sanction of court*—The court will not sanction an unauthorized change of investment of trust funds merely on the ground that the beneficiaries will be benefited thereby.

*In re New*, 50 W. R. 17, [1901] 2 Ch. 534, discussed.

Decision of Kekewich, J. (reported as *In re T——*, *ante*, p. 568, [1903] 1 Ch. 457), affirmed.—TOLLEMACHE, RE, *C.A.*, 597; [1903] 1 Ch. 955; 72 L. J. Ch. 539; 88 L. T. 670.

7. *Investments—Unauthorized investment—Breach of trust—Partly-paid shares—Death of co-trustee— Call on shares—Contribution.*—Two trustees in breach of trust invested trust funds in partly-paid shares of a company.

Some years after the death of one trustee, the survivor, who had made every reasonable effort to dispose of the shares, but without success, paid a call of £800 as a contributory in the liquidation of the company.

Held, that the deceased trustee's representatives,

though not liable to the company for the call, were liable to the surviving trustee for contribution.

*Ashhurst* v. *Mason*, (1875) L. R. 20 Eq. 225, explained and applied.—JACKSON *v.* DICKINSON, *Ch.D. Swinfen Eady, J.*; [1903] 1 Ch. 947; 88 L. T. 507.

8. *Lease—Renewal—Personal incapacity to benefit—Partial interest—Absence of unfair dealing—Rebuttable presumption of law.*—The mere fact that a person has only a partial interest in a lease does not in itself disentitle him to take a renewal of the lease for his own benefit. Any presumption of law that the renewal is for the benefit of all the persons interested in the original lease may be rebutted by evidence that there has been no fraud or unfair dealing towards the other persons interested on the part of the person obtaining the renewal, provided that his position with regard to them is neither clearly fiduciary nor of such a special character that he owes a duty towards them by virtue thereof; in either of which cases the presumption of law of his personal incapacity to retain the benefit is irrebuttable.—BISS *v.* BISS, *C.A.*, 504; [1903] 2 Ch. 40; 72 L. J. Ch. 473; 88 L. T. 403.

9. *Title deeds—Certificates of registered stock—Custody.*—There is no strict rule entitling a trustee as a matter of legal or equitable right to require that trust documents, consisting of title deeds and certificates of registered stock, shall not remain in the physical possession of either trustee, and shall be placed in a bank in their joint names.—SISSON, RE. JONES *v.* TRAPPES, *Ch.D. Swinfen Eady, J.*, 41; [1903] 1 Ch. 262; 72 L. J. Ch. 212; 87 L. J. 743.

10. *Trust for sale—Power to retain trust property in present form of investment—Shares in company—Reconstruction of company—Allotment of shares in new company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.—Where there is a trust for sale with a power to retain trust property (which includes shares in a company) in its present form of investment, on the reconstruction of the company under an arrangement whereby no option is given to shareholders to take cash in lieu of shares in the new company, the trustees may accept an allotment of and retain such shares.—SMITH, RE, SMITH *v.* LEWIS, *Ch.D. Buckley, J.*, 11; [1902] 2 Ch. 667; 71 L. J. Ch. 885.

11. *Voluntary settlement — Realty — Common law grant—Covenant for further assurance—No power of revocation reserved—Disclaimer of trustee by deed—Effect on settlement—Subsequent mortgage by settlor—Marshalling.*—Where real estate was in 1866 settled by a voluntary deed operating by way of common law grant, and containing a covenant by the settlor for further assurance, but no power of revocation, and the trustee, who had not executed the settlement, in March, 1867, by deed disclaimed the trusts, and the settlor by deed-poll in April, 1867, purported to revoke the settlement, and in 1888 conveyed certain of the estate comprised in the settlement by way of mortgage, and died in 1898, and the mortgage was in 1899 transferred to the executors of his will in trust for his estate, the mortgagee having been paid off out of his assets, it was held that the settlement had been duly constituted, and that the legal estate in the settled realty passed to the trustee and continued in him up to the time of his disclaimer, and that upon such disclaimer the trust created by the settlement was not destroyed, but that the settlor thereupon became the trustee thereof; and further, that, under the doctrine of marshalling, the persons claiming under the settlement were entitled to have the amount of the mortgage thrown primarily on the unsettled estate.—MALLOTT *v.* WILSON, *Ch.D. Byrne, J.*; 72 L. J. Ch. 664.

See also Bankruptcy, 14; Power, 5; Settled Land, 9; Vendor and Purchaser, 12.

VACCINATION:—

*Child not vaccinated when six months old—Subsequent medical certificate—Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *ss.* 29, 31.—A child, aged eleven months, not having been vaccinated a summons was issued against the father. On the day before the summons was heard the appellant obtained a doctor's certificate that, owing to a complaint that the child was suffering from, it would be unsafe to vaccinate.

Held, that the certificate was no defence.—HINDS *v.* ELSAM, *K.B.D.*; 88 L. T. 867.

VENDOR AND PURCHASER:—

1. *Building scheme—Restrictive stipulations—Right to enforce—Notice.*—Where an estate is sold in lots at successive sales under a building scheme imposing restrictive stipulations on the lots, a purchaser can only enforce the stipulations against property shown as lotted in the plan and subject to the stipulation at the sale at which he purchases.

A purchaser can enforce the stipulations, although his conveyance contains an accidental or (*semble*) an intentional departure therefrom, as, notwithstanding the form of the conveyance, the purchaser is not entitled to the benefit of this departure as against other purchasers, nor are they bound by it.

*Mackenzie* v. *Childers*, (1889) 43 Ch. D. 265, and *Knight* v. *Simmonds*, (1896) 1 Ch. 653, 2 Ch. 294, applied.

*Semble*, a sub-purchaser of part of a lot can enforce the stipulations, although, previously to his purchase, his vendor had committed a breach on another part.

Where property is sold under an open contract, and no restrictions appear on the title, the mere fact that that the vendor's solicitor proposes to insert restrictive stipulations in the conveyance, which are partly waived and partly insisted on, is not sufficient to affect the purchaser or his solicitor with notice that the property is already subject to restrictions.—ROWELL *v.* SATCHELL, *Ch.D. Swinfen Eady, J.*; [1903] 2 Ch. 212.

2. *Conditions of sale—Wilful default—Form of conveyance—Honest mistake—Interest—Vendor in possession—Account of rents and profits not on the footing of wilful default—Occupation rent—Losses incurred by vendor in carrying on business.*—A contract provided that interest should be paid on the purchase-money if the completion were delayed from any cause other than the wilful default of the vendors. The vendors insisted on the insertion of a particular clause in the conveyance, the purchaser brought an action and obtained judgment for specific performance.

Held, by Stirling and Cozens-Hardy, L.JJ. (Vaughan Williams, L.J., *dissentiente*), that the purchaser was liable to pay interest on the purchase-money.

By Stirling, L.J.—The persistence of the vendors in having the clause inserted, though arising out of an honest mistake on their part, amounted to wilful default within the contract, but the real cause of the delay in completion having been the inability of the purchaser to find the purchase-money, he was not thereby relieved from his liability for interest.

By Cozens-Hardy, L.J.—The vendors had not been guilty of wilful default within the meaning of the contract.

By Vaughan Williams, L.J.—The vendors had been guilty of wilful default within the meaning of the contract, and had thereby become disentitled to any interest.

Decision of Buckley, J. (50 W. R. 118, [1902] 1 Ch. 226), affirmed.—BENNETT *v.* STONE, *C.A.*, 338; [1903] 1 Ch. 509; 72 L. J. Ch. 240; 88 L. T. 35.

3. *Contract—Vendor to complete house and furnish fixtures, &c.—Breach of contract—Claim for damages after completion and conveyance.*—S. agreed to buy a house in the course of erection from C., who agreed to supply and fix certain drains, stoves, fixtures, &c., and complete the house in a proper and workmanlike manner.

Held, that, notwithstanding the completion of the conveyance of the house, S. could maintain an action against C. for failing to supply and fix certain articles, and for not completing the house in a proper and workmanlike manner.—SAUNDERS *v.* COCKRILL, *K.B.D.*; 87 L. T. 30.

4. *Executor—Charge of debts and legacies—Power of executor to sell land and to grant easements to provide for payment of debts and legacies—Law of Property Amendment Act*, 1859, *Lord St. Leonards' Act* (22 & 23 *Vict. c.* 35), *ss.* 14, 15, 16, 18—*Lands Clauses Act*, 1845 (8 *Vict. c.* 18), *s.* 7—*The Barrow-in-Furness Corporation Act*, 1901, *ss.* 22, 31, 32.—A testator bequeathed his residuary personal estate to trustees (who were also appointed executors) upon trust for sale and conversion, and directed that if his residuary personal estate should be insufficient to provide for his funeral and testamentary expenses, debts and legacies, his residuary real estate should stand charged with payment of such deficiency, and authorized the trustees to raise such deficiency by mortgage of his residuary real estate; and the testator devised his residuary real estate in case (as happened) no son of his should have attained the age of twenty-five years during his lifetime, to the use of such son of his as after his death should first attain the age of twenty-five years in fee. The testator died in 1875. At his death part of his residuary real estate was incumbered and the legal estate was outstanding. The residuary personal estate proved insufficient to pay the legacies. The testator's eldest son attained twenty-five years in 1888, and subsequently settled the real estate, subject to prior incumbrances, and died in 1897. In 1901 the surviving executor and trustee of the testator's will contracted to sell part of the residuary real estate to the Barrow-in-Furness Corporation, and further to grant to them an easement over other parts of the residuary real estate.

Held, that the vendor, as executor, had power (apart from any common law right) to sell the land under section 16 of Lord St. Leonards' Act; and that section 18 of that Act did not apply, because at the date of the testator's death there was no devisee within the meaning of that section who could sell the land.

Held, also, that under the joint operation of section 32 of the Barrow-in-Furness Corporation Act, 1901, and section 7 of the Lands Clauses Act, 1845, the vendor was not competent to grant the easement.—BARROW-IN-FURNESS CORPORATION AND RAWLINSON, RE, *Ch.D. Kekewich, J.*, 248; [1903] 1 Ch. 339; 72 L. J. Ch. 233; 87 L. T. 724.

5. *Leaseholds—Deducing title—Single document—Solicitor and client—Costs—Scale charge—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *General Order under, Schedule I., Part I.—Practice—Taxation—Vendor and purchaser summons, raising question of taxation on—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).—On a sale of leaseholds, the delivery of an abstract of the vendor's title consisting of the lease only is not "deducing title" so as to entitle the vendor's solicitor to the scale charge under Schedule I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881.

*Wellby* v. *Still*, [1894] 3 Ch. 641, followed.

*Semble*, per Romer, L.J.: A question as to the amount of the vendor's costs on a sale is not properly raised upon an ordinary summons under the Vendor and Purchaser Act, 1874, the solicitor not being a party to and therefore not bound by the proceedings. Such a question should be raised on taxation.—WEBSTER AND JONES' CONTRACT, RE, *C.A.*; [1902] 2 Ch. 551; 71 L. J. Ch. 749; 87 L. T. 213.

6. *Leaseholds—Open contract—Breach of covenant to repair—Dangerous structure—Knowledge of purchaser—Last receipt for rent produced—London Building Acts*, 1894 (57 & 58 *Vict. c. ccxiii.*) *and* 1898 (61 & 62 *Vict. c. cxxxvii.*)—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-section* 4.—On an open contract for the sale of leaseholds the purchaser is not precluded by section 3, sub-section 4, of the Conveyancing Act, 1881—which makes the production of the last receipt for rent evidence that the covenants in the lease have been observed, unless the contrary appears — from proving breaches of covenant by the vendor, even though the purchaser was aware of those breaches. That sub-section only throws on the purchaser the burden of proving breaches of covenant.

*Barnett* v. *Wheeler*, 7 M. & W. 364, followed.

Decision of Swinfen Eady, J. (50 W. R. 424, [1902] 2 Ch. 214), affirmed.—HIGHETT AND BIRD'S CONTRACT, RE, *C.A.*, 227; [1903] 1 Ch. 287; L. J. Ch. 220; 87 L. T. 697.

7. *Leaseholds—Sale by executor—Non-existence of debts.*—An executor can sell leasehold property, either for the purpose of paying debts (even after twenty years from the testator's death) or for the purpose of defraying other expenses of administering his testator's estate; but where an executor-vendor gives the purchaser notice that there are no debts, and does not assert that the sale is made for the purpose of defraying other expenses of administration, he cannot make out such a title as can be forced upon a purchaser.

*In re Whistler*, 35 W. R. 662, 35 Ch. D. 561, and *In re Venn and Furze's Contract*, 42 W. R. 440, [1894] 2 Ch. 101, distinguished.—VERRELL'S CONTRACT, RE, *Ch.D. Kekewich, J.*, 73; [1903] 1 Ch. 65; 72 L. J. Ch. 44; 87 L. T. 521.

8. *Mistake—Bidding for wrong property—Contract signed by auctioneer—Authority—Error in date—Statute of Frauds.*—A bidder at an auction bid for one property in the belief that he was bidding for another. The property was knocked down to him, but on finding out his mistake he refused to sign the contract. The auctioneer signed the contract on his behalf. The contract signed had been prepared with a view to an earlier sale, and bore date one month earlier than the actual date of the sale.

Held, that there was no memorandum in writing of the alleged contract sufficient to satisfy the Statute of Frauds.

Decision of Kekewich, J. ([1902] 2 Ch. 266, 50 W. R. Dig. 181), reversed.—VAN PRAAGH *v.* EVERIDGE, *C.A.*, 357; [1903] 1 Ch. 434; 72 L. J. Ch. 260; 88 L. T. 249.

9. *Priority—Equitable mortgage—Notice—Forged signature—Receipt—Legal estate—Title deeds.*—A purchaser, who having notice of the existence of an equitable charge on the purchased property leaves it to the vendor to pay off such charge, is not protected against such equitable charge by possession of the legal estate and the title deeds in the event of the vendor failing to discharge it, even though there has been no negligence on his part and he has been deceived by the production of a receipt which was forged by the vendor's solicitor.—JARED *v.* CLEMENTS, *C.A.*, 401; [1903] 1 Ch. 428; 72 L. J. Ch. 291; 88 L. T. 97.

10. *Specific performance—Contract in letters—Contract "subject to an agreement"—Reference to formal contract—Intention—Statute of Frauds.*—In answer to an offer to purchase land for £275, the vendor accepted "subject to the conditions of sale and an agreement." At that time the property was subject to some incumbrances which the vendor had not yet removed, though he was trying so to do. The purchaser had apparently been allowed to go on the land, and had executed some repairs there, but the vendor had remained in occupation. The conditions of sale referred to were conditions used at an abortive auction at which the property had been offered for sale.

Held, on the facts, in an action by the purchaser for specific performance, that there was in this case no concluded contract.

*Filby* v. *Hounsell*, 45 W. R. 232, [1896] 2 Ch. 737, discussed.—CLARK *v.* ROBINSON, *Ch.D. Byrne, J.*, 443.

11. *Trustee—Leasehold—Unauthorized purchase—Power of sale.*—A testatrix by her will appointed her husband, H. B., sole trustee and executor, and gave two legacies of £3,000 each to her nephews W. and R. absolutely subject to prior life interest.

By a codicil the testatrix stated that she did not wish her nephews to have a vested interest unless they obtained the age of twenty-one years, and she gave the legacies and the residue of her estate to the two nephews on their attaining twenty-one years, and if only one attained twenty-one she gave him both legacies and the residue absolutely. If both died under twenty-one the legacies and residue were to go to her statutory next-of-kin of the whole blood as if she had died unmarried.

The testatrix died on the 9th of November, 1899.

H. B., out of the legacy of £3,000 to R. or out of residue, purchased a leasehold house for £2,100, although there was no power in the will authorizing him so to do, and spent £400 of the trust estate in improving the house.

By his will, dated the 31st of July, 1900, he appointed the vendors his executors and trustees, and he died on the 21st of December, 1901.

The vendors on the 29th of October, 1902, agreed to sell the house for £2,600, but the purchaser objected that, as the purchase was made in breach of trust, the beneficiaries under the will had a right to affirm the purchase and elect to keep the house.

Held, that the legal personal representatives of the trustee were entitled to realize the investment improperly made by their testator, and that it was their duty to do so to ascertain the liability.

Held, also, that the purchaser was not entitled to insist on one of the beneficiaries joining in the conveyance.—JENKINS AND RANDALL'S CONTRACT, RE, *Ch.D. Swinfen Eady, J.*; [1903] 2 Ch. 362; 88 L. T. 628.

12. *Trustees with power of sale—Resale before completion to trustee—Specific performance—Damages—Substitution of name of purchaser's nominee in conveyance for name of purchaser.*—A purchaser from co-trustees is not entitled to resell to one of such co-trustees while the original contract remains executory, nor will such purchaser be entitled under such circumstances either to specific performance or damages against the trustee to whom he has agreed to sell, nor independently of contract to have such trustee's name inserted in the conveyance in the place of his own.—DELVES *v.* GRAY, *Ch.D. Byrne. J.*, 56; [1902] 2 Ch. 606; 71 L. J. Ch. 808; 87 L. T. 425.

VICTORIA, LAW of:—

1. *Book debts—Invalidity of assignment does not extend to covenants and recitals—Victorian Book Debts Act*, 1896, *s.* 3.—*Construction.*—By the third section of the Victorian Book Debts Act, 1896, it is enacted that no assignment or transfer of book debts shall be valid unless registered.

Held, that by its true construction only that part of an instrument which effects assignment or transfer is invalidated by non-registration. The invalidity does not extend to the covenants and recitals therein contained.

Where, however, the unregistered assignment of a book debt contained covenants onerous to some of the assignors and a subsequent registered assignment omitted the same,

Held, that the second assignment being in substitution for the first, the covenants were no longer enforceable.—NATIONAL BANK OF AUSTRALASIA *v.* FALKINGHAM, *P.C.*; [1902] A. C. 585; 71 L. J. P. C. 105; 87 L. T. 90.

2. *Probate duty—Administration Act*, 1890, *s.* 115—*Conveyance, assignment, . . . or transfer with intent to evade payment of duty—Mortgage debt—Land mortgaged situated in different state to testator's domicil.*—That part of section 115 of the Administration and Probate Act of Victoria, 1890, relating to conveyances, assignments, gifts, deliveries, or transfers "with intent to evade the payment of duty" is applicable to colourable transactions only. Therefore where a testator, a father, had *bonâ fide* transferred mortgages to his son to accustom him to the management of business and the responsibilities of property, and to make him independent.

Held, that the property transferred was not liable to duty.

Part of testator's property consisted of a mortgage on land situated in New South Wales, though both he and his mortgagee were resident and domiciled in Victoria, the debt being a speciality debt in New South Wales and a simple contract debt in Victoria.

Held, that the debt was an asset in Victoria, and therefore recoverable under a Victorian probate.—PAYNE *v.* REX, *P.C.*, 351; [1902] A. C. 552; 71 L. J. P. C. 128; 87 L. T. 84.

3. *Salaries of Government officials—Deductions—Officer "not entitled to quarters."*—By the Public Service Act, 1883 (47 Vic. No. 773 of Victoria), s. 89, "if any officer not entitled to quarters is allowed to use for the purpose of residence any building belonging to the Government" the Government "may direct that a fair and reasonable sum as rent thereof be deducted from such officer's salary." In the case of officers such as a postmaster and the governor of a gaol, who were obliged to reside in Government buildings in order to discharge properly the duties of their respective offices,

Held, that rent could not be deducted from their

salaries under the section.—REX *v.* FISHER; REX *v.* BULL, *P.C.*; [1903] A. C. 158; 72 L. J. P. C. 45; 88 L. T. 74.

WARRANTY:—

*Sale—Fertiliser—Warranty on sale—False invoice—Analysis condition precedent to prosecution—"Causing or permitting invoice to be false."*—An analysis by the district analyst and the taking of samples in accordance with section 5 of the Fertilisers and Feeding Stuffs Act, 1893, are not conditions precedent to a prosecution by a county council under that Act. An invoice that stated the article "contains 38 to 45 per cent. total phosphates," whereas it contained only about 31 per cent., is false in a material particular to the prejudice of the purchaser within section 3 (1) (*b*) of the Act, notwithstanding that the invoice states "Minimum guaranteed subject to conditions printed on the back hereof," and such conditions make provision that if on analysis the phosphates are below the minimum a *pro rata* allowance will be made to the purchaser. K., the managing director of the sellers of the article, was cognizant of the form of invoice used. He signed letters proving that he knew that article contained various uncertain proportions of phosphates that might have to be ascertained in a particular way. Sales of the article would come under his notice, and the invoice would not be sent out with a guarantee without his knowledge; but there was no evidence that he saw the particular invoice.

Held, that there was evidence upon which K. might be convicted of aiding and abetting the commission of an offence under section 3 (1) (*b*).

*Per* Channell, J.—That a *mens rea* is necessary for an offence within 3 (1) (*b*).—KORTEN *v.* WEST SUSSEX COUNTY COUNCIL, *K.B.D.*; 88 L. T. 466.

See Adulteration, 7, 8; Sale of Goods, 1-3.

WASTE:—

*Timber—Equitable waste—Ornamental timber—Intention of settlor—Inference from existing circumstances.*—Where, in an action for an injunction by a remainderman under a settlement of real estate to restrain a tenant for life not impeachable for waste from cutting timber, the plaintiff adduces some evidence that some of the timber which is being cut by the defendant (the tenant for life) was either originally planted or was left standing for the purpose of ornament or shelter, by the settlor, the plaintiff has made out a *primâ facie* case for an injunction on the ground of equitable waste, which the defendant must answer.—WELD-BLUNDELL *v.* WOLSELEY, *Ch.D. Swinfen Eady, J.*, 635.

WATER:—

1. *School—Swimming bath—Domestic purposes—Trade, manufacture, or business—Waterworks Clauses Act*, 1847 (10 *Vict. c.* 17), *s.* 53—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *ss.* 12, 17—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 56, 58, 65.—A supply of water for a swimming bath constructed and required for the purposes of the business of a school is not a supply of water for "domestic purposes" within the meaning of section 53 of the Waterworks Clauses Act, 1847, but is a supply for the purposes of a "trade, manufacture, or business" within section 12 of the Waterworks Clauses Act, 1863.

Decision of Buckley, J. (50 W. R. 92, [1901] 2 Ch. 813), reversed.—BARNARD CASTLE DISTRICT COUNCIL *v.* WILSON, *C.A.*, 102; [1902] 2 Ch. 746; 71 L. J. Ch. 825; 87 L. T. 279.

2. *Supply—Mines and minerals—Support for pipes—Arbitration—Liability to pay compensation.*—The appellants were the owners of two water pipes called the C. pipe and the M. pipe. The pipes were laid so close together that support from subjacent minerals could not be removed from one pipe without affecting the support of the other. The C. pipe was laid under a local Act, and for it the appellants had a common law right of support. The M. pipe was laid under an Act which incorporated the provisions of the Waterworks Clauses Act, 1847. The respondents, who were the owners of the subjacent minerals, gave notice under section 22 of the Waterworks Clauses Act of their intention to work the minerals under the M. pipe. The appellants thereupon gave a counter-notice under the Act intimating their willingness to pay compensation under the Act "so far as you are entitled thereto," and requiring them to leave the minerals unworked. The respondents accordingly left the minerals unworked, and the amount of compensation was referred to arbitration in the usual course under the Act. The appellants reserved all their right of support to the C. pipe. The arbitrator awarded a sum as compensation for the non-working of the minerals under the M. pipe, but the appellants refused to pay it, on the ground that the right of support for the C. pipe necessarily involved abstention from working the minerals under the M. pipe, and therefore that there was no damage to the respondents for which they were entitled to compensation.

Held, that the appellants, having elected to put in force the procedure provided by the statute, were bound to pay the compensation fixed by the arbitrator in accordance with it, it not appearing that the arbitrator had in any way exceeded his jurisdiction. Lord Halsbury, L.C., *dubitante.*—WATER TRUSTEES *v.* CLIPPENS OIL CO, *H.L.*; 87 L. T. 275.

3. *Underground water—Unknown but ascertainable channel.*—The Morton Beck, a river in Yorkshire, derived some of its water from the Sweet Well Spring. Defendants sank wells or shafts on their land in close proximity to the Sweet Well Spring, and by this means some of the water from the spring was alleged to be diverted. Plaintiffs were riparian proprietors on the banks of the Morton Beck.

Held, that plaintiffs had no right of action for the obstruction of the said water, as even assuming the existence of a defined channel, along which the underground water flowed to the well, such channel was not known and could not be ascertained except by excavation of the soil.

*Ewart* v. *Belfast Poor Law Guardians*, 9 L. R. Ir. 172, approved. — BRADFORD CORPORATION *v.* FERRAND, *Ch.D. Farwell, J.*, 122; [1902] 2 Ch. 655; 71 L. J. Ch. 859; 87 L. T. 388.

WATERWORKS:—

1. *Lands compulsorily taken—Special adaptability of site.*—An arbitrator, in assessing the value of lands taken for the purposes of a reservoir, may award on extra value in respect of the special adaptability of the site for the purposes of a reservoir even though it cannot be proved that there are other competitors for the site.—GOUGH AND ASPATRIA SILLOTH JOINT WATER BOARD. RE, *K.B.D.*, 590; [1903] 1 K. B. 574; 72 L. J. K. B. 285; 88 L. T. 421.

2. *Prescribed rates of dividend—Surplus profits—Deficiencies in previous years—Incorporation of Waterworks Clauses Act*, 1847—*Deficiencies in years prior to incorporation of Act—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 75.—A water-

works company, which was incorporated in 1809, obtained in 1864 an Act of Parliament to enable it to amalgamate with another company. This Act provided that from and after the passing of the Act the Waterworks Clauses Act, 1847, should apply to the whole of the undertaking and waterworks of the company. Before the passing of the Act of 1864 there was no limitation on the rate of dividend which the company might pay. but after that date. by virtue of section 75 of the Waterworks Clauses Act, 1847, no larger dividend than 10 per cent. was permissible, "unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of" 10 per cent.

Held, that the Act of 1847 was not retrospective, but spoke only from the time of its incorporation, and as providing for the future. Consequently the company was not justified in paying a larger dividend than 10 per cent. in order to make up any deficiencies or arrears of dividend which had occurred prior to the year 1864.—LAMPLOUGH *v.* KENT WATERWORKS CO., *C.A.*. 535; [1903] 1 Ch. 575; 72 L. J. Ch. 418; 88 L. T. 485.

See Local Government, 17, 18.

WAY.—See Easement.

WILL:—

1. *Absolute gift—Gift over on death "without a will and childless" —Repugnancy.*—A testator, after an absolute gift of his residuary real and personal estate among his children equally, provided that in case any of his said children should die "without a will and childless," the share of the child or children so dying should go over to the surviving children.

Held, that the words "without a will and childless" were repugnant to the absolute estate previously given, and the gift consequently did not take effect.—DIXON, RE, DIXON *v.* CHARLESWORTH, *Ch.D. Swinfen Eady, J.*, 652; 72 L. J. Ch. 642; 88 L. T. 862.

2. *Accumulation—Direction for accumulation of rents and profits—Purchase of land—Accumulations Act*, 1892 (55 & 56 *Vict. c.* 58).—A testatrix, who died on the 17th of January, 1896, by her will made in 1889, directed that the residue of her property (which consisted largely of surplus rents and profits of landed estate) should be applied to the discharge of incumbrances and the purchase of other landed estate.

Held, that this direction was in contravention of the Accumulations Act, 1892.—LLANOVER, RE, HERBERT *v.* FRESHFIELD (No. 2), *Ch.D. Farwell, J.*, 615; [1903] 2 Ch. 330; 88 L. T. 856.

3. *Ambiguity—Legatee—Construction.*—A testatrix by her will gave a legacy to Percy H., son of C. A. H. C. A. H. had no son Percy; but he had a son Herbert who was generally called "Bertie." Two persons, not sons of C. A. H., but who stood to the testatrix in the same degree of relationship as the sons of the said C. A. H., bore the name of Percy, but they did not claim the legacy.

Held that Herbert, son of C. A. H., was entitled to the legacy, the solicitor taking testatrix's instructions having probably mistaken the word Bertie for the word Percy.—HOOPER, RE, HOOPER *v.* WARNER, *Ch.D. Byrne, J.*, 153; 88 L. T. 160.

4. *Appropriation—Contingent legacy.*—When a testator gives a sum of cash as a contingent legacy without any provision for the payment of interest before the happening of the contingency, the executor is not entitled of his own authority, and to the possible detriment of the contingent legatee, to invest and appropriate a fund to meet that legacy; and if the fund so appropriated should, owing to depreciation of the security, be insufficient to answer the full amount of the legacy, if and when the legacy becomes payable, the legatee is entitled to have the deficiency made good, either out of the residuary estate or by the executor personally.

Decision of Kekewich, J. (*ante*, p. 107), reversed. —HALL, RE, FOSTER *v.* METCALFE, *C.A.*, 529; [1903] 2 Ch. 226; 72 L. J. Ch. 554; 88 L. T. 619.

5. *Charitable legacy—Evidence—Admissibility.*—A testatrix bequeathed £4,000 to C. "for the charitable purposes agreed upon between us."

Held, that evidence was admissible to show what were the charitable purposes referred to in the will, but no further; and that as the subject-matter of the legacy on the face of the will was £4,000, evidence was not admissible to show that it was only the income of £4,000 that the testatrix had agreed should be applied for charitable purposes.

Decision of Farwell, J., on this point (50 W. R. 185, [1902] 1 Ch. 214), reversed.—HUXTABLE, RE, HUXTABLE *v.* CRAWFURD, *C.A.*, 282; [1902] 2 Ch. 793; 71 L. J. Ch. 876; 87 L. T. 415.

6. *Charity — Gift to voluntary association for charitable object—Failure of gift.*—A testator directed his trustees to sell leasehold and freehold property and to divide the proceeds in legacies to certain individuals named "or their successors" or "his successor."

Held, that the gifts were not given to the individuals for their own benefit, but for charitable objects, and therefore failed.—DELANY, RE, CONOLEY *v.* QUICK, *Ch.D. Farwell, J.*, 27; [1902] 2 Ch. 642; 71 L. J. Ch. 811; 87 L. T. 46.

7. *Charity—Institute erected for the benefit of inhabitants—Legacy for the benefit of the institute—General charitable intention.*—A testatrix erected an institute, and during her life it was used for the benefit of the inhabitants of a place. By her will she gave £3,000 to trustees to be applied in such manner as they should consider most expedient for the benefit of the institute.

Held, that there was a general intention and that the legacy was valid.—MANN, RE, HARDY *v.* ATTORNEY-GENERAL, *Ch.D. Farwell, J.*, 165; [1903] 1 Ch. 232; 72 L. J. Ch. 150; 87 L. T. 734.

8. *Class—"My own nephews and nieces"—Half-blood—Husband's nephew described as "my nephew" —Great-niece described as "my niece."*—When there is no context to the contrary, a gift to persons of a certain degree of relationship to the donor includes those of the half-blood.

The inaccurate use of a term of relationship in describing a particular person may, but need not, lead to the inference that the same term when used in the same instrument to designate a class includes that person and others to whom it may be equally applicable.

A testatrix gave a gift unto and among "my own nephews and nieces." In another part of the same will she had referred to a person who was her great-niece as "my niece," but in yet another part she had described her correctly as "the daughter of my nephew X." She also referred in her will to a nephew of her husband once by his name alone and once as "my nephew."

Held, that the words "my own nephews and nieces" excluded not only the husband's nephews

and nieces, but the testatrix's great-nephews and great-nieces, not excepting the great-niece who had been called "my niece."—COZENS, RE, MILES *v.* WILSON, *Ch.D. Swinfen Eady, J.*, 220; [1903] 1 Ch. 138; 72 L. J. Ch. 39; 87 L. T. 581.

9. *Construction—Condition that devisee should take testator's name — Condition precedent — Condition subsequent—Death of devisee in lifetime of tenant for life—Impossibility of performance—Act of God.*—A testator devised real estate upon trust for his daughter for life, and after her death for her children; and if she should have no child, then upon trust for his cousin, on condition, nevertheless, that if the testator's wife should be then living she should have the enjoyment of the dwelling-house for the remainder of her then life, and on further condition that he should then take and use the testator's name, but subject to the payment of certain legacies. The devisee died in the lifetime of the testator's daughter without ever having taken the testator's name.

Held, on the construction of the will, that the condition was a condition subsequent which was not intended to operate unless and until the devisee actually came into possession of the estate. The performance of the condition having been rendered impossible by act of God, the estate consequently passed discharged from the condition.

Decision of Joyce, J. ([1902] 2 Ch. 198, 50 W. R. Dig. 186), reversed.—GREENWOOD, RE, GOODHART *v.* WOODHEAD, *C.A.*, 358; [1903] 1 Ch. 749; 72 L. J. Ch. 281; 88 L. T. 212.

10. *Construction—Devise of "my freehold land and hereditaments"—Customary freeholds.*—A testatrix devised "my freehold land and hereditaments at M" to A., and the residue of her real and personal estate to trustees. Testatrix was entitled at the date of her death to four closes of land at M, of which two were freeholds and two were customary freeholds. The four closes were in the occupation of A.

Held, that the words "my freehold land and hereditaments" included the customary freeholds. STEEL, RE, WAPPETT *v.* ROBINSON, *Ch.D. Swinfen Eady, J.*, 252; [1903] 1 Ch. 135; 72 L. J. Ch. 42; 87 L. J. 548.

11. *Construction—Devise to "B. and her heirs"—Gift over to collateral heirs—Rule of construction—Estate tail.*—By his will a testator gave two houses to his daughter A. for life, and after her death as to one house "to her daughter B. and her heirs," and as to the other house "to her son C. and his heirs"; and, further, "if either the said B. or C. should die without an heir their share is to go to the survivor's heir or heirs."

Held, that B. and C. took estates tail, and that the word "heirs" in the last phrase, "the survivor's heir or heirs," must be read as "heirs general" and not as "heirs of the body," although the word had that latter signification throughout the other parts of the will where there were gifts over.—WAUGH *v.* CRIPPS, *Ch.D. Farwell, J.*, 461; [1903] 1 Ch. 744; 72 L. J. Ch. 586; 88 L. T. 54.

12. *Construction—Dying "without leaving any child."*—In a gift over in a will upon death "without leaving any child or children," it is a well-settled rule of construction that these words will be construed "without having had any child who has attained a vested interest" under the previous gift; and it makes no difference in the application of this rule of construction that the testator's new at the date of the will that the person on death the gift over is made in fact had a child then living.

*Treharne* v. *Layton*, 44 L. J. Q. B. 202, L. R. 10 Q. B. 459, followed.—COBBOLD, RE, COBBOLD *v.* LAWTON, *C.A.*; [1903] 2 Ch. 299; 72 L. J. Ch. 588; 88 L. T. 745.

13. *Construction—Estate in special tail—Issue—Gift to A. if he marries a gentlewoman and has issue male, to such issue male and their descendants.*—A testator willed and bequeathed certain estates to his son Charles, and after providing that his eldest son might redeem those estates, continued: "The proceeds to go with the limitations of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and has issue male, and their male descendants, in failure of which" then over.

Held, that Charles took an estate in special tail male.

Decision of the Court of Appeal (50 W. R. 83, [1902] 1 Ch. 34) affirmed.—PELHAM CLINTON *v.* DUKE OF NEWCASTLE, *H.L.*, 608; [1903] A. C. 111; 72 L. J. Ch. 424; 88 L. T. 273.

14. *Construction—Gift of income of residue to children for life in equal shares subject to annuity to widow — Advances to some children — Adjustment between advanced and unadvanced children—Hotchpot.*—A testator by his will and codicil dated the 5th of May, 1880, and the 12th of July, 1882, respectively, after giving certain legacies, devised and bequeathed his residuary estate to trustees upon trust to pay out of the income thereof the annual sum of £2,000 to his widow during her life, and, subject thereto, to divide the residuary estate into as many shares as there should be children living at his death, and to pay the annual income of such shares to his children; and then upon trusts therein expressed. The testator provided that, as to certain advances already made to some of his children, and as to any future advances to his children exceeding at any one time the sum of £1,000, these advances should be treated as capital of the original shares, and be brought into hotchpot and accounted for accordingly. The testator died on the 3rd of July, 1887, and left surviving him six children; of whom three had received advances and three had not. The widow died in March, 1900.

Held, that for the purpose of ascertaining the proportions of the settled shares of the six children, the value of the net residuary estate of the testator at the day of his death ought to be ascertained, and there should be added thereto the several advances, and that the actual income received from the testator's death ought to be divided in the respective proportions so ascertained, and that the share of each child in such income ought to be debited with one sixth part of the testator's widow's annuity; and therefore any calculation of interest on the amount advanced to any child was unnecessary.—HARGREAVES, RE, HARGREAVES v. HARGREAVES, *C.A.*; 88 L. T. 100.

15. *Construction—Gift of residue in equal shares—Provision that share of legatee dying without leaving issue shall fall into residue—Accruer to survivors—Intestacy.*—A testator gave his residuary estate upon trust as to one-fourth for each of his four daughters for life with remainder to their issue, with a provision that the share of any daughter dying without leaving issue should fall into and form part of his residuary estate, and be held and disposed of "on the same trusts as are hereinbefore declared thereof."

Held, that the case fell within *In re Palmer*, 42

W. R. 151, [1893] 3 Ch. 369, and that on the death of any daughter without leaving issue her share accrued to the surviving daughters, and was not divisible among all the daughters, including the deceased, with an intestacy as to one-fourth of the deceased's original fourth.

Decision of Buckley, J., reversed.—ALLAN, RE, DOW *v.* CASSAIGNE, *C.A.*, 403; [1903] 1 Ch. 276; 72 L. J. Ch. 159; 88 L. T. 246.

16. *Construction—Gift of residue with an exception—Failure of gift comprised in exception—Excepted property held to pass by residuary gift.*—A testator gave his residuary estate to his wife absolutely, except as to a sum of £1,000, in which he gave her a life interest, with remainder as to £500 to "my nephew James Jupp," and as to the other £500 to certain other nieces and nephews. It appeared from the evidence that the testator had, so far as was known, no nephew named James Jupp, and though he had had a brother of that name the brother had predeceased him.

Held, that the gift to James Jupp failing, the beneficiaries of the wife were entitled to the £500 bequeathed to him, subject to a liability to refund it should a nephew of the testator bearing that name establish a claim.—JUPP, RE, GLADMAN *v.* JUPP, *Ch.D. Joyce, J.*; 87 L. T. 739.

17. *Construction—Gift over—Death "before becoming entitled"—Entitled "in right" or "in possession"—Vesting.*—A testatrix gave real estate to her son R. for his life, and after his death specifically among her grandchildren, R.'s sons and daughters, but in the event of any of her grandchildren dying "before becoming entitled" then over.

Held, upon the construction of the will, that the words "becoming entitled" meant "entitled in possession."

Decision of Joyce, J. (*ante*, p. 31, [1902] 2 Ch. 875), affirmed.—MAUNDER, RE, MAUNDER *v.* MAUNDER, *C.A.*, 549; [1903] 1 Ch. 451; 72 L. J. Ch. 367; 88 L. T. 280.

18. *Construction—Gift to A. and B. and the children of C.—Gift to a class.*—A testator by his will bequeathed his residuary personal estate to trustees upon trusts for the benefit of his daughter for life, and for her issue, and, in the event of the failure of issue, "in trust for G. B., his sister M. B., and the children now living of R. H., who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, and if more than one in equal shares." The daughter died unmarried. At the date of the death of the testator there were four children of R. H. living, who all attained the age of twenty-one years.

Held, that the gift was a gift to a class, and that the fund was divisible in equal sixths between G. M., M. B., and the four children of R. H.—KEKEWICH *v.* BARKER, *H.L.*; 88 L. T. 130.

19. *Construction—Gift to wife of named person—Wife living at date of will—Second wife.*—If there is in a will a gift to the wife of a person, who has to the knowledge of the testator a wife living at the time, the *primâ facie* presumption is that the gift refers to that wife and not to any subsequent wife, and the only question in each case is whether there is a sufficient context in the particular will before the court to negative that *primâ facie* presumption.

*In re Burrow's Trusts*, 10 L. T. Rep. 184, 12 W. R. Ch. Dig. 113, approved.

*In re Lyne's Trust*, L. R. 8 Eq. 65, 17 W. R. Ch. Dig. 186, disapproved by Romer and Cozens-Hardy, L.JJ.—COLEY, RE, HOLLINSHEAD *v.* COLEY, *C.A.*, 563; [1903] 2 Ch. 102; 72 L. J. Ch. 502; 88 L. T. 517.

20. *Construction—Issue—Gift over.*—In a gift over on failure of the line of one child to "other of my children and their issue," the word issue must receive its plain and ordinary meaning, and not be restricted to the issue of children dying in the lifetime of the testatrix unless the rest of the will plainly requires it.—ENDYVEAN *v.* ARCHER, *P.C.*; [1903] A. C. 379.

21. *Construction—Married woman—Restraint on anticipation—Remoteness—Duration of restraint.*—A testator by his will gave his residuary estate to his wife, two daughters, and a son for life, the interests of the wife and the daughters to be without power of anticipation, and after the death of the survivor he gave his estate to the then and future children of his son in equal proportions. By a codicil the testator declared that the bequests to any female taking any beneficial interest under his will should be for her separate use, but so that she might not anticipate any part of the property to which she might become entitled, and he also declared the receipt of any female taking an interest under his will should be a good and sufficient discharge to his trustees for the money after the same should have actually accrued due. The survior of the wife, daughters, and son died in January, 1902. The son left five children living at his death, of whom two were married women.

Held, that the restraint on anticipation was valid, not being void for remoteness, but that it only lasted during the existence of the prior life interests both as to income and corpus, and determined when the property fell into possession in January, 1902.—MILWARD, RE, STRADMAN *v.* HOBDAY, *Ch.D. Joyce, J.*; 87 L. T. 476.

22. *Construction—Parol directions as to disposition—Admissibility—Uncertainty.*—A testator, after giving all his property to his wife for life, added the following clause, "I desire and empower her to dispose of my estate by her will or in her lifetime in accordance with my wishes verbally expressed by me to her."

Held, that the clause was void for uncertainty, for parol evidence was not admissible to prove what these wishes were.

*In re Fleetwood, Sidgreaves* v. *Brewer*, 15 Ch. D. 594, 28 W. R. Dig. 245, distinguished.—HETLEY, RE, HETLEY *v.* HETLEY, *Ch.D. Joyce, J.*, 202; [1902] 2 Ch. 866; 71 L. J. Ch. 769; 87 L. T. 265.

23. *Residuary devise—"All other my freehold property"—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 25.—A devise of "all other my freehold messuages or tenements at W. and elsewhere" is a "residuary devise" within the meaning of section 25 of the Wills Act, 1837.

Decision of the Court of Appeal—*In re Mason, Ogden* v. *Mason*, [1901] 1 Ch. 619, 49 W. R. Dig. 202—affirmed.—MASON *v.* OGDEN, *H.L.*, 560; [1903] A. C. 1; 72 L. J. Ch. 152; 87 L. T. 622.

24. *Construction—Residuary gift and bequest—Subsequent trusts—Real estate—Resulting trust.*—A testator gave and bequeathed the residue of his estate and effects to trustees on certain trusts. There was no express trust for sale and conversion of real estate, and *primâ facie* the trusts were applicable to personal estate.

Held, (1) on the principle of *D'Almaine* v. *Moseley*, 1 W. R. 475, 1 Drew. 629, that the words of bequest

were sufficient to pass real estate; and (2) on the principle of *Saumarez* v. *Saumarez*, 4 My. & Cr. 331, that, inasmuch as the testator had shown an intention to dispose of all his property, and the succeeding trusts did not show an intention only to deal with his personal estate, there was no resulting trust of the real estate.

*Dunnage* v. *White*, 1 Jac. & W. 583; *Coard* v. *Holderness*, 3 W. R. 311, 20 Beav. 147; and *Longley* v. *Longley*, 20 W. R. 227, L. R. 13 Eq. 133, distinguished. — KIRBY SMITH *v.* PARNELL, *Ch.D. Buckley, J.*, 493; [1903] 1 Ch. 483; 72 L. J. Ch. 468; 88 L. T. 483.

25. *Construction—Rule against perpetuities—Void trust for sale—Intention of testator—Class ascertained with prescribed limit.*—Effect will be given to the intention of a testator, which appears from his will, to benefit certain persons who can be ascertained within the rule against perpetuities even though he has directed his intention to be carried out by means of a trust for sale which is void as offending against the rule against perpetuities.

Decision of Byrne, J. (*ante*, p. 153), affirmed.—APPLEBY, RE, WALKER *v.* LEVER, *C.A.*, 453; [1903] 1 Ch. 565; 72 L. J. Ch. 332; 88 L. T. 219.

26. *Construction — Trust for issue, including an illegitimate son — Intention to legitimate for all purposes.*—A testator gave estate A to trustees upon trust for G. F. S. for life or until assignment, and upon failure of such trust in his lifetime upon discretionary trusts for the wife and issue of G. F. S., "including S. S. R., hereinafter named," and subject thereto upon trust for sale, and to hold the proceeds upon trust for the issue of G. F. S., "including S. S. R., the illegitimate son of" G. F. S., and if there should be "no child of the said G. F. S., including the same S. S. R.," then over. The testator gave estate B upon trusts for M. S. for life, and subject thereto, in events which happened, upon trust for (*inter alios*) the issue of G. F. S., but without expressly including in such class the said S. S. R.

Held, that S. S. R. had been legitimated for all the purposes of the will, and was entitled to share in estate B.—SMILTER, RE, BEDFORD *v.* HUGHES, *Ch.D. Kekewich, J.*, 231; [1903] 1 Ch. 198; 72 L. J. Ch. 102; 87 L. T. 644.

27. *Construction—Vesting—Chattels given in trust for person entitled to "actual possession" of real estate—Other personalty given in trust for person for time being "entitled to possession" of real estate—Death of first tenant in tail in lifetime of tenant for life.*—Chattels bequeathed as heirlooms upon trust to go along with and be enjoyed by the person for the time being entitled to the "actual" possession of settled real estate do not vest absolutely in a tenant in tail of the real estate who dies in the lifetime of the tenant for life.

*In re Angerstein*, 44 W. R. 152, [1895] 3 Ch. 883, followed.

Personalty given upon trust for the person for the time being entitled to the possession of real estate as far as the rules of law and equity will permit vests absolutely in the first tenant in tail at birth, unless there be a clear expression of intention that it shall not so vest, and words declaring the testator's general desire that the income of certain personalty shall go in keeping up the real estate, are not such an expression of opinion as will prevent the personalty so vesting. — FOTHERGILL, RE, FOTHERGILL *v.* PRICE, *Ch.D. Swinfen Eady, J.*, 203; [1903] 1 Ch. 149; 72 L. J. Ch. 164; 87 L. T. 677.

28. *Devise—Gift of minerals "if they should be worked"—Condition precedent — Perpetuity.* — A testator, who died in 1858, by his will, dated in 1845, devised certain freehold property to his son for life, with remainder to his grandson in fee. Subsequently the testator became entitled to the payment of a sum of money for certain lands taken by a railway company for the purposes of their undertaking. Accordingly, by a codicil dated in 1857, the testator bequeathed this sum to his son and his two daughters in equal shares; and he directed that "if the minerals" under the devised property "should be worked," the same should "be divided in the same manner as before mentioned in three parts equal shares."

Held, the gift of the minerals to the testator's son and daughters, not being a present one, so that the minerals should pass to them immediately, but a conditional one, the division of the proceeds depending on the working and sale of the minerals, which condition might not happen within the period allowed by law, the gift was void under the rule against perpetuities.—THOMAS *v.* THOMAS, *C.A.*; 87 L. T. 58.

29. *Duty—Annuity without any deduction except legacy duty—Republication after passing of the Customs and Inland Revenue Act*, 1888—*Succession duty—Customs and Inland Revenue Act*, 1888 (51 *Vict. c.* 8), *s.* 21—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9.—A testator, by a will made in 1882, gave an annuity to H. for life, and after her death he gave annuities to H.'s children; and he charged all said annuities upon his real estate and directed that they should be paid "without any deductions except for legacy duty and income tax." A codicil, dated the 12th of July, 1888, confirmed the will. The testator died in 1892, and H. in 1900.

Held, that the codicil operated as a republication of the will as from the date of the codicil; that therefore there was a direction for the payment of the annuities to H.'s children "without deduction except legacy duty," made at a time when there was no duty called by that name, another duty called succession duty having been substituted by section 21 of the Inland Revenue Act, 1888, in respect of legacies and annuities charged on the real estate of any person dying after the 1st of July, 1888; and that the devisees of the annuities were liable to pay the succession duty.

Held, also, that the estate duty arising under the Finance Act, 1894, was payable out of the testator's residuary personal estate.—RAYER RE, RAYER *v.* RAYER, *Ch.D. Farwell, J.*, 538; [1903] 1 Ch. 685; 72 L. J. Ch. 230; 87 L. T. 712.

30. *Duty—Bequest of sum "sufficient to pay and discharge all estate duty"—Declaration of trust—Charge on settled estates in respect of duty.*—A testator by a codicil to his will, executed after the passing of the Finance Act, 1894, bequeathed to his eldest son, to whom certain settled estates would pass on the testator's death, "a sum of money sufficient to pay and discharge all the estate duty which may be payable by" him; and he directed such sum to be paid out of moneys in the hands of his bankers at his death, but if the sum at the bankers should not be sufficient, he declared that no other part of his estate should be liable to make good the deficiency.

Held, that the legacy was a gift to the eldest son for his own benefit absolutely, and was not impressed with a trust to pay the estate duty out of it; and consequently that the legatee had not lost his right to recoup himself for the duty by a charge on the settled estates under section 9 (6) of

the Act.—MEXBOROUGH (EARL) v. SAVILE, *H.L.*; 88 L. T. 131.

31. *Duty—Direction to set apart a fund—"To produce a clear yearly sum"—Settlement estate duty.*—A testator directed his trustees to set apart and invest so much of his estate as would produce a clear yearly sum of £400 and pay the income thereof to his wife during her widowhood.

Held, that the settlement estate duty must be paid out of residue.—DYET, RE, MORGAN v. DYET, *Ch.D. Swinfen Eady, J.*; 87 L. T. 744.

32. *Interest on advances—Period of distribution—Rate of interest—Simple or compound interest—Method of computation.*—The period of distribution is, for the purposes of calculation, the date from which interest is to be charged upon advances made by a testator in his lifetime to one of his residuary legatees; and such period of distribution is not the less the death of the testator because he has given to his widow an annuity which has prevented a large part of the residue from being divided during her lifetime.

In calculating the interest to be charged upon advances from time to time made residuary legatees between the testator's death and the time of division of the fund, simple interest is to be charged upon the advances from the dates of payment, and it is not proper to distinguish between the capital and income of the sums advanced and charge interest upon the capital only with annual rests.

The rate of interest to be charged upon advances should now be three, and not four per cent. per annum.

*In re Lambert*, 45 W. R. 661, 17 Ch. D. 169, followed.—WHITEFORD, RE, INGLIS v WHITEFORD, *Ch.D. Buckley, J.*, 491; [1903] 1 Ch. 889; 72 L. J. Ch. 540.

33. *Investments—Railway or other "public company"—American company—Investment, trust for—Construction of will.*— A testatrix after empowering her trustees to postpone the sale or conversion of any part of her estate, declared that any money by her will directed to be invested should be invested in "any of the public funds, or in Government or real or leasehold securities, or upon the stocks, shares, or securities of any railway or other public company." Some time after her death two shares which she had held in an English steamship company were exchanged for preference and ordinary stock in an American steamship company which had taken over the business of the English company.

Held, that the words "public company," when read in connection with the preceding words of the clause, must be confined to public companies in the United Kingdom, and consequently that the trustees were not authorized to retain the American preference and ordinary stock as an investment.—CASTLEHOW, RE, LAMONBY v. CARTER, *Ch.D. Byrne, J.*; [1903] 1 Ch. 352; 72 L. J. Ch. 211; 88 L. T. 455.

34. *Legacy—Ademption—Particular purpose.*—A testator gave a legacy of £500 to his great-niece; by a subsequent settlement he settled a sum of £500 for her benefit.

Held, that the legacy was not adeemed.—SMYTHIES, RE, WEYMAN v. SMYTHIES, *Ch.D. Swinfen Eady, J.*, 284; [1903] 1 Ch. 259; 72 L. J. Ch. 216; 87 L. T. 742.

35. *Propounding by executors—Testatrix not of sound mind—Costs of executors.*—Where executors have had ample opportunity of examining into the state of mind of a testator and of getting a clear knowledge of the whole state of affairs, and yet take upon themselves the responsibility of propounding a will, they do so at their own risk, and if they are defeated on the trial of the action, the court will not, except under special circumstances, interfere with the general rule that costs shall follow the event.—PAGE v. WILLIAMSON, *P.D. & Ad.D.*; 87 L. T. 146.

36. *Real and personal estate—Gift to son for life—Remainder to his children "or their heirs"—Substitutional or alternative—Heirs entitled—Construction.*—The testator G. I., by his will dated in 1877, devised and bequeathed unto his wife M. I. absolutely all his real and personal estate, and, at the death of his said wife, to his two sons J. I and H. I. to be divided equally between them, and, at their death, their or his portions or portion if married to their or his child or children or their heirs. G. I. died in 1890; M. I. had died in 1879. J. I. died in 1895; he had two children—M. G., now living, and L. L., who died in 1888. L. L. had one child, S. I. L., born in 1888, and now living.

Held, that S. I. L. was not entitled under the will, and that accordingly M. G. was absolutely entitled to the share in which J. I. had a life estate.—IBBETSON, RE, IBBETSON v. IBBETSON, *Ch.D. Joyce, J.*; 88 L. T. 461.

37. *Residuary gift — Named person — Lapse — Limited survivorship clause—Revocation of gift by codicil—Gift to person by wrong name.*—A testatrix left her residuary estate to four named persons, A., B., C., and D., "as tenants in common, and if only one of them shall survive me, then to such one absolutely." By a codicil, after referring to the death of D., the testatrix revoked whatever interest D. had in her will. A., B., and C. survived the testatrix.

Held, that the gift of survivorship was intended to be general and not confined to the case of only one legatee dying, and that in any event the revocation clause of the codicil must be construed as directing the residuary bequest of the will to be read as if D. was not one of the residuary legatees; and, consequently, that in the events that had happened D.'s share was not undisposed of, but went to the other legatees.

Two of the residuary legatees were described as "Edith Beale, daughter of E. J. Beale," and "Violet Beale, daughter of E. J. Beale." E. J. Beale had two and only two daughters, one of whom was named Violet Edith Beale, the other had different first names.

Held, that both daughters were residuary legatees.—RADCLIFFE, RE, YOUNG v. BEALE, *Ch.D. Buckley, J.*, 409.

38. *Substitution—Original or substitutional—Conjunctions "or" and "and"—Joint tenancy or tenancy in common—Will—Gift after life estate to children, to grandchildren then living "or the issue of such as may have died."*—Testator gave his property to trustees upon trust after the death of the survivor of his children to divide the same between and among "his grandchildren then living equally *per stirpes* and not *per capita*, or the issue of such as may have died (such issue taking a parent's share only), so that my grandchildren (or their issue) may take their shares equally *in loco parentis*."

Held, that the gift to the issue of the grandchildren was original and not substitutional, and that a great-grandchild of the testator who predeceased his own parent and the last surviving tenant for life took a vested interest.

Held, also, that upon the whole will the issue of the grandchildren took as tenants in common.

*Martin* v. *Holgate*, (1866) L. R. 1 H. L. 175, followed.

*In re Merrick's Trusts*, (1866) L. R. 1 Eq. 551, considered and explained.—WOOLLEY, RE, WORMALD *v.* WOOLLEY, *Ch.D. Joyce, J.*; [1903] 2 Ch. 206.

39. "*Surviving*"—*Will*—*Construction.*—A will gave portions in trust for each of the testator's children, E., L., and T., for their respective lives, and afterwards for their respective children; provided that if any of his children died without leaving a child entitled to take under the will, the shares of such children should go to their "then surviving" brothers and sisters, if more than one in equal shares, and if only one then to him or her absolutely.

E., L., and T. all survived the testator. E. died first, leaving children. Then L. died without issue, leaving T. surviving.

Held, that upon the true construction of this will the words "then surviving" must receive their ordinary and natural meaning, and that the children of E. took no part of L.'s share.

The decision of the Court of Appeal ([1901] 2 Ch. 738) affirmed.—INDERWICK *v.* TATCHELL, *H.L.*; [1903] A. C. 120; 72 L. J. Ch. 393; 88 L. T. 399.

40. *Vesting—Gift, after life interest, to children of tenant for life "or legal representatives"—Children dying before period of distribution.*—Testator gave a share of his residuary estate to each of his two daughters for their respective lives, and after their deaths their respective shares "to be equally divided between their respective children or legal representatives."

Held, that "representatives" meant the representatives of the tenants for life and not those of the children; that the addition to the gift to the children of the words "or legal representatives" did not operate as a divesting clause, but constituted an alternative gift to arise only in the event of there being no child that took a vested interest; and consequently that all children of the daughters who survived the testator, or were born after his death, took vested interests notwithstanding that they might not have survived their respective mothers.—ROBERTS, RE, PERCIVAL *v.* ROBERTS, *Ch.D. Joyce, J.*; [1903] 2 Ch. 200; 72 L. J. Ch. 597; 88 L. T. 505.

41. *Vesting—Residue to individuals in shares at twenty-one—Maintenance clause—Income for maintenance of all—Vested or contingent.*—It is now a well-settled rule of construction that, where there is a gift by will of a share of residue, to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested and not contingent.

A testator gave his residuary estate in trust to pay and transfer the same unto and equally between his two children, a son and daughter, on their severally attaining twenty-one, the income "during their respective minorities" to be applied in or towards their maintenance, with a power for the trustees at any time during the "respective minorities" of his said two children to advance any portion "of his or her presumptive share" in or towards "their" advancement in the world.

Held, upon the construction of the will, that the income of each share was to be applied separately for the maintenance of the child entitled to that share alone, and not indiscriminately in respect of both shares, and therefore that, according to the rule above stated, each child took an immediate vested interest in his or her share.

Decision of Swinfen Eady, J. ([1902] 1 Ch. 945), reversed.—GOSSLING, RE, GOSSLING *v.* ELCOCK, *C.A.*; [1903] 1 Ch. 448; 72 L. J. Ch. 433; 88 L. T. 279.

See also Ademption, 1-3; Charity, 1-5; Infant, 3.

WORKMAN.—See Master and Servant.

WRIT.—See *Ne Exeat Regno.*

[THE END.]

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